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July 13, 2020

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Docket ID ED-2020-OPE-0078, Comments in Response to Interim Final Rule on Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act

Dear Secretary DeVos:

We write on behalf of the Presidents' Alliance on Higher Education and Immigration (Presidents' Alliance), TheDream.US, and the Community College Consortium for Immigrant Education (CCCIE),¹ three higher education organizations committed to supporting immigrant and international students and families. We submit this comment letter in response to the U.S. Department of Education's (Department) interim final rule *Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, 85 Fed. Reg. 36,494 (June 17, 2020) (Docket ID ED-2020-OPE-0078). **We write to express our opposition to the exclusion of those who do not qualify for Title IV assistance from receiving emergency financial aid under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.** We particularly oppose the Department's extratextual exclusion of Deferred Action for Childhood Arrivals (DACA) and undocumented students enrolled in institutions of higher education (IHEs).

The nonpartisan, nonprofit Presidents' Alliance brings together U.S. college and university leaders concerned about how U.S. immigration policies impact their students, campuses, and communities, including undocumented, other immigrant, and international students, and committed to supporting policies and practices that create a welcoming, educationally effective environment for immigrant and international students. The Alliance is composed of over 450 presidents and chancellors of public and private colleges and universities, serving over five million students in 41 states, D.C., and Puerto Rico.

¹ The submitters extend their thanks to Brendan Hopkins and Ellen Findley for their extensive work in researching, drafting, and finalizing this comment.

TheDream.US is the nation's largest college access and success program for DREAMers, having provided over 5,000 college scholarships to DREAMers at more than 70 partner colleges in 16 states and Washington, D.C. TheDream.US believes that all young Americans, regardless of where they were born, should have the opportunity to get a college education and pursue a meaningful career that contributes to our country's prosperity.

CCCIE is a national network of nearly 65 community colleges, community college systems, and other professional organizations committed to increasing educational and career opportunities for immigrant and refugee students. CCCIE builds the capacity of community colleges to accelerate immigrant and refugee success and raises awareness of the essential role these colleges play in advancing immigrant integration through education and career development.

The Presidents' Alliance, TheDream.US, and CCCIE object to this interim final rule on the grounds of both policy and law.

As a matter of policy, the interim final rule ignores its most substantial costs. Most obviously, the interim final rule fails to consider its economic and non-economic effects on students who are not eligible for Title IV assistance—and are therefore now ineligible for emergency financial aid under the CARES Act. The Department also declines to account for enormous burdens that the rule places on millions of students who *are* eligible for Title IV assistance, but who have not yet confirmed their eligibility. And the Department takes no notice of the bulk of the rule's direct and indirect effects on IHEs.

Even the relatively few benefits that the Department does account for would impose substantial burdens on IHEs and students. Meanwhile, the other side of the scale is empty: The Department fails to credibly assert so much as one benefit of its interim final rule. Three of the four alleged "benefits" are facially nonexistent; the last is without foundation. The Department asserts that (1) students and (2) IHEs will benefit from Section 18004 funds. But those are benefits of the CARES Act, not the interim final rule. Next, the Department asserts that (3) IHEs will benefit from being required to use Title IV's "existing eligibility framework." That is plainly wrong: IHEs could have done that all along, and now they are *required* to do so—and to incur substantial costs in so doing. Last, the Department fails to support, even hypothetically, what it deems the most "important" benefit of the interim final rule: its foundationless assertion that the rule will mitigate "waste, fraud, and abuse." That alone requires that the Department withdraw this rule.

What is more, the interim final rule is unlawful. The Department lacks statutory authority to add a Title IV eligibility requirement to Section 18004(c). Even if (contrary to fact) the Department had such authority, Section 18004(c) is not ambiguous, and the Department's interpretation of the statute is impermissible. Separately, by issuing this arbitrary and capricious rule, and by waiving notice-and-comment participation and making the rule

effective immediately, the Department ran afoul of its obligations under the Administrative Procedure Act. Last, the Department's assertion that Section 1611 "clearly" applies to emergency financial aid under the CARES Act is both wrong and irrelevant to the legality of this interim final rule.

For these reasons, and for the additional shortcomings that we survey below, the Department should promptly withdraw this interim final rule. The following page contains a Table of Contents outlining the content of our comment.

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ARGUMENT

I. The interim final rule is unsound as a matter of policy.

A. The interim final rule has substantial effects on students ineligible for Title IV assistance.

All students are facing unprecedented challenges as a result of the ongoing COVID-19 pandemic. Many students who are not eligible for Title IV assistance are experiencing those challenges particularly acutely. And many of those ineligible students will face difficulty in continuing their education, absent emergency financial aid. The Department ignores the effects that its interim final rule will have on students who are ineligible for Title IV assistance—the rule’s most obvious cost. The Department’s resulting interim final rule is unsound and ineffective policy.

1. *The Department ignores the costs of the interim final rule on students ineligible for Title IV assistance.*

The Department’s interim final rule looks past its most substantial cost: its effects on students who are ineligible to receive Title IV assistance. Those potential effects are enormous. The Department itself estimates that its Title IV eligibility requirement would “exclu[de]” more than 1.12 million noncitizens, to say nothing of the many other students who are ineligible for Title IV aid on different grounds.² Separately, the Department observes “urgent economic challenges facing many students as a result of the crisis.”³ But the Department does not connect the dots: It does not consider the economic and non-economic costs of excluding more than 1.12 million students from accessing emergency financial aid during this “national emergency.”⁴

² 85 Fed. Reg. at 36,499-50. The Department declines to estimate, as it must, how many students overall are ineligible for Title IV assistance. *See id.* at 36,496 n.2; *id.* at 35,499-50. As the Department knows, it must “use the best available techniques to quantify anticipated present and future . . . costs as accurately as possible.” *Id.* at 36,499 (quoting Exec. Order No. 13,563). Besides excluding a single class of some noncitizens, the Department does not engage in *any* techniques to estimate the total population of enrolled students who do not meet Title IV’s eligibility requirements. *Contra* Exec. Order No. 13,563.

³ 85 Fed. Reg. at 36,498.

⁴ *Id.*

2. *All students—including students ineligible for Title IV assistance—are facing unprecedented challenges.*

COVID-19 represents a national emergency, indeed. The United States has had more than three million cases of COVID-19—by far the most of any country in the world.⁵ COVID-19 has caused more than 134,000 deaths in the United States.⁶ Many IHE-enrolled students and their family members have contracted—and will contract—COVID-19.⁷

Meanwhile, economic circumstances are dire. The United States' national unemployment rate skyrocketed from 4.4 percent in March to 14.7 percent in April.⁸ The unemployment rate remained high in May, clocking in at 13.3 percent, and June, at 11.1 percent.⁹ Many IHE-enrolled students are struggling with these economic effects of COVID-19: Nearly 60 percent of students in one study had experienced basic needs insecurity in the prior 30 days, and more than 10 percent had experienced homelessness.¹⁰

Students are struggling in particular due to a number of issues unique to the student population.

First, in line with public-health concerns, many students were directed or encouraged to leave campus during the spring semester due to COVID-19.¹¹ Many students who depend on campus jobs to fund their education thus lost that employment.¹² One study found that more than one-third of students who were working before the pandemic lost their jobs.¹³

Second, many students' summer internship plans were cancelled as a result of COVID-19, depriving them of expected income.¹⁴

⁵ *Coronavirus Disease 2019, Cases in the US*, Ctrs. for Disease Control & Prevention (last updated July 13, 2020), tinyurl.com/qqt3aq6; *WHO Coronavirus Disease (COVID-19) Dashboard*, World Health Org. (last updated July 13, 2020), tinyurl.com/y750qow7.

⁶ Ctrs. for Disease Control & Prevention, *supra* note 5.

⁷ *See id.*

⁸ *Labor Force Statistics*, U.S. Bureau of Labor Statistics (June 13, 2020), tinyurl.com/zyq5xlx.

⁹ *Id.*

¹⁰ Sara Goldrick-Rab et al., *New Evidence on Basic Needs Insecurity and Student Well-Being*, Hope Ctr., 2 (June 2020), tinyurl.com/y8c9995c.

¹¹ *E.g.*, Elizabeth Redden, *Colleges Ask Students to Leave Campuses*, Inside Higher Ed (Mar. 11, 2020), tinyurl.com/wcecy8f.

¹² *See id.*

¹³ Goldrick-Rab et al., *supra* note 10, at 14.

¹⁴ *See, e.g.*, David Yaffe-Bellany, *Another Casualty of the Coronavirus: Summer Internships*, N.Y. Times (May 27, 2020), tinyurl.com/ybueznjd; Joanna Nesbit, *Coronavirus Is Upending Internships for College Students. Here's What to Do If Yours Was Canceled*, Money (Apr. 30, 2020), tinyurl.com/ydd4omrp (“Internship opportunities have dropped 52%, according to recent research.”).

And **third**, many traditional-aged IHE students were ineligible for a stimulus check under the CARES Act's Recovery Rebates provision.¹⁵ Under federal law, for purposes of the CARES Act, many IHE-enrolled students “are stuck in a position where they’re not considered adults and they’re not considered children. In other words, the CARES Act gave them no direct financial relief, nor did it give their parents any on their behalf.”¹⁶ All told, many IHE students are struggling to make ends meet and are facing economic challenges particular to students.

3. *Students ineligible for Title IV assistance are among those most in need of emergency financial aid.*

The Department previously “encourage[d]” IHEs to prioritize “students with the greatest need” in awarding emergency financial aid.¹⁷ We agree. And we explain below that many students who are not eligible for Title IV assistance are among those with the “greatest need.”

Times are hard. Students ineligible for Title IV assistance are struggling to afford their “cost of attendance,” including “food, housing, course materials, technology, healthcare, and child care.”¹⁸ Indeed, many students who are ineligible for Title IV assistance have been hit the hardest by this pandemic’s effects—and are most in need of CARES Act support. Many students who are not eligible for Title IV assistance—and their families—are uninsured. As of 2018, more than four in ten undocumented immigrants (45 percent) were uninsured.¹⁹ Nearly four in ten individuals eligible for DACA (39 percent) were uninsured as of that same year.²⁰

At the same time, it is likely that students who are not eligible for Title IV assistance have suffered disproportionate health effects. Ninety-four percent of DACA recipients, for

¹⁵ See Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020).

¹⁶ Hao Liu, *Most College Students Won't Get Stimulus Checks—But They Should*, Fortune (May 5, 2020), tinyurl.com/y877ycl8.

¹⁷ Letter from Betsy DeVos to College and University Presidents (Apr. 9, 2020), tinyurl.com/y7f9tlrk [hereinafter “DeVos Letter”].

¹⁸ 85 Fed. Reg. at 36,496 (quoting CARES Act § 18004(c)).

¹⁹ *Health Coverage of Immigrants*, Kaiser Family Found. (Mar. 18, 2020), tinyurl.com/y9vf4h4j. See also NYS Health Found., *Connecting Undocumented New Yorkers to Coverage 2* (2018), tinyurl.com/yemy3aoo (New York, where COVID-19 has had its most severe effects, finding that “noncitizen New Yorkers had uninsured rates of more than 25%, the highest rate of any subpopulation. Noncitizens were three times more likely than citizens to lack health insurance coverage. Among immigrants, undocumented immigrants had the highest uninsured rates.”).

²⁰ See *Key Facts on Individuals Eligible for the Deferred Action for Childhood Arrivals (DACA) Program*, Kaiser Family Found. (Feb. 1, 2018), tinyurl.com/y7tdhpbq.

instance, were Hispanic or Latino as of 2017.²¹ And minority communities in the United States have been afflicted by COVID-19 at disproportionate rates. Hispanic and Latino individuals, for instance, account for more than 34.4 percent of people in the United States with COVID-19, despite that Hispanic and Latino individuals amount to less than 20 percent of the United States population.²² Those health concerns are especially pronounced because many students ineligible for Title IV assistance are on the front lines of the COVID-19 crisis. These same individuals are more likely to fall through the cracks of our medical system and lack basic safety net protections, making it all the more untenable to withhold vital aid.

In view of these realities, many IHEs hope to provide funding to students who are not eligible for Title IV assistance. As the Department recognizes, in trying to further their education, students can use that funding for purposes of necessary “healthcare” under the express terms of the CARES Act.²³ It is unsound policy to prevent these students from accessing critical funding in the midst of a global pandemic.

Many students who are ineligible for Title IV assistance and their families are struggling financially. For one, Section 2201 of the CARES Act excluded—that is, *explicitly* excluded—“any nonresident alien individual” from receiving a Recovery Rebate check.²⁴ It also excluded spouses and children of undocumented immigrants from receiving a check.²⁵ Additionally, minority communities are disproportionately facing record levels of unemployment. Among Hispanic and Latino individuals, the unemployment rate jumped to 18.9 percent in April, dropping only slightly to 17.6 percent in May and 14.5 percent in June.²⁶ Some DACA recipients have become the “sole provider in [their] home[s] because of COVID-19,” as their family members have lost their jobs.²⁷

²¹ Gustavo López & Jens Manuel Krogstad, *Key Facts About Unauthorized Immigrants Enrolled in DACA*, Pew Research Ctr. (Sept. 25, 2017), tinyurl.com/yb4juems.

²² Ctrs. for Disease Control & Prevention, *supra* note 5; *QuickFacts*, U.S. Census Bureau, tinyurl.com/rjjqu8d (last visited July 13, 2020); see *COVID-19 in Racial and Ethnic Minority Groups*, Ctrs. for Disease Control & Prevention, tinyurl.com/ybwms8j7 (last visited July 13, 2020); Maria Godoy & Daniel Wood, *What Do Coronavirus Racial Disparities Look Like State by State?*, NPR (May 30, 2020), tinyurl.com/y74qgeq3.

²³ 85 Fed. Reg. at 36,496 (quoting CARES Act § 18004(c)).

²⁴ CARES Act § 2201(a). “[T]he CARES Act section authorizing \$1,200 payments to individuals specifically excludes ‘nonresident alien individuals’ from eligibility. See CARES Act § 2201 (‘Recovery Rebates for Individuals’). That Congress specifically included language to exclude noncitizens from eligibility for individual cash payments, but failed to include specific language to exclude noncitizens from eligibility for HEERF funds, indicates that the omission was intentional.” Order Granting Pl.’s Mot. for Prelim. Inj. (Dkt. 31) at 19, *Washington v. DeVos*, No. 2:20-cv-00182 (E.D. Wash. June 12, 2020) [hereinafter “Wash. PI Order”].

²⁵ CARES Act § 2201(a) (requiring a “valid identification number,” which is defined as “a social security number”); see Joe Davidson, *She’s a U.S. Citizen. He’s Not. Their Family Can’t Get a Stimulus Check*, Wash. Post (May 11, 2020), tinyurl.com/ybo27n4p.

²⁶ *The Unemployment Situation—June 2020*, U.S. Bureau of Labor Statistics (July 2020), tinyurl.com/hu87hxo (Summary Table A).

²⁷ *E.g.*, Sophie Tatum, *DACA Recipient College Students Stuck in Political Limbo Without Emergency Cash Grants*, ABC News (May 14, 2020), tinyurl.com/yahb3g9u.

A March 2020 survey of nearly 1,700 TheDream.US scholars enrolled in IHEs found that 80 percent of such students experienced income loss due to job loss or reduced hours.²⁸ Two-thirds of these students needed assistance with their rent or utilities; half needed assistance with food.²⁹ Fifty-eight percent of students reported needing mental health support.³⁰ As one Scholar put it, “[I’m] worried about everything: rent, food, [and] medical care . . . that my family and I might need and might not get if there’s no work to pay for basic needs.”³¹

According to a Presidents’ Alliance-New American Economy April 2020 report, over 450,000 undocumented students are enrolled in postsecondary educational institutions.³² The overwhelming majority—over 80 percent—of undocumented students attend two- and four-year public colleges and universities, and many attend community colleges.³³ In fact, numerous studies suggest that “community colleges are the most likely educational port of entry for undocumented students.”³⁴ Many of these students come from families with high levels of poverty.³⁵ Consequently, these students are unable to rely on their parents for financial assistance, and furthermore feel obligated to support their families financially.³⁶ While studies show undocumented students at both two- and four-year institutions concerned about financing their education, undocumented students at community colleges are even more likely to face extremely high levels of financial stress, compared to their peers at four-year colleges.³⁷ Despite these financial challenges, undocumented students enrolled at community colleges have made impressive academic gains. These findings suggest that reforms “to increase support and lower barriers to college access for undocumented youth generally . . . would broaden undocumented students’ access not only to community colleges but also to 4-year schools.”³⁸

²⁸ *In Their Own Words: The Impact of Covid19 on DREAMers*, TheDream.US, 3-4 (Mar. 26, 2020), tinyurl.com/ya6j7l4t.

²⁹ *Id.* at 10.

³⁰ *Id.* at 7-8.

³¹ *Id.* at 3.

³² Miriam Feldblum et al., *New Am. Econ. & Presidents’ Alliance on Higher Educ. & Immigration, Undocumented Students in Higher Education: How Many Students Are in U.S. Colleges and Universities, and Who Are They?* 4 (2020), tinyurl.com/ybocnauf.

³³ *Id.*

³⁴ Olivia Osei-Twumasi & Guadalupe Lopez Hernandez, *Resilience in the Face of Adversity: Undocumented at Students Community Colleges*, in *Immigrant-Origin Students in Community College: Navigating Risk and Reward in Higher Education* (Carola Suarez-Orozco & Olivia Osei-Twumasi eds., 2019).

³⁵ *Id.* (citing Hirokazu Yoshikawa et al., *Unauthorized Status and Youth Development in the United States: Consensus Statement of the Society for Research on Adolescence*, 27 *J. Research on Adolescence* 4 (2016)).

³⁶ *Id.* (citing Veronica Terriquez, *Dreams Delayed: Barriers to Degree Completion Among Undocumented Community College Students*, 41 *J. Ethnic & Migration Studies* 1302, 1302-23 (2015)).

³⁷ *Id.* (citing Carola Suárez-Orozco et al., *Undocumented Undergraduates on College Campuses: Understanding Their Challenges and Assets and What It Takes to Make an Undocufriendly Campus*, 85 *Harv. Educ. Rev.* 427 (2015)).

³⁸ *Id.*

Already, many undocumented graduate students hold degrees in STEM fields.³⁹ In fact, 39 percent of undocumented students pursuing advanced degrees have an undergraduate STEM degree, with 43 percent of DACA-eligible students pursuing advanced degrees having an undergraduate STEM degree. Among all undocumented graduate students with a STEM undergraduate degree, 41 percent have a degree in healthcare-related field, an especially important finding as the COVID-19 crisis highlights the nation's severe shortages across the healthcare industry, from physicians to home health aides. Among DACA-eligible students, that proportion increases to 46 percent.⁴⁰

Indeed, students ineligible for Title IV assistance would benefit greatly from full access to CARES Act funding. Again, as the Department recognizes, these students would be able to use CARES Act funding for “food,” “housing,” “technology,” and “child care.”⁴¹ It is unsound policy for the Department to prevent IHEs from supporting these students—and allowing students to meet their most fundamental needs.

4. *Students ineligible for Title IV assistance may be forced to postpone or forego higher education, imposing substantial costs on those students and on society at large.*

As the Department has recognized, many students are facing significant “financial challenges and struggling to make ends meet.”⁴² The Department has stated that it would provide IHEs with the “resources” (i.e., emergency financial aid under the CARES Act) to “continue educating your students.”⁴³ Of course, students ineligible for Title IV assistance, too, are facing severe “financial challenges and struggling to make ends meet.” And the Department correctly realizes that, without emergency financial aid, many of those ineligible students will be unable to “continue” their education.⁴⁴

As one example, faced with significant state and local funding reductions, the City University of New York (CUNY) system, with its highly diverse immigrant student body, must now impose major budget cuts and consider possible tuition hikes, which would represent a

³⁹ STEM fields include those categorized as STEM fields by Department of Homeland Security's (2016) STEM Designated Degree Program List and nursing fields as defined by U.S. Census Bureau; American Community Survey, 2018.

⁴⁰ Miriam Feldblum et al. *supra* note 32, at 4.

⁴¹ 85 Fed. Reg. at 36,495 (quoting CARES Act § 18004(c)).

⁴² DeVos Letter.

⁴³ *Id.*

⁴⁴ *Accord, e.g., Br. of Amici Curiae 25 Ctys., Cities, & Municipalities* (Dkt. 27-1) at 2-5, *Oakley v. DeVos*, No. 4:20-cv-03215 (N.D. Cal. June 1, 2020); *id.* at 5 (IHE reporting “withdrawal rates 16% higher than this time last year”); *id.* at 4 (“Immigrant students denied HEERF Student Assistance because of the eligibility restrictions are more likely to sacrifice their education to provide for basic necessities and compensate for the services that their school would have otherwise provided.”); *id.* at 5 (describing undocumented student who “was laid off in March and is currently living off the money she was saving to attend UCLA or UC Santa Cruz this fall”).

financial hardship for many degree-seeking CUNY students. Nearly 40 percent of the CUNY student population comes from families earning less than \$20,000 annually, and nearly half of CUNY students work while attending college, with many students “now either unemployed or underemployed because of the pandemic” and “experiencing food and housing insecurity and lack of access to health care.”⁴⁵

If students who are not eligible for Title IV assistance are forced to defer or abandon their higher education, those students will suffer obvious costs. In the Department’s words, “[a] postsecondary credential has never been more important.”⁴⁶ “College graduates with a bachelor’s degree typically earn 66 percent more than those with only a high school diploma; and are also far less likely to face unemployment.”⁴⁷ “Over the course of a lifetime, the average worker with a bachelor’s degree will earn approximately \$1 million more than a worker without a postsecondary education.”⁴⁸ And approximately two-thirds of job openings now “require postsecondary education or training.”⁴⁹ If students are forced to postpone or abandon their goal of obtaining a postsecondary credential, they will lose out on all of these benefits.

What is more, as the Department puts it, “[t]he most expensive education is one that doesn’t lead to a degree.”⁵⁰ “Students who take out college loans but don’t graduate are three times more likely to default than borrowers who” do, and such default has lifelong effects.⁵¹ Students who postpone or abandon their education midstream may struggle to afford to repay their college loans, especially given difficult economic circumstances and their lack of a postsecondary credential. In fact, unemployment is substantially higher today for individuals who completed “[s]ome college” compared to individuals with a “[b]achelor’s degree and higher.”⁵²

This interim final rule is bad policy not only because it hurts students ineligible for Title IV assistance, including DACA students, but because it hurts our nation as a whole. Findings from the National UnDACAmented Research Project, which surveyed a diverse sample of over 400 respondents from six states, found that many DACA recipients accessed higher-wage jobs, and while not all individuals could afford tuition at four-year colleges, many found job-training and shorter-term certificate programs at community colleges and community organizations that served as stepping stones to further education and specialized

⁴⁵ Marjorie Valbrun, *Lives and Livelihoods*, Inside Higher Ed (June 23, 2020), tinyurl.com/ya34ms4p.

⁴⁶ *College Affordability and Completion: Ensuring a Pathway to Opportunity*, U.S. Dep’t of Educ., tinyurl.com/y7aosnsv (last visited July 13, 2020).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *The Unemployment Situation—June 2020*, *supra* note 26 (15.0 percent versus 8.4 percent in April; 13.3 percent versus 7.4 percent in May; 10.9 versus 6.9 percent in June).

high-demand careers.⁵³ In summary, “[f]or those who had previously left high school, DACA has provided motivation to enroll in GED and adult education programs. For those seeking higher education, DACA has improved access to vocational programs, community colleges, universities, and graduate schools.”⁵⁴

Society at large will suffer if students who are not eligible for Title IV assistance are forced to postpone or forego higher education. Higher education is associated with numerous external benefits, including:

- lower levels of unemployment and poverty;⁵⁵
- greater tax revenues and decreased demand on public assistance;⁵⁶
- higher levels of civic participation, from volunteering to voting;⁵⁷
- a more productive workforce;⁵⁸
- reduced crime rates;⁵⁹
- increased consumption;⁶⁰
- increased workforce eligibility;⁶¹ and
- increased social cohesion.⁶²

The Department’s interim final rule will diminish these societal benefits.

* * *

The Department claims that it issued its interim final rule “only on a reasoned determination that its benefits would justify its costs.”⁶³ The Department’s analysis, however, is far from reasoned. The interim final rule ignores its effects on students who are ineligible for Title IV assistance—the rule’s most obvious and significant cost. This failure

⁵³ Roberto G. Gonzales et al., Immigration Initiative at Harvard, *The Long-Term Impact of DACA: Forging Futures Despite DACA’s Uncertainty: Findings from the National UnDACAmented Research Project (NURP)* 4 (2019), tinyurl.com/y8vsgyrh.

⁵⁴ *Id.*

⁵⁵ Jennifer Ma et al., Coll. Bd., *Trends in Higher Education Series: Education Pays 2019*, at 4-5 (2019), tinyurl.com/y8259omq.

⁵⁶ *Id.*

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 9.

⁵⁹ David E. Bloom et al., *Beyond Private Gain: The Public Benefits of Higher Education*, 18 Int’l Handbook of Higher Educ. 300 tbl. 2 (2004) (citing Inst. for Higher Educ. Policy, *Reaping the Benefits: Defining the Public and Private Value of Going to College* (1998)).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 85 Fed. Reg. at 36,499.

alone is fatal to the interim final rule. The Department should swiftly confirm that Section 18004(c) of the CARES Act imposes no Title IV eligibility requirement.

B. The interim final rule imposes significant costs on many students eligible for Title IV assistance.

The Department also declines to consider the interim final rule’s effects on students who are eligible for Title IV assistance, but who have not yet confirmed their Title IV eligibility. Many students will be unable to navigate the maze of establishing Title IV eligibility—a process that the Department acknowledges is complex for many students. Low-income, minority, and first-generation college students will be hit the hardest. And even students who do undergo this process will incur substantial costs, which the Department ignores.

1. *Many students who are eligible for Title IV assistance will be unable to confirm that eligibility—and thus unable to receive emergency financial aid.*

Some students who are eligible for Title IV assistance have documentation in place that establishes their eligibility. But many do not.⁶⁴ Many students do not complete the FAFSA. As the Department recognizes, many students “lack the necessary information or familiarity with the financial aid process to have information in place already.”⁶⁵ The Department acknowledges that this is due to the FAFSA’s “complexity” and the “lack of counseling” options available to students.⁶⁶ And the Department further observes that these barriers are “particularly challenging for low-income, minority, and first-generation [college] students.”⁶⁷ According to the Owen and Westlund study, which the Department itself cites and which uses Department-provided data, more than *half* of the 8,655 students studied did not complete the FAFSA.⁶⁸

The Department’s own statistics bear out that a substantial percentage of students do not complete the FAFSA. Approximately thirty-five percent of students in one studied cohort did not complete the FAFSA; did not even know what the FAFSA is; or did not know whether they completed the FAFSA (making completion unlikely).⁶⁹ Hispanic students, students

⁶⁴ *See id.* at 36,500.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* (citing Laura Owen & Erik Westlund, *Increasing College Opportunity: School Counselors and FAFSA Completion*, 2 J. of Coll. Access 6 (2016)).

⁶⁸ Owen & Westlund, *supra* note 67, at 12 tbl. 1 (“FAFSA Complete”: 45 percent).

⁶⁹ Steven Bahr et al., U.S. Dep’t of Educ., NCES 2018–061, *Why Didn’t Students Complete a Free Application for Federal Student Aid (FAFSA)? A Detailed Look* 20 (2018), tinyurl.com/y59j2ye7 (23.7, 2.6, and 8.3 percent, respectively).

whose parents did not themselves graduate from an IHE, and students from low-income families had the lowest FAFSA completion rates.⁷⁰

The Department offers two solutions for students who have not completed the FAFSA. **First**, the Department submits, such students can simply “submit the [FAFSA].”⁷¹ That is a non-starter. As the Department recognizes, vast numbers of students “lack the necessary information or familiarity with the financial aid process” to complete the FAFSA, perhaps due to the FAFSA’s “complexity” and students’ “lack of counseling.”⁷² Perhaps recognizing its own point and observing the high rates of students who have not completed the FAFSA, the Department offers a **second** option. Students may complete an application “in which the student attests under the penalty of perjury to meeting the requirements of section 484 of the HEA.”⁷³

That option is even more transparently flawed. Under “penalty of perjury,” students will struggle to confidently assert that they meet all of the eligibility requirements listed in 20 U.S.C. § 1091.⁷⁴ Some questions that students may struggle with include:

- Am I an “eligible”—as opposed to ineligible—“noncitizen”?⁷⁵ Under Section 1091(a)(5), an “eligible” noncitizen includes an individual who is “able to provide evidence from the Immigration and Naturalization Service that he or she is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident.”⁷⁶ What does that mean?
- Am I maintaining “satisfactory academic progress . . . in accordance with . . . subsection (c)”?⁷⁷ Subsection (c) says that I have to obtain “academic standing consistent with the requirements for graduation, as determined by the institution.”⁷⁸ What are those requirements at my school? If I once was not in good academic standing, my institution can “determin[e]” that I now am.⁷⁹ Has the institution so determined?
- If I am not in good academic standing because of the “death of [my] relative,” a “personal injury or illness,” or other “special circumstances as determined by [my] institution,” has my institution “waive[d]” the requirements of Section 1091(c)(1) and Section 1091(c)(2)?⁸⁰ What does my university consider “special circumstances”? Can

⁷⁰ *Id.*

⁷¹ 85 Fed. Reg. at 36,497.

⁷² *Id.* at 36,500.

⁷³ *Id.*

⁷⁴ 20 U.S.C. § 1091.

⁷⁵ *See* 85 Fed. Reg. at 36,499 n.7.

⁷⁶ 20 U.S.C. § 1091(a)(5).

⁷⁷ *Id.* § 1091(a)(2).

⁷⁸ *Id.* § 1091(c)(1)(B).

⁷⁹ *Id.* § 1091(c)(2).

⁸⁰ *Id.* §§ 1091(c)(3)(A), 1091(c)(3)(B), 1091(c)(3)(C).

I ask the university to waive the requirements of Section 1091(c)(1) and Section 1091(c)(2) now?

- With whom do I file a “statement of educational purpose”?⁸¹ Do I file it with my institution or “the Secretary”?⁸² What does it mean to file the “statement of educational purpose” “as part of the original financial aid application process”?⁸³ Do I have to undergo an “original financial aid application process” to access Section 18004(c) funding?⁸⁴
- Who has to register for the “Selective Service”?⁸⁵ What is that? Could I get in trouble for registering if I am undocumented? Could I get in trouble for registering late?

The list goes on; the point remains. In the application, students will face difficulties in determining whether they meet Title IV’s eligibility requirements. For citizen students in mixed-status families, these questions are particularly fraught. Many students will decline to complete this application under “penalty of perjury,” which carries a possible sentence of five years of imprisonment.⁸⁶ The decision to not submit the form is understandable: For many or most students, this application will be much more “complex[]” than the FAFSA.⁸⁷ And students will lack “counseling” on how to complete this application, too.⁸⁸ It is a foreseeable—indeed, clear—result that many eligible students in need will be unable to confirm their eligibility.

2. These costs will fall most squarely on students who are eligible for Title IV assistance but are “low-income, minority, and first-generation [college] students.”

The Department recognizes that the interim final rule will impose especially harsh burdens on “low-income, minority, and first-generation [college] students.”⁸⁹ As discussed above, low-income, minority, and first-generation college students have the lowest FAFSA completion rates. They are the students who will struggle the most moving forward to submit the FAFSA.⁹⁰ And they are likely the students who will struggle the most to complete the Department’s alternatively suggested application.

⁸¹ *Id.* § 1091(a)(4)(A).

⁸² *Id.* § 1091(a)(4).

⁸³ *Id.* § 1091(a)(4)(A).

⁸⁴ *Id.*

⁸⁵ 85 Fed. Reg. at 36,499 n.7.

⁸⁶ 18 U.S.C. § 1621(2).

⁸⁷ 85 Fed. Reg. at 36,500.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See id.* at 36,500 & n.10.

What is more, many low-income, minority, and first-generation college students are the very people who most need CARES Act funding. As the Department itself previously acknowledged, it is bad policy to prevent students “most in need” from accessing Title IV funding “as quickly as possible.”⁹¹ And it is bad policy to chill—through complicated forms and risks of perjury—eligible students who are “struggling to make ends meet” from accessing emergency financial aid.⁹² The Department’s interim final rule will do just that.

3. *The Department ignores the costs of establishing Title IV eligibility.*

The Department estimates that 15 percent of Title IV *recipients*—more than 1.5 million students—will request emergency financial aid.⁹³ The Department’s calculation considers only people who have actually received Title IV aid. Those students necessarily would have established their Title IV eligibility.

But the Department ignores the interim final rule’s costs to students who are *eligible* for Title IV assistance but have not yet established their eligibility. The Department fails to consider the costs that those students will incur in completing the FAFSA or their institutions’ applications. Nor does the Department estimate how many students will complete the FAFSA or an application, or the time it will take students to complete the FAFSA or an application. Once again, the Department simply ignores some of the most obvious and substantial costs of its interim final rule.

Those costs would likely be extensive. “According to the Department of Education, during the 2019-2020 FAFSA cycle . . . it took dependent students 47 to 58 minutes on average to complete a new form.”⁹⁴ In the application year 2017-2018 (the most recent year on record), only 10.72 million students eligible for Title IV assistance filed a FAFSA.⁹⁵ Yet the Department estimates that 19.75 million students are eligible under Title IV to receive emergency financial aid grants.⁹⁶ The Department’s analysis thus completely ignores the interim final rule’s effects on more than *nine million students*.

Imagine that these students elect to demonstrate their eligibility by filing the FAFSA, as the Department suggests they should.⁹⁷ Using the Department’s own wage rate⁹⁸ and the

⁹¹ DeVos Letter.

⁹² *Id.*

⁹³ 85 Fed. Reg. at 36,503.

⁹⁴ Farran Powell & Emma Kerr, *Completing the FAFSA: Everything You Should Know*, U.S. News (Oct. 1, 2019), tinyurl.com/ycpztivr.

⁹⁵ *FAFSA Volume Reports*, U.S. Dep’t of Educ., Office of Fed. Student Aid, tinyurl.com/yc3awk8b (last visited July 13, 2020) (“FAFSA Data by Demographic Characteristics”).

⁹⁶ 85 Fed. Reg. at 36,499-50 & tbl. 1.

⁹⁷ *Id.* at 36,497.

⁹⁸ *Id.* at 36,500.

Department's own estimate of the percent of students who will apply for emergency financial aid,⁹⁹ the Department leaves out of its analysis:

- 1,057,500 to 1,305,000 hours of additional student labor to complete the FAFSA;¹⁰⁰ and
- \$18,918,675 to \$23,346,450 of additional costs to students to complete the FAFSA.¹⁰¹

The average time—and thus the average costs—of completing an institution-provided application would likely be higher yet. Students facing a “penalty of perjury” carrying a maximum sentence of five years of imprisonment would take the time to fully research any points of uncertainty.¹⁰² Many students would likely need to confirm with their institutions whether they are in good academic standing, whether they are an “eligible” noncitizen, whether they need to undertake an “original financial aid application process,” and so forth. Many institutions, in turn, would need to ask students clarifying questions, to which students would have to respond. For many students, this process could take days or weeks. In any event, the Department takes no notice of more than a million hours' worth, and tens of millions of dollars' worth, of direct costs.

Moreover, the Department's figures—and thus the costs calculated above—are without basis and may well be substantial underestimates. The Department offers no basis to choose 15 percent as the percentage of students that will request emergency financial aid. As the Department knows, it is legally required to do so. “Executive Order 13563 [] requires an agency ‘to use the best available techniques to quantify anticipated present and future . . . costs as accurately as possible.’”¹⁰³ The Department could have, at a minimum, consulted with IHEs that have already administered funds to obtain a more reasonable basis for its estimate. Instead, it offers a bare guess.¹⁰⁴

Separately, the Department offers no basis for its \$17.89 wage estimate. Surely, not all students work in retail; many are compensated at higher rates.

* * *

This rule's negative policy effects are not limited to students ineligible for Title IV assistance. Many students who are eligible for Title IV assistance will decline to undergo the “complex[]” process of confirming their eligibility because they do not understand that process or are afraid of misstating their Title IV eligibility. And those eligible students that *do* undergo that process will incur substantial costs—costs that the Department does not

⁹⁹ *Id.* at 36,503 (estimating figure in the context of students who have received Title IV assistance).

¹⁰⁰ Calculations: $9,000,000 * (47/60) * 0.15 = 1,057,500$; $9,000,000 * (58/60) * 0.15 = 1,305,000$

¹⁰¹ Calculations: $1,057,500 * \$17.89 = \$18,918,675$; $1,305,000 * \$17.89 = \$23,346,450$

¹⁰² 85 Fed. Reg. at 36,500.

¹⁰³ *Id.* at 36,499 (quoting Exec. Order 13,563).

¹⁰⁴ *Contra* Exec. Order 13,563.

consider. Again, it is hard to see how the Department made a “reasoned determination” that this rule’s benefits outweigh its costs.¹⁰⁵ It neglected to consider many of the most pronounced costs of its rule.

C. The interim final rule imposes significant costs on institutions.

The Department’s analysis considers only a small fraction of the direct costs that IHEs will bear as a result of the interim final rule. It also leaves out of the equation all of the indirect costs that the rule will impose on IHEs, as students will be forced to postpone or abandon their higher education, depriving IHEs of tuition revenues. And the Department fails to consider the non-economic costs to campus communities that will arise from limiting the number of students ineligible for Title IV assistance who will be able to afford to continue their higher education.

1. Institutions will incur substantial direct costs.

The Department identifies only one cost to IHEs: that each institution “would require five hours to set up a[] new form for students to complete and establish review and recordkeeping procedures to be able to comply with the separate reporting requirements.”¹⁰⁶ Using its five-hour estimate, the Department estimates that doing so will require a total of 25,680 hours, amounting to \$1.18 million dollars.¹⁰⁷ The Department overlooks apparent and substantial direct costs of its rule. It is untenable to suggest that this rule will impose an average of only five hours of additional work for IHEs. Below, we consider a handful of sources of additional work.

First, setting up the eligibility-confirming application alone will likely take more than five hours. IHEs will have to thoroughly review the interim final rule before creating this application—a cost that the Department ignores.¹⁰⁸ And, as explained above, Section 1091 and its eligibility requirements raise numerous difficult questions and leave others open to IHEs’ discretion.¹⁰⁹ IHEs will have to thoroughly research these statutory requirements to ensure that they are accurately advising their students. And they will have to clearly spell out their own policies that determine, for instance, whether students are in good academic standing. Thus, it is likely that creating the application alone will take much longer than five hours.

¹⁰⁵ 85 Fed. Reg. at 36,499.

¹⁰⁶ *Id.* at 36,503.

¹⁰⁷ *Id.* at 36,501.

¹⁰⁸ See, e.g., *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114, 51,229 (Oct. 10, 2018) (public charge rule considering familiarization costs).

¹⁰⁹ *Supra*, Section I.B.1.

Second, IHEs will have to follow up with students about questions that arise as students fill out their applications.¹¹⁰ Students may ask, for instance, questions about the statutory requirements or university's policies (*e.g.*, "I received poor grades last semester due to a death in my family. Under Section 1091(c)(1), will the university waive the good-academic-standing requirement?"). This back and forth will consume substantial time, which the Department fails to acknowledge.

Third, IHEs will have to carefully review each eligibility-establishing application they receive. Otherwise, they will now run afoul of their contractual obligation to comply with "all relevant provisions and requirements of the CARES Act," exposing themselves to legal penalties.¹¹¹

Fourth, beyond "*establish[ing]*" recordkeeping procedures, IHEs will actually have to *maintain* records of each and every Title IV eligibility-establishing document that they receive. Again, if they fail to do so, they will expose themselves to legal penalties.¹¹²

And **fifth**, college officials will likely need to instruct many students seeking to establish their Title IV eligibility on how to complete the FAFSA.¹¹³

The Department errs by declining to consider these foreseeable direct costs of its interim final rule. These costs will likely amount to tens, if not hundreds, of thousands of hours of additional work for IHEs. That will result in immense direct economic costs to IHEs. While IHEs are struggling to adapt to these novel and difficult circumstances, the Department's interim final rule directly imposes huge and unacknowledged burdens on them. That is bad policy.

2. Institutions will incur substantial indirect costs.

As the Department puts it, "institutions are rightfully concerned about declining enrollments and the loss of ancillary revenue as a result of COVID-19."¹¹⁴ But the Department ignores that its interim final rule will make this problem worse.

IHEs are already concerned about enrollment and supporting their students through these unprecedented times. Many do not know whether they will be able to reopen their campuses

¹¹⁰ *See id.*

¹¹¹ *Recipient's Funding Certification and Agreement for the Institutional Portion of the Higher Education Emergency Relief Fund Formula Grants Authorized by Section 18004(a)(1) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act § 4(i)*, U.S. Dep't of Educ., tinyurl.com/y8eef6a (last visited July 13, 2020) [hereinafter "HEERF Certification"].

¹¹² *See id.*

¹¹³ *See* 85 Fed. Reg. at 36,500.

¹¹⁴ *Id.* at 36,497.

in the fall.¹¹⁵ Meanwhile, students have expressed “[h]esitation” on registering for fall classes “until they know if they will be in person.”¹¹⁶ “Enrollment decline concerns” are widespread across IHEs.¹¹⁷ At Arizona State University, for instance, 13 percent of survey respondents have already delayed their graduation.¹¹⁸

The Department’s interim final rule exacerbates IHEs’ enrollment issues. As we explained above, many students ineligible for Title IV assistance may be financially constrained to postpone or abandon their higher education.¹¹⁹ Eligible students who are unable to prove their eligibility may face a similar calculus. And thus, along with these integral members of their communities, IHEs will experience financial difficulties. The Department’s failure to consider this apparent effect of its interim final rule is mystifying, especially after it identifies IHEs’ “rightful[]” concerns on this score.¹²⁰

3. *Students ineligible for Title IV assistance are vital to IHE communities, which will suffer if such students defer or abandon their higher education.*

Students who are not eligible for Title IV assistance are integral and valued members of IHE communities. In particular, noncitizens play a crucial role on college and university campuses. As noted, more than 450,000 students enrolled in higher education are undocumented immigrants.¹²¹ That amounts to two percent of all students in higher education in the United States.¹²² Approximately 216,000 enrolled students are DACA-eligible.¹²³

The Supreme Court has long recognized the substantial benefits that a diverse student body brings:

- “[E]nrolling a diverse student body ‘promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.’”¹²⁴

¹¹⁵ See, e.g., *Flash Poll Results: CARES Act Emergency Aid for Students*, Nat’l Ass’n of Coll. & Univ. Bus. Officers (May 11, 2020), tinyurl.com/ycqkxgwm.

¹¹⁶ *Id.* (quotation marks omitted).

¹¹⁷ *Id.* (quotation marks omitted).

¹¹⁸ Madeleine St. Amour, *Report: COVID-19 Has Hurt College Students*, Inside Higher Ed (June 23, 2020), tinyurl.com/ycwtmh88.

¹¹⁹ *Supra*, Section I.A.4.

¹²⁰ 85 Fed. Reg. at 36,497.

¹²¹ Feldblum et al., *supra* note 32, at 1.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

- “Equally important, ‘student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.’”¹²⁵
- “[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”¹²⁶
- “[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”¹²⁷
- “The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.”¹²⁸
- “[I]t is not too much to say that the nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”¹²⁹
- “[A] great deal of learning occurs informally. It occurs through interactions among students . . . of different races, religions, and backgrounds; who come . . . from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.”¹³⁰

Lower courts agree. As one court recently explained, “a heterogeneous student body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community.”¹³¹

Outside literature confirms this important role of diversity in IHEs, for a host of reasons. Cross-cultural interaction is critical to “the amount of acceptance students reported for people from other cultures, the rate at which they participated in community service programs, and the amount of growth they exhibited in other areas of civic responsibility.”¹³² Diverse campuses lead to “higher levels of cultural awareness and acceptance and increased commitment to the goal of improving racial understanding.”¹³³ Engagement with peers of

¹²⁵ *Id.* (quoting *Grutter*, 539 U.S. at 330).

¹²⁶ *Grutter*, 539 U.S. at 330.

¹²⁷ *Id.* (quotation marks omitted).

¹²⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quotation marks omitted).

¹²⁹ *Id.* at 312-13 (quotation marks omitted).

¹³⁰ *Id.* at 312 n.48 (quotation marks omitted).

¹³¹ Findings of Fact and Conclusion of Law (Dkt. 672) at 7, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, No. 14-cv-14176 (D. Mass. Sept. 30, 2019).

¹³² Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors* ch. 5 p. 9 (2003), tinyurl.com/y8wnbjbg (citing William G. Bowen & Derek Bok, *The Shape of the River* (1998)).

¹³³ *Id.* (citing Linda J. Sax & Alexander W. Astin, *The Development of ‘Civic Virtue’ Among College Students, in The Senior Year Experience: Facilitating Integration, Reflection, Closure, and Transition* (J.N. Gardner & G. Van der Veer eds., 1997); Jeffrey F. Milem, *The Impact of College on Students’ Racial Attitudes and Levels of*

diverse backgrounds affects students' cognitive, social, and democratic outcomes.¹³⁴ “[S]tudents who reported meaningful and positive interactions with diverse peers tend to score higher . . . on cultural awareness, interest in social issues, self-efficacy for social change, belief in the importance of creating greater social awareness, perspective-taking skills, the development of a pluralistic orientation, interest in poverty issues, concern for the public good, and support for race-based initiatives.”¹³⁵ The list of benefits goes on.¹³⁶

At bottom, “any actions taken to reduce the numbers of students of color on college and university campuses will have a powerfully negative effect on the opportunity that students have to learn from one another.”¹³⁷

Unsurprisingly, IHEs recognize the important role that students who are not eligible for Title IV assistance play on their campuses. As more than 165 IHEs recently made clear, “American institutions of higher education benefit profoundly from the presence of immigrant students on our campuses. Whether they attend large public universities, private research universities, liberal arts colleges, or community colleges, these students contribute a perspective and experience that is unique and important. That is especially true of Dreamers.”¹³⁸

Racial Awareness (1992) (doctoral dissertation, University of California at Los Angeles) (on file at University Microforms International); Jeffrey F. Milem, *College, Students, and Racial Understanding*, 9 Thought & Action 51 (1994).

¹³⁴ Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. Soc. Issues 595 (2005).

¹³⁵ *Id.* at 602.

¹³⁶ See generally *Amici Curiae* Br. of 21 Colorful Crimson et al. (Dkt. 504) at 26–28, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), No. 14-cv-14176 (D. Mass. Aug. 30, 2018) (surveying academic literature, court opinions, expert testimony, and other materials, and highlighting the benefits of diverse student bodies).

¹³⁷ Milem, *supra* note 132, at ch. 5 p. 10.

¹³⁸ Br. for *Amici Curiae* Insts. of Higher Educ. at 2, *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, Nos. 18-587, 18-588, 18-589 (U.S. Oct. 4, 2019), [tinyurl.com/ybkbhmtz](https://www.tinyurl.com/ybkbhmtz). See also *id.* at 11-13 & n.22 (observing that hundreds of university presidents have issued public statements on DACA students’ importance to American colleges and universities); Br. for *Amici Curiae* Nineteen Colls. & Univs., *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, Nos. 18-587, 18-588, 18-589 (U.S. Oct. 3, 2019), [tinyurl.com/yb77gmzf](https://www.tinyurl.com/yb77gmzf). The Institutions of Higher Education *amicus* brief (at 12-13 n.22) lists a nonexhaustive list of IHE presidents who have publicly recognized the importance of DACA students to their communities: “Pomona Coll., *Statement in Support of the Deferred Action for Childhood Arrivals (DACA) Program and Our Undocumented Students*, [[tinyurl.com/y7g4uuer](https://www.tinyurl.com/y7g4uuer)] (last visited Sept. 27, 2019) (letter opposing the nonrenewal of DACA signed by over 700 university and college presidents and chancellors); see also, e.g., *California Community Colleges Chancellor Eloy Ortiz Oakley’s Statement on the Trump Administration’s Action to End DACA for Dreamers* (Sept. 5, 2017), [[tinyurl.com/ydh3uy4s](https://www.tinyurl.com/ydh3uy4s)]; Letter from Andrew D. Hamilton, President, New York University to Donald J. Trump, President (Sept. 1, 2017), [[tinyurl.com/yaecigtq](https://www.tinyurl.com/yaecigtq)]; Letter from Vincent E. Price, President, Duke University, to Donald J. Trump, President (Aug. 30, 2017), [[tinyurl.com/yd8y5kuj](https://www.tinyurl.com/yd8y5kuj)]; Letter from Drew Gilpin Faust, President, Harvard University, to Donald J. Trump, President (Aug. 28, 2017), [[tinyurl.com/y7vywjx6](https://www.tinyurl.com/y7vywjx6)]; Letter from Ron Liebowitz, President, Brandeis University, to Donald J. Trump, President (Sept. 5, 2017), [[tinyurl.com/ybdbulrf](https://www.tinyurl.com/ybdbulrf)]; Univ. of Michigan, *Statement on DACA from President Mark*

While IHEs in the United States have grown more racially and ethnically diverse, “we nonetheless see stagnant and low levels of secondary school completion, college participation, and educational attainment for many communities of color.”¹³⁹ And even for diverse students who do enroll in IHEs, “celebrating ethnic and racial diversity . . . is not the same thing as achieving equity. [IHEs] must deliberately and energetically remove the conditions that deny or impede equitable outcomes for all students.”¹⁴⁰ IHEs have a critical responsibility to diverse students to remove obstacles, both in terms of access to higher education and the ability to succeed once such students enroll. This interim final rule will make the playing field more uneven, making it that much more difficult for IHEs to meet their educational and moral obligations to students of color, low-income students, undocumented students, and otherwise-marginalized students.

Students ineligible for Title IV assistance may be forced to postpone or forego their higher education.¹⁴¹ This will deprive IHEs of vital members of their communities and the numerous benefits that their presence on campus brings—and interfere with IHEs’ vital responsibility of improving equitable access to, and success in, higher education.

* * *

The Department’s interim final rule will impose enormous (and mostly unacknowledged) direct costs on IHEs. It will add to IHEs’ “rightful[.]” enrollment concerns, preventing students (and especially students ineligible for Title IV assistance) from enrolling. As a result, it will also deprive IHE communities of valuable members that bring a host of benefits to their schools—and will interfere with IHEs’ critical goal of improving equitable outcomes in higher education.

Schlissel (Sept. 3, 2017), [tinyurl.com/y9dsw6rd]; Letter from Adam Falk, President, Williams College, to the Williams Community (Nov. 17, 2016), [tinyurl.com/ydgvuo67]; Letter from Kathleen McCartney, President, Smith College, to Students, Staff and Faculty (Sept. 5, 2017), [tinyurl.com/y8dfdxrk]; Letter from Lee Pelton, President, Emerson College, to Emerson Community (Sept. 6, 2017), [tinyurl.com/y9g5f9mk]; Resolution of the Board of Governors, California Community Colleges, No. 2017-01, [tinyurl.com/y97e76to] (last visited Sept. 27, 2019); Statement of Susan Herbst, President, University of Connecticut, to the University of Connecticut Community (Sept. 5, 2017), [tinyurl.com/y9so4s8r]; Letter from David W. Leebron, President, Rice University (Sept. 5, 2017) . . . , Northeastern University, to all members of the Northeastern Community (Sept. 4, 2017), [tinyurl.com/ycxuss2s]; Ass’n of Vermont Indep. Colls., Statement on the Revocation of the Deferred Action for Childhood Arrivals (DACA) Program . . . (last visited Sept. 27, 2019).”

¹³⁹ Lorelle L. Espinosa et al., Am. Council on Educ., *Race and Ethnicity in Higher Education: A Status Report* xiii (2019), tinyurl.com/y6vuezr2.

¹⁴⁰ Estela Mara Bensimon, *The Diversity Scorecard: A Learning Approach to Institutional Change*, 36 *Change* 44, 46 (2004).

¹⁴¹ *Supra*, Section I.A.4.

D. The interim final rule confers no benefits.

Against these weighty and mostly unacknowledged costs, the Department puts nothing on the other side of the scale. Its concern about “waste, fraud, and abuse” is without support, and the Department fails to make even a plausible *hypothetical* case for this asserted “benefit.”¹⁴² Two of the other “benefits” that the Department discusses are benefits of the CARES Act, not the interim final rule. The remaining “benefit” is plainly not a benefit: IHEs had the ability all along to do what the Department is now requiring them to do, and now schools will face the certainty of substantial costs.

1. *The Department’s concern about “waste, fraud, and abuse” is unsupported and not addressed by the interim final rule.*

The Department explains that its engrafted Title IV eligibility requirement is “designed to prevent waste, fraud, and abuse.”¹⁴³ In support of its proposition that combatting “waste, fraud, and abuse” should embody the Department’s central policy goal, the Department cites a single *New York Times* article.¹⁴⁴ But the Department is right to note that this single article arises in an entirely different “context[.]”¹⁴⁵ That article identifies evidence that a single “well-organized Nigerian fraud ring” used U.S. citizens’ personal identifying information to file unemployment claims.¹⁴⁶

This sole piece of evidentiary support is unpersuasive at best. Among other considerations, it arises in a different context (unemployment versus emergency student aid), and it involves different actors (thousands of accredited IHEs subject to U.S. law and dedicated to teaching students versus a single international fraud ring).¹⁴⁷

Lacking any meaningful evidentiary support for its proclaimed policy goal, the Department conjures up a parade of horrors. As the Department sees it, absent its engrafted Title IV eligibility requirement:

- “[I]nstitutions could use the HEERF grant funding to incentivize the re-enrollment of students cannot [sic] maintain Satisfactory Academic Progress (SAP) due to reasons

¹⁴² 85 Fed. Reg. at 36,499.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 36,497 n.3.

¹⁴⁵ *Id.* at 36,497.

¹⁴⁶ Mike Baker, *Feds Suspect Vast Fraud Network is Targeting U.S. Unemployment Systems*, N.Y. Times (updated May 22, 2020), tinyurl.com/yeshl3kr.

¹⁴⁷ If there ever were such fraud, the Department would learn about it: The CARES Act and accompanying HEERF certification establish reporting requirements on how grants are distributed to students, how the amount of each grant was calculated, and any instructions or directions that the institution gave to students about the grant. This is all true regardless of whether a person is eligible for Title IV assistance or not, and whether a student is documented or undocumented.

beyond the qualifying emergency, solely for the purpose of increasing revenues via the tuition such students would pay.”¹⁴⁸

- “[U]nscrupulous institutions could create cheap classes and programming that provides little or no educational value and then use the HEERF grant funding to incentivize individuals not qualified under title IV to enroll as paying students in those classes and programs, thereby qualifying for a grant.”¹⁴⁹
- “[I]nstitutions could also use HEERF funds for students who are enrolled at the institution but do not intend to receive a degree or certificate, thereby diverting funds from students who are pursuing a degree or certificate in an eligible program.”¹⁵⁰

It bears re-emphasis that the Department offers not an iota of support for these hypothetical concerns. Even still, these hypothetical concerns are easily disposed of. The first concern is meritless. Even under the interim final rule, universities could incentivize such re-enrollment. Under Title IV, an IHE “may waive” the satisfactory-progress requirement based on “special circumstances *as determined by the institution.*”¹⁵¹ An IHE could circumvent Section 1091(c)’s general requirements by defining any number of hardships, including this pandemic, as “special circumstances.” Alternatively, consider that a student must maintain only “academic standing consistent with the requirements for graduation, *as determined by the institution.*”¹⁵² An IHE could re-define its requirements for graduation. Even under the interim final rule, if an IHE desired to, it could incentivize the re-enrollment of these students under multiple express terms of Section 1091.

The second concern is also without merit. It does not turn on Title IV eligibility. In fact, students who are ineligible for Title IV assistance would be substantially less likely than other students to enroll in a course with “little to no educational value” at a net financial loss during these dire economic circumstances. Such students receive no financial assistance from the federal government and would thus have to pay more out-of-pocket for tuition and other expenses. Separately, existing law bars defrauding students, whether they are eligible for Title IV assistance or not. If an IHE fraudulently misrepresented the value of a course that had “no educational value,” existing law provides for appropriate recourse.

The third concern, too, is flimsy. First of all, the Department proceeds from a faulty premise. The Department does not offer any reason as to why all such students should be ineligible for CARES Act funds. Some students, for instance, are taking courses to qualify for a degree-seeking program, perhaps at the very same IHE. Students who are not currently seeking a degree or certificate may be enrolled in community colleges, which received disproportionately less funding from the CARES Act based on Section 18004 (a)’s formula,

¹⁴⁸ 85 Fed. Reg. at 36,498.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 20 U.S.C. § 1091(c)(3) (emphasis added).

¹⁵² *Id.* § 1091(c)(1) (emphasis added).

despite the fact that community colleges often enroll students with the greatest financial and educational needs.¹⁵³ The Department offers no explanation as to why providing funds to such students would amount to “waste, fraud, [or] abuse” as a matter of policy or law. It would not. Second, even assuming any validity to the Department’s faulty premise, the vast majority of students enrolled in IHEs are seeking a degree or certificate.¹⁵⁴

The Department fails to quantify the asserted value of this most “important” benefit. As it knows, it is “require[d]” to use “the best available techniques to quantify anticipated present and future benefits . . . as accurately as possible.”¹⁵⁵ But the Department does not even wager an unsupported guess, as it does elsewhere.¹⁵⁶ Instead, the Department offers a footnote-consigned *New York Times* article about a single fraud ring attacking unemployment systems and an array of hypothetical concerns. That is plainly insufficient for the Department to meet its obligations under Executive Order 13,563.

In summary, the Department offers a single piece of unpersuasive evidence in support of the most “important” benefit purportedly animating its interim final rule.¹⁵⁷ And the Department’s hypothetical concerns do not survive a cursory examination; the Department fails to make even a credible conjectural case for its animating “benefit.” All the while, the Department fails to quantify this claimed benefit. There are no reasonable grounds underlying the primary “benefit” of the interim final rule.

2. *The other alleged “benefits” of the rule are hollow.*

The Department asserts that there are three other “benefits” of the interim final rule. Saying so does not make it so.

First, the Department asserts that “[s]tudents will benefit from assistance in paying additional expenses associated with elements included in their cost of attendance, such as room and board, that changed with the disruption of campus activities.”¹⁵⁸ That is a benefit of the CARES Act, not the interim final rule.¹⁵⁹

¹⁵³ See Kery Murakami, *Community Colleges Get Smaller Shares of Emergency Grants*, Inside Higher Ed (May 5, 2020), [tinyurl.com/y8dzbyr2](https://www.insidehighered.com/digital-learning/article/2020/05/05/community-colleges-get-smaller-shares-of-emergency-grants).

¹⁵⁴ See, e.g., Nat’l Student Clearinghouse Research Ctr., *Current Term Enrollment Estimates: Spring 2019*, at 5 (2019), [tinyurl.com/yalqk290](https://www.nscrc.org/research/current-term-enrollment-estimates-spring-2019).

¹⁵⁵ 85 Fed. Reg. at 36,499 (quoting Exec. Order 13,563).

¹⁵⁶ See *id.* at 36,503.

¹⁵⁷ *Id.* at 36,497.

¹⁵⁸ *Id.* at 36,500; see *id.* at 36,502 tbl. 3 (“Assistance may support students”).

¹⁵⁹ CARES Act § 18004(c).

Second, the Department suggests that “institutions may benefit from applying no more than 50 percent of their allocation of HEERF funds to institutional costs.”¹⁶⁰ Once again, that is a benefit of the CARES Act, not the interim final rule.¹⁶¹

Third, the Department suggests that IHEs “will benefit” from using “a familiar existing eligibility framework to determine who should receive emergency financial aid grants under HEERF.”¹⁶² But IHEs had discretion to do this all along. They could have chosen to use the “existing eligibility” framework; they could have chosen not to do so.¹⁶³ Now, however, IHEs *must* use it. IHEs will need to coordinate with millions of students who are eligible for Title IV assistance but have not confirmed their eligibility.¹⁶⁴ IHEs will need to create an application for students to prove their eligibility.¹⁶⁵ IHEs will need to assist students along the way.¹⁶⁶ IHEs will need to carefully review documentation that confirms eligibility.¹⁶⁷ And IHEs will need to maintain detailed records of all documentation.¹⁶⁸ Any error could result in legal penalties.¹⁶⁹ The Department’s rule, now *requiring* IHEs to use Title IV eligibility standards for all students, is clearly not a “benefit”; it imposes enormous costs on both institutions and students.

And, once again, the Department fails to quantify any of these three asserted benefits.¹⁷⁰

* * *

The Department fails to support a single proclaimed “benefit” of its interim final rule. Nor can it quantify a single benefit. This rule is overwhelmingly bad policy, especially in light of the many acknowledged and unacknowledged costs of this rule.

II. The interim final rule is unlawful.

A. The Department lacks statutory authority.

Agency action is “unlawful” and “shall” be “set aside” when an agency acts “in excess of statutory . . . authority.”¹⁷¹ The Department lacked statutory authority to impose an eligibility

¹⁶⁰ 85 Fed. Reg. at 36,502.

¹⁶¹ CARES Act § 18004(c).

¹⁶² 85 Fed. Reg. at 36,502.

¹⁶³ *See, e.g., id.* at 36,498 n.4.

¹⁶⁴ *Supra*, Section I.C.1.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ HEERF Certification § 4(i).

¹⁷⁰ *Contra* Exec. Order 13,563.

¹⁷¹ 5 U.S.C. § 706(2).

restriction. On this basis alone, the rule must be “set aside.” The exercise of statutory authority is also unconstitutional, violating separation-of-powers principles and the Spending Clause.

1. *The Department lacks authority under the two statutes that it claims to give it authority, and under the CARES Act.*

The Department claims general “authority under 20 U.S.C. 1221e-3 and 20 U.S.C. 3474.”¹⁷² Notably, the Department does not claim authority to issue its interpretation based on the CARES Act itself.¹⁷³ Sections 1221e-3 and 3474, however, each turn on whether Congress made a delegation under the CARES Act. Section 1221e-3 allows for the Secretary to promulgate rules and regulations, but only “in order to carry out functions . . . vested in the Secretary by law or by delegation of authority.”¹⁷⁴ So too with Section 3474. That section authorizes the Secretary to establish rules and regulations, but only “to administer and manage the functions of the Secretary or the Department.”¹⁷⁵ Thus, under both statutes, the Department has authority to act only if the CARES Act delegates the authority to administer Section 18004(c) of the HEERF program.

The Department lacks statutory authority to issue its interim final rule.

First, the Department has waived the right to claim statutory authority under the CARES Act. While the Department parenthetically cites the proposition that legislative delegations under *Chevron* may be “implicit,” the Department does not claim to issue the rule under any implicit delegation from Section 18004(c).¹⁷⁶ Rather, the Department claims authority to issue its interpretation only under Sections 1221e-3 and 3474.¹⁷⁷

Second, in any event, Section 18004(c) does not grant any authority to the Secretary or the Department. Indeed, it does not so much as mention the Secretary or Department.

Third, Section 18004 as a whole does not implicitly delegate total authority to administer HEERF funds, as the Department has suggested elsewhere.¹⁷⁸

¹⁷² 85 Fed. Reg. at 36,495-96.

¹⁷³ *See id.*

¹⁷⁴ 20 U.S.C. § 1221e-3.

¹⁷⁵ *Id.* § 3474.

¹⁷⁶ 85 Fed. Reg. at 36,495-96.

¹⁷⁷ *Id.*

¹⁷⁸ *See* Defs.’ Opp’n to Mot. for Prelim. Inj. (Dkt. 20) at 16, *Oakley v. DeVos*, No. 4:20-cv-3215 (N.D. Cal. June 9, 2020) [hereinafter “Cal. Gov’t Br.”]; Defs.’ Resp. in Opp’n to Pl.’s Mot. for Prelim. Inj. (Dkt. 22) at 18, *Washington v. DeVos*, No. 2:20-cv-00182 (E.D. Wash. June 2, 2020) [hereinafter “Wash. Gov’t Br.”].

As the Department sees it, it “[u]nquestionably” has that total authority.¹⁷⁹ That assertion is more than questionable; it is wrong. As one court has already observed, that claim:

is inconsistent with the language of the statute, which only grants discretionary authority where it directs the Secretary to allocate 2.5 percent of the HEERF to the institutions the Secretary determines have the greatest unmet needs. Otherwise, the statute requires the Secretary to distribute [the] vast majority of the HEERF funds in accordance with prescribed formulas.¹⁸⁰

The Department has previously emphasized that Section 18004(e), which establishes reporting requirements, “gives the Department an oversight role as to whether IHEs’ use of HEERF funds appropriately falls within the limits of [Section] 18004(c).”¹⁸¹ But Section 18004(c) sets only one “limit[]”: that the funds granted to students be used “for expenses related to the disruption of campus operations due to coronavirus.”¹⁸² The Department may have authority to assess whether or not funds are used for that purpose. But it lacks statutory authority under the CARES Act to *impose* an extratextual eligibility requirement.

2. *Congress chose not to delegate authority to set eligibility restrictions.*

Congress chose not to make any delegation in Section 18004(c), let alone a “clear[]” delegation.¹⁸³ If Congress had wanted to delegate authority allowing the Department to set eligibility criteria or conditions for purposes of Section 18004(c), it would have done so, as it has done elsewhere.¹⁸⁴ In fact, Congress made such delegations elsewhere in the CARES Act itself.¹⁸⁵

Congress could have delegated authority; it chose not to. The Department cannot ignore Congress’ choice.

¹⁷⁹ Cal. Gov’t Br. at 16.

¹⁸⁰ Wash. PI Order at 25 (citations omitted).

¹⁸¹ Cal. Gov’t Br. at 16.

¹⁸² *Accord* DeVos Letter (describing this as “the only statutory requirement”).

¹⁸³ *See, e.g.,* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014) (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”) (quotation marks omitted); *Alcoa Steamship Co. v. Fed. Maritime Comm’n*, 348 F.2d 756, 758 (D.C. Cir. 1965) (“Where Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power.”).

¹⁸⁴ *See, e.g.,* 20 U.S.C. § 1002(a)(2)(B)(iii)(IV) (“The Secretary may . . . issue proposed regulations establishing [eligibility] criteria.”); *id.* § 1078-2(a)(1)(C) (“meet such other eligibility criteria as the Secretary may establish by regulation”); *id.* § 1087c(b)(2) (“other eligibility requirements as the Secretary shall prescribe”); *id.* § 1066b(b)(11) (“conditions prescribed by the Secretary”); *id.* § 1072(a)(3) (“shall be upon such terms and conditions . . . as the Secretary determines will best carry out the purpose of this section”); *id.* § 1072(c)(7) (“terms and conditions satisfactory to the Secretary”); *id.* § 1082(a)(3) (“terms, conditions, and covenants . . . as the Secretary determines to be necessary”).

¹⁸⁵ *See, e.g.,* CARES Act § 1109(d) (“The Secretary may issue regulations” to “establish terms and conditions.”); *id.* § 2110(a)(3) (“The Secretary shall determine eligibility criteria.”).

3. *The interim final rule is unlawful under the Administrative Procedure Act for lack of statutory authority.*

Agency action is “unlawful” and “shall” be “set aside” when an agency acts “in excess of statutory . . . authority.”¹⁸⁶ Here, the agency lacked statutory authority.¹⁸⁷ The rule is thus unlawful under the APA.¹⁸⁸

4. *The interim final rule violates separation-of-powers principles and the Spending Clause.*

The Department also lacks constitutional authority to act as it does. The Founders granted “the power of the purse to Congress, not the President.”¹⁸⁹ If Congress “has not delegated authority to the Executive to [impose funding] condition[s],” the Department lacks the authority to do so.¹⁹⁰ And if “Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”¹⁹¹ The Department’s interim final rule defeats itself. It claims that there is a “critical ambiguity” that requires the Department to decide whether or not Section 18004(c) imposes a Title IV eligibility requirement.¹⁹² But “a condition on the grant of federal moneys” *cannot* be ambiguous.¹⁹³

Additionally, many schools signed HEERF certifications before the Department engrafted its Title IV eligibility requirement.¹⁹⁴ The Department’s “post acceptance” conditions are prohibited under the Spending Clause.¹⁹⁵

The Department’s interim final rule is thus unconstitutional.¹⁹⁶

* * *

In summary, Congress did not grant or delegate the Department any authority to impose its extratextual eligibility requirement. The Department thus “has no power to act.”¹⁹⁷ This

¹⁸⁶ 5 U.S.C. § 706(2).

¹⁸⁷ *Supra*, Sections II.A.1, II.A.2.

¹⁸⁸ *Accord* Order Granting Pls.’ Mot. for Prelim. Inj. (Dkt. 44) at 18-19, *Oakley v. DeVos*, No. 4:20-cv-03215 (N.D. Cal. June 17, 2020) [hereinafter “Cal. PI Order”].

¹⁸⁹ *Id.* at 11 (quoting *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018)).

¹⁹⁰ *Id.* (quoting *City & Cty. of San Francisco*, 897 F.3d at 1233).

¹⁹¹ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

¹⁹² 85 Fed. Reg. at 36,495.

¹⁹³ *Pennhurst*, 451 U.S. at 17.

¹⁹⁴ Cal. PI Order at 18 & n.19.

¹⁹⁵ *Id.* (citing *Pennhurst*, 451 U.S. at 25).

¹⁹⁶ *Accord* Cal. PI Order at 11-18.

¹⁹⁷ *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

agency action is “unlawful” under 5 U.S.C. § 706 and must be “set aside.” It is also unconstitutional.

B. *Chevron* deference is inapplicable.

The Department purports to issue its interim final rule under *Chevron*.¹⁹⁸ *Chevron* deference is inapplicable. The interim final rule fails at *Chevron* step zero: Congress has not delegated authority to the Department.¹⁹⁹ It also fails to clear *Chevron* step one: After exhausting all “traditional tools of statutory construction,” Section 18004(c) is not “silent or ambiguous with respect to the specific issue.”²⁰⁰ The interim final rule separately fails at *Chevron* step two: The Department’s construction of the statute is not permissible.²⁰¹

1. *The interim final rule fails Chevron step zero.*

Chevron deference is only applicable “when it appears that Congress delegated authority generally to make rules carrying the force of law.”²⁰² As explained above,²⁰³ Congress did not so delegate. *Chevron* deference does not apply.

2. *The interim final rule fails Chevron step one.*

Chevron deference is proper only after exhausting all “traditional tools of statutory construction” to determine whether the statute is truly “silent or ambiguous with respect to the specific issue.”²⁰⁴

First, we consider the statutory text. “A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”²⁰⁵ “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”²⁰⁶ These elementary principles “foreclose[] [the Department’s] reading.”²⁰⁷ The Department of Education ironically strains to define the term “students” in a manner plainly contrary to the “ordinary understanding” of that word.²⁰⁸ No dictionary defines “students” with a Title IV eligibility requirement.²⁰⁹ The common

¹⁹⁸ 85 Fed. Reg. at 36,495. See also *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

¹⁹⁹ *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

²⁰⁰ *Chevron*, 467 U.S. at 843 & n.9; see *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

²⁰¹ *Chevron*, 467 U.S. at 843.

²⁰² *Mead Corp.*, 533 U.S. at 226-27.

²⁰³ *Supra*, Sections II.A.1, II.A.2.

²⁰⁴ *Chevron*, 467 U.S. at 843 & n.9.

²⁰⁵ *Perrin v. United States*, 444 U.S. 37, 42 (1979).

²⁰⁶ *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

²⁰⁷ *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

²⁰⁸ *Babbitt v. Sweet Home Chapter, Cmty. for a Great Or.*, 515 U.S. 687, 697 (1995).

²⁰⁹ See *id.* (relying on dictionary definition).

usage of the word is not restricted to those eligible for Title IV assistance. In line with the common understanding of the word, the Department itself repeatedly refers to students who are ineligible for Title IV assistance as “students” *in its interim final rule*.²¹⁰

Nonetheless, the Department resists the “ordinary understanding” of the word because “the CARES Act does not define” the term “students.”²¹¹ True, Congress did not explicitly define the term “students.” Nor did it explicitly define the word “food.”²¹² It did not define these terms because their meaning is commonly understood. The Department’s suggestion that it can redefine statutory terms in a manner inconsistent with their ordinary meaning lacks all merit.²¹³ That Congress did *not* provide a definition for this word means that the word carries its ordinary meaning.²¹⁴

Second, we consider statutory structure. The Department’s new definition of “students” in Section 18004(c) is not a “harmonious construction”;²¹⁵ it would create an inconsistent definition of “students” within Section 18004 itself.

Section 18004(a)(1)(B) provides that the Department “shall” allocate funding “according to the relative share of full-time equivalent enrollment of *students* who were not Federal Pell Grant recipients.”²¹⁶ The Department allocated funds under the statute using the “total 2017/18 FTE enrollment of students,” which included more than a million students clearly ineligible for Title IV assistance.²¹⁷ Indeed, the Center for American Progress estimates that undocumented students alone helped their IHEs receive as much as \$132.6 million in the stimulus bill.²¹⁸ The Department thus acknowledges that Section 18004(a)’s definition of “students” “differ[s]” from the definition it adopts for Section 18004(c).²¹⁹

²¹⁰ See, e.g., 85 Fed. Reg. at 36,498 (“students [who] cannot maintain Satisfactory Academic Progress”); *id.* (“students who . . . do not intend to receive a degree or certificate”).

²¹¹ *Id.* at 36,495.

²¹² CARES Act § 18004(c).

²¹³ E.g., *Perrin*, 444 U.S. at 42.

²¹⁴ See *id.*; *Babbitt*, 515 U.S. at 697.

²¹⁵ 85 Fed. Reg. at 36,496.

²¹⁶ CARES Act § 18004(a)(1)(B) (emphasis added).

²¹⁷ 85 Fed. Reg. at 36,497 n.2; *Methodology for Calculating Allocations per Section 18004(a)(1) of the CARES Act*, U.S. Dep’t of Educ., tinyurl.com/ybvzuzu8 (last visited July 13, 2020); *IPEDS Data Explorer: 2017-18*, U.S. Dep’t of Educ., tinyurl.com/yaonr6cq (last visited July 13, 2020) (including 1.2 million “[n]onresident alien” students). See also, e.g., *IPEDS 2019-20 Survey Materials: Instructions*, U.S. Dep’t of Educ., tinyurl.com/y9hwkx4e (last visited July 13, 2020) (defining “[n]onresident alien” in a manner inconsistent with Title IV eligibility).

²¹⁸ Vivianne Anguiano, *Undocumented Students Generated Up to \$132 Million in Relief to Colleges—But They Won’t Receive a Dime from the Stimulus*, Ctr. for Am. Progress (May 5, 2020), tinyurl.com/ya73ngen.

²¹⁹ 85 Fed. Reg. at 36,497 n.2.

The Department claims that it intended to interpret the terms the “same way” all along.²²⁰ First of all, that is irrelevant: The Department was required by law to administer the funds, and it did so under a different definition of the term “students.” Second of all, that is very likely not true. The Department easily could have subtracted out the “[n]onresident alien” population of students while allocating the funds.²²¹ Indeed, the Department now does exactly that in estimating the population of “eligible” students for purposes of this interim final rule.²²²

Moreover, where Congress wanted to make exclusions in the CARES Act, it did so.²²³ Congress did not do so in Section 18004(c). “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”²²⁴ Just so here.

The Department’s contrary statutory-structure arguments are unsound. The Department first contends that an “implicit title IV eligibility requirement” in a different section of the CARES Act should be imported to Section 18004(c), because both sections use the term “emergency financial aid grants to students.”²²⁵ But Section 3504 “authorizes the reallocation of funds that have already been awarded under Title IV and are clearly subject to Title IV restrictions.”²²⁶ “In contrast, Section 18004 selectively incorporates certain Title IV definitions in a manner that does not indicate an intent to subject HEERF funds to Title IV restrictions.”²²⁷

The Department next contends that the references to Title IV in Section 18004 “imply[]” that Title IV’s eligibility standards govern that section.²²⁸ Not so. Taking the Department’s arguments in turn:

- True, Section 18004(a)(1) “links a *component*” of the allocated funds to Pell Grant recipients, who are subject to Title IV eligibility.²²⁹ But the Department omits that Section 18004(a)(1) also “links a component” to students who are “*not* Federal Pell Grant recipients,” and are not subject to Title IV eligibility.²³⁰ Section 18004(a)(1) is evidence only that Section 18004 as a whole has no Title IV eligibility requirement.

²²⁰ *Id.*

²²¹ See *IPEDS Data Explorer: 2017-18*, *supra* note 217.

²²² 85 Fed. Reg. at 36,499-50 & tbl. 1.

²²³ See CARES Act § 2201 (excluding “nonresident alien individuals” from eligibility).

²²⁴ *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (citation omitted).

²²⁵ 85 Fed. Reg. at 36,496.

²²⁶ Wash. PI Order at 27; CARES Act § 3504(a).

²²⁷ Wash. PI Order at 27.

²²⁸ 85 Fed. Reg. at 36,496

²²⁹ *Id.* (emphasis added).

²³⁰ *Id.* (emphasis added).

- Congress defined the term “cost of attendance” in the CARES Act by reference to the Higher Education Act.²³¹ That Congress used one definition from the Higher Education Act and did not import any Title IV eligibility requirement to “students” in Section 18004(c) again supports us, not the Department. Congress did not simply forget to incorporate the eligibility requirements in Section 18004(c).
- Section 18004(a)(3) grants the Secretary discretion over 2.5 percent of funds, and that provision “expressly requires students to be eligible” under Title IV.²³² That no other provision incorporates Title IV’s eligibility requirements is compelling evidence that no other section is subject to Title IV’s eligibility requirements.
- Section 18004(b) requires the Secretary to use the Title IV “systems” to distribute funds.²³³ Congress had good reason to direct the Department to use the standard “systems” for distributing funds quickly to schools. That says nothing of Title IV’s substantive requirements.

At bottom, contrary to the Department’s reasoning, “Congress’ limited incorporation of certain Title IV provisions raises the inference that the failure to similarly incorporate all of Title IV’s eligibility restrictions into the CARES Act was intentional.”²³⁴

Last, we consider the statute’s purpose.²³⁵ The CARES Act, which passed unanimously in the Senate, is designed to provide rapid relief due to today’s urgent concerns.²³⁶ Legislators repeatedly highlighted the necessity of urgent action.²³⁷ The Department’s definition would impose great delays in distributing funds to students, which is directly counter to this overriding legislative purpose.²³⁸

After employing the tools of statutory construction, the statute is not ambiguous. *Chevron* deference is inapplicable on this basis, too.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ Wash. PI Order at 24.

²³⁵ *See, e.g., Babbitt*, 515 U.S. at 698; *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142-44 (2016).

²³⁶ *See, e.g., The CARES Act: Major Coronavirus Relief for American Workers, Families, and Small Businesses*, Mitch McConnell, Senate Majority Leader (Mar. 19, 2020), tinyurl.com/wbxskkf.

²³⁷ *Id.* (Senator Mitch McConnell: “extremely urgent”); *id.* (Senator John Thune: “Every day in this fight is critical. . . . The time to act is now.”); *id.* (Senator Lamar Alexander: “urgent situation”); *id.* (Senator Susan Collins: “[W]e must act and we must act immediately.”).

²³⁸ *See supra*, Section I.B.3.

3. *The interim final rule fails Chevron step two.*

Last, the Department’s construction is not a “permissible” one.²³⁹ In view of the plain statutory text, structure, and purpose, the Department’s reading is not permissible.²⁴⁰ The Department offers no “rational basis” for its definition as a matter of law²⁴¹ or policy.²⁴²

* * *

Chevron deference is inapplicable; the interim final rule fails at *Chevron* steps zero, one, and two.

C. The interim final rule is arbitrary and capricious.

The rule is also “arbitrary” and “capricious” and must be “set aside” on that basis, too.²⁴³ In its interim final rule, the Department changes course without explanation (or, in the main, acknowledgment). It does not consider the most important data underlying the interim final rule, ignoring enormous costs. And it does not issue a satisfactory explanation for its policy choice.

1. *The Department fails to acknowledge or explain its inconsistency.*

An “[u]nexplained inconsistency’ in agency policy is ‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.’”²⁴⁴ If “an agency changes its existing position,” it “must at least ‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’”²⁴⁵ The Department does not acknowledge its inconsistency. In fact, it has claimed in litigation that it has “consistently adhered” to its central positions.²⁴⁶

The Department is wrong to claim consistency:

- On March 27, the CARES Act was signed into law.

²³⁹ *Chevron*, 467 U.S. at 843.

²⁴⁰ *See supra*, Section II.A.2.

²⁴¹ *See id.*

²⁴² *See supra*, Section I. *See also* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 388, 391-92 (1999) (noting that the interpretation must be “rationally related to the goals of the [CARES] Act”).

²⁴³ 5 U.S.C. § 706(2)(A).

²⁴⁴ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

²⁴⁵ *Id.* at 2125-26 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

²⁴⁶ Wash. Gov’t Br. at 9; Cal. Gov’t Br. at 8.

- On April 9, the Secretary of Education issued a letter to “College and University Presidents” on Department letterhead.²⁴⁷ In line with the direct text of Section 18004(c), she informed IHE presidents that “[t]he *only statutory requirement* is that the funds be used to cover expenses related to the disruption of campus operations due to coronavirus.”²⁴⁸ She emphasized that “institutions” have “significant discretion on how to award this emergency assistance to students.”²⁴⁹ She stated that she “gave [her] team a charge as soon as the CARES Act was signed into law: get support to those most in need as quickly as possible.”²⁵⁰ She “encourage[d]” IHEs to “prioritize [their] students with the greatest need.”²⁵¹ Nowhere did she discuss a Title IV eligibility requirement.²⁵²
- Also on April 9, the Secretary allocated funds to institutions. The Department calculated those funds by including students who are not eligible for Title IV assistance.²⁵³
- On that same day, the Secretary issued a certification form that institutions were required to complete before receiving HEERF funds. The certification form stated that the Secretary “does not consider these individual emergency financial aid grants to constitute Federal financial aid under Title IV.”²⁵⁴
- On April 21, for the first time, the Department informed IHEs that “[o]nly students who are or could be eligible to participate in programs under [S]ection 484 in title IV of the Higher Education Act of 1965, as amended (HEA), may receive emergency financial aid grants.”²⁵⁵
- On April 27, Secretary DeVos appeared on the news program “Full Court Press.”²⁵⁶ She stated that “DREAMers” “are not eligible for Title IV funds, and so that’s kind of the distinction that Congress was explicit about in the law.”²⁵⁷ “[W]e know that there

²⁴⁷ DeVos Letter.

²⁴⁸ *Id.* (emphasis added).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *See id.*

²⁵³ *See supra*, Section II.B.2.

²⁵⁴ *See, e.g.*, Danielle Douglas-Gabriel, *More than a Million College Students will be Shut Out of Emergency Grant Program*, Wash. Post (Apr. 21, 2020). The Department eventually took down the original certification form and replaced it with a certification whose URL ended “v2,” for version two. *See* HEERF Certification. The second version of the form removed that language.

²⁵⁵ *Frequently Asked Questions about the Emergency Financial Aid Grants to Students under Section 18004 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, U.S. Dep’t of Educ., tinyurl.com/yajnjpr2 (last visited July 13, 2020).

²⁵⁶ *Education Secretary Betsy DeVos Says CARES Act Funding Will Go To Students*, Full Court Press (Apr. 27, 2020), tinyurl.com/yaaawjtz.

²⁵⁷ *Id.* at 4:27 to 4:52.

are millions of students, those students included, that are struggling in this time period, but we are focused on following the law that Congress wrote.”²⁵⁸

- On May 21, pending a motion for a preliminary injunction in the U.S. District Court for the Northern District of California, the Department posted an updated statement saying that its guidance “lack[ed] the force and effect of law.”²⁵⁹ For the first time, though, the Department asserted that “the restriction in 8 U.S.C. § 1611 on eligibility for Federal public benefits including [HEERF] grants” is “legally binding” on IHEs.²⁶⁰
- On June 11—11 weeks after the CARES Act was signed into law—the Department published an unofficial copy of its interim final rule.
- On June 17, the Department published its interim final rule.

There are numerous, glaring inconsistencies in this timeline.

First, the Department initially asserted that “the only statutory requirement” was Section 18004(c)’s sole explicit textual requirement. Later, it asserted that Section 18004(c) contains a separate Title IV eligibility requirement and that Section 1611 is “legally binding.”

Second, the Department changed course in describing its Title IV eligibility requirement. At first, it issued a certification stating that it “does not consider these individual emergency financial aid grants to constitute Federal financial aid under Title IV”—which it later replaced with “v2” of that form that does not include that language. Later on, the Secretary reversed course, stating that Congress was “explicit” about a Title IV eligibility requirement. Now, the Department reverses course again, saying that Congress left in the statute a “critical ambiguity.”²⁶¹

Third, the Department included students who are not eligible for Title IV assistance in making its allocations under Section 18004(a). Now, it defines that term differently.

The Department’s footnote discussing the third (and only the third) reversal of course is not an explanation. The Department does not—and cannot—explain away the fact that it chose not to subtract out the “[n]onresident alien” population of students when it was allocating the funds.²⁶² The Department does precisely that in its interim final rule.²⁶³ The Department’s offered excuse that it did not want to “stop[]” the HEERF process to calculate

²⁵⁸ *Id.* at 5:26 to 5:39. While making the argument that the word “students” in Section 18004(c) “explicit[ly]” excludes DREAMers, the Secretary used the word “students” to describe DREAMers.

²⁵⁹ *CARES Act: Higher Education Emergency Relief Fund*, U.S. Dep’t of Educ., tinyurl.com/y7wenjge (last visited July 13, 2020).

²⁶⁰ *Id.*

²⁶¹ 85 Fed. Reg. at 36,495.

²⁶² *See supra*, Section II.B.2

²⁶³ 85 Fed. Reg. at 36,499-50 & tbl. 1.

the funds does not pass muster.²⁶⁴ It could easily have “stopp[ed]” for a few moments to subtract out a single number, or clearly explained its decision at the time of the allocations. It has now waited almost *three full months* to issue this interim final rule, while IHEs have been awaiting clarity before they administer their funds. Institutions have recognized the Department’s clear inconsistencies along the way.²⁶⁵

* * *

If “an agency changes its existing position,” it “must at least ‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’”²⁶⁶ The Department has manifestly changed its position in numerous ways. The Department altogether ignores most of those changes of position. It offers one excuse for a change in another position, but the footnote-allocated explanation does not pass muster. The rule is arbitrary and capricious for this reason alone.

2. *The Department fails to consider the relevant data and to make a rational connection between the data and the policy.*

To survive arbitrary-and-capricious review, the agency “must [1] examine the relevant data and [2] articulate a satisfactory explanation for its action, including a ‘rational connection between the facts found and the choice made.’”²⁶⁷ The Department failed to examine the relevant data. It also failed to make a rational connection between the (few) facts it did find and the choice it made.

In its rule, the Department “failed to consider . . . important aspect[s] of the problem.”²⁶⁸ Indeed, the Department did not consider the bulk of the relevant data. As stated above, the Department altogether ignored the rule’s newly imposed:

- direct costs on students who are ineligible for Title IV assistance who are struggling economically and otherwise during this national emergency,²⁶⁹ and who the Secretary herself has previously recognized “are struggling”;²⁷⁰

²⁶⁴ *Id.* at 36,497 n.2.

²⁶⁵ *E.g.*, *Flash Poll Results*, *supra* note 115 (institutions identifying “[c]hanging ED guidance,” “[c]hanging guidance from Dept. of Ed. that narrowed the scope of allowed disbursement,” and “fed strings attached released weeks after the fact”).

²⁶⁶ *Encino Motorcars, LLC*, 136 S. Ct. at 2126 (2016) (quotation marks omitted).

²⁶⁷ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

²⁶⁸ *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, No. 18-587 (June 18, 2020), slip op. 18 (quoting *State Farm*, 463 U.S. at 43).

²⁶⁹ *Supra*, Section I.A.

²⁷⁰ *Supra*, Section II.C.1

- indirect costs on students ineligible for Title IV assistance who will be forced to postpone or defer their higher education;²⁷¹
- resulting costs on society;²⁷²
- costs on students—especially “low-income, minority, and first-generation [college] students”—who are eligible under Title IV but have not confirmed, and will not confirm, their eligibility;²⁷³
- direct costs on students of establishing Title IV eligibility by completing the FAFSA or an institution-provided application;²⁷⁴
- direct costs on institutions, which will greatly exceed “five hours”;²⁷⁵
- indirect costs on institutions by exacerbating enrollment issues;²⁷⁶ and
- costs on IHE communities by depriving them of vital members of their communities and the host of benefits that such students bring.²⁷⁷

In sum, the Department ignored the vast majority of the economic and non-economic costs that its interim final rule imposes. On the other hand, the Department considers one single piece of “data” supporting *any* of the rule’s claimed benefits. That piece of data is an off-point *New York Times* article.²⁷⁸ Even if the interim final rule could have better supported these benefits, that would be irrelevant: “It is a ‘foundational principle of administrative law’ that judicial review of agency action is limited to ‘the grounds that the agency invoked when it took the action.’”²⁷⁹ And the Department cannot now claim that the rule has *other* benefits. Agency action may not be “upheld on the basis of impermissible ‘post hoc rationalization.’”²⁸⁰ Put simply, “[a]n agency must defend its actions based on the reasons it gave when it acted.”²⁸¹ It is apparent that the Department has not considered the relevant data. Its resulting rule is arbitrary and capricious on that basis alone.

Separately, the Department does not “articulate a satisfactory explanation for its action, including a ‘rational connection between the facts found and the choice made.’”²⁸² The Department considers and rejects the ordinary meaning of the word “student” (in its words,

²⁷¹ *Supra*, Section I.A.4.

²⁷² *Id.*

²⁷³ *Supra*, Sections I.B.1, I.B.2.

²⁷⁴ *Supra*, Section I.B.3.

²⁷⁵ *Supra*, Section I.C.1.

²⁷⁶ *Supra*, Section I.C.2.

²⁷⁷ *Supra*, Section I.C.3.

²⁷⁸ *Supra*, Section I.D.1.

²⁷⁹ *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, No. 18-587 (June 18, 2020), slip op. 13 (quoting *Michigan*, 576 U.S. at 758).

²⁸⁰ *Id.* at 14-15 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)); *accord id.* at 16-17 (quoting *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 589 (1981); *Volpe*, 401 U.S. at 419)).

²⁸¹ *Id.* at 17.

²⁸² *State Farm*, 463 U.S. at 44.

a “broad definition of ‘student’”).²⁸³ But there is no reasonable basis for rejecting this option. The Department lists only hypothetical concerns and footnote-cites an unrelated *New York Times* article in support of its policy choice.

The Department states conclusorily that its rule is issued “only on a reasoned determination that its benefits would justify its costs.”²⁸⁴ But that is obviously untrue. For one, the Department did not attempt to “f[ind]” the bulk of the facts at issue by exploring all costs of its rule. And even the few costs that it does recognize²⁸⁵ far outweigh the *zero* benefits that it supports or quantifies throughout the interim final rule.²⁸⁶ The Department does not issue a “satisfactory explanation,” and it fails to make any “rational connection” between the facts found and its policy choice. The rule is arbitrary and capricious on this basis as well. Because this interim final rule was not “based on a consideration of the relevant factors,” and because “there has been a clear error of judgment,” the rule is unlawful.²⁸⁷

* * *

The Department fails to acknowledge, let alone explain, obvious reversals in policy. It fails to consider the relevant data in issuing its rule. And it fails to offer a satisfactory explanation for its policy choice. Any one of these failures—let alone all of them—is enough to make this rule “unlawful” and require that it be “set aside” as arbitrary and capricious.

D. The Department’s interim final rule violates procedure required by law.

The Department violates “procedure required by law.”²⁸⁸ As a result, the interim final rule is “unlawful” and must be “set aside.”

1. *The Department’s waiver of notice-and-comment rulemaking is unlawful.*

Under the Administrative Procedure Act, “the Department generally offers interested parties the opportunity to comment on proposed rules.”²⁸⁹ The Department asserts, however, that it has “good cause” for waiving the APA’s generally applicable notice-and-comment requirement for this rulemaking (which, we note, it seems to have issued due to pending

²⁸³ 85 Fed. Reg. at 36,498.

²⁸⁴ *Id.* at 36,499.

²⁸⁵ *E.g., id.* at 36,503.

²⁸⁶ *See supra*, Section I.D.

²⁸⁷ *E.g., Volpe*, 401 U.S. at 416.

²⁸⁸ 5 U.S.C. § 706(2)(D); *id.* § 706(2)(A).

²⁸⁹ 85 Fed. Reg. at 36,498.

litigation).²⁹⁰ An agency may waive notice-and-comment rulemaking only when it “for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”²⁹¹ The Department asserts two bases for the good-cause exception here: (1) “the importance of institutions properly distributing the HEERF allocations” and (2) “the current national emergency.”²⁹²

The first basis is untenable. The Department could make that argument with respect to any funding it administers. The Department does not have perpetual good cause to waive rulemakings because it wants to ensure institutions are distributing funds in the manner it deems “proper[.]” That is especially so here, where the Department waited almost three months to issue its rule, knowing that institutions were apparently “[im]properly” administering funds all the while. “A mere recitation that good cause exists, coupled with a desire to provide immediate guidance, does not amount to good cause.”²⁹³ “If conclusory statement[s] that normal procedures were not followed because of the need to provide immediate guidance . . . constituted ‘good cause,’ then [the] exception to the notice requirement would be created that would swallow the rule.”²⁹⁴

The second basis is also unsound. The Department issued this interim final rule almost *twelve weeks* after the CARES Act was signed, and more than *eight weeks* after the Department first mentioned any Title IV eligibility restriction. Any exigency now is of the Department’s own making. The Department cannot “simply wait” to promulgate a rule and then claim that circumstances are too “imminen[t]” for notice and comment.²⁹⁵ Put differently, “an emergency of [the Department’s] own making” cannot constitute good cause.²⁹⁶

The Department claims that waiver is in the public interest.²⁹⁷ Of course, we strongly disagree: As we have explained, this rule is overwhelmingly bad policy and ignores enormous categories of costs that the Department would have been required to respond to in a notice-and-comment proceeding. “Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.”²⁹⁸ The “notice-and-comment procedures of the Administrative Procedure Act [were] designed to

²⁹⁰ *Id.*

²⁹¹ 5 U.S.C. § 553(b)(3)(B).

²⁹² 85 Fed. Reg. at 36,498-99.

²⁹³ *Zhang v. Slattery*, 55 F.3d 723, 746 (2d Cir. 1995).

²⁹⁴ *Id.* (quotation marks omitted).

²⁹⁵ *See, e.g., Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580-81 (D.C. Cir. 1981).

²⁹⁶ *NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004).

²⁹⁷ 85 Fed. Reg. at 36,498.

²⁹⁸ *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

assure due deliberation.”²⁹⁹ Thus, good-cause exceptions “are desperate measures,” which must be “narrowly construed and only reluctantly countenanced.”³⁰⁰

The Department cannot forego the notice-and-comment procedures at the heart of the Administrative Procedure Act simply because it thinks it has a “proper[]” interpretation of a statute that it now wants to administer after months of waiting.

2. *The Department’s decision to make the rule effective upon publication is unlawful.*

That is especially so when, as here, the Department also makes the rule effective immediately. The Administrative Procedure Act generally requires that publication of a substantive rule “shall be made not less than 30 days before its effective date.”³⁰¹ The statute carves out an exception “for good cause found and published with the rule.”³⁰² Section 801(2) carves out a similar “good cause” exception. The Department claims the same two bases mentioned above for “good cause” to make its rule effective immediately.³⁰³ The Department’s arguments fail for the same reasons as above.³⁰⁴

* * *

The Department eschews fundamental principles of agency rulemaking. After months of failing to issue a rule, it now issues one that prevents the public from participating in notice-and-comment rulemaking and that takes effect immediately. The Department lacks good cause for violating “procedure required by law.” The interim final rule is unlawful on this basis as well.³⁰⁵

²⁹⁹ Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996).

³⁰⁰ Commonwealth of N. Mariana Islands v. United States, 686 F. Supp. 2d 7, 14 (D.D.C. 2009) (quoting Petry v. Block, 737 F.2d 1193, 1200 (D.C. Cir. 1984)).

³⁰¹ 5 U.S.C. § 553(d).

³⁰² *Id.* § 553(d)(3).

³⁰³ 85 Fed. Reg. at 36,498; *supra*, Section II.D.1.

³⁰⁴ *Supra*, Section II.D.1.

³⁰⁵ If the Department declines to withdraw the rule altogether (as it should), it should issue this regulation as a proposed rule with a comment period of 60 days. The current 30-day comment period (with no assurance that the Department will respond meaningfully to expressed concerns) is not sufficient for IHEs to collect data, metrics, and narratives of those affected by the rule, especially in the midst of this pandemic.

E. Section 1611 is irrelevant to the lawfulness of this rule—and is inapplicable.

The Department additionally asserts that Section 1611 “clearly” applies to HEERF funds.³⁰⁶ In spite of the Department’s ostensible clarity on the point, both courts to consider the issue disagree with that assessment.³⁰⁷

As an initial matter, we note that the outcome of the Section 1611 question in no way affects the lawfulness of this interim final rule. In any event, the rule must be set aside because the Department acts without statutory authorization, running afoul of the Administrative Procedure Act and the Constitution; acts arbitrarily and capriciously; and violates procedure required by law by waiving notice-and-comment rulemaking and the effective-date requirement without good cause. The rule is unlawful as a whole and must be set aside.

More to the point, the Department is wrong. In the main, the Department argues that (1) Section 1611’s “notwithstanding” clause applies and (2) HEERF funds are a “[f]ederal public benefit” for purposes of Section 1611.³⁰⁸ In order to prevail on its assertion that Section 1611 applies to emergency financial aid, the Department must prevail on both of those points.

The Department fails at the *first* step: Section 1611’s “notwithstanding” clause does not bar students from accessing HEERF funds. Courts have “repeatedly held that the phrase ‘notwithstanding any other law’ is not always construed literally.”³⁰⁹ Indeed, a “‘notwithstanding’ clause ‘can be overridden by other statutory indicators.’”³¹⁰ Just so here. As we have explained above,³¹¹ numerous features of Section 18004 “override . . . application of Section 1611’s ‘notwithstanding’ clause to HEERF emergency financial aid grants.”³¹² The CARES Act’s statutory text, structure, and purpose provide compelling evidence that the “notwithstanding” clause does not apply.

Another section of the CARES Act explicitly excludes “any nonresident alien individual” from receiving funds.³¹³ If Congress wanted to exclude noncitizens from accessing HEERF

³⁰⁶ 85 Fed. Reg. at 36,496.

³⁰⁷ See Cal. PI Order at 24 (“[T]he Court is not persuaded . . . that HEERF funds would constitute ‘Federal public benefits’ from which most non-citizens would be denied eligibility, nor that the Secretary’s election to apply 1611(a)’s restrictions to these funds as an eligibility condition would be lawful.”); Wash. PI Order at 21 (reserving the question after noting the plaintiff’s “reasonable and compelling arguments” against application of Section 1611 to HEERF funds).

³⁰⁸ 85 Fed. Reg. at 36,496.

³⁰⁹ Cal. PI Order at 24 (quoting *Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996)).

³¹⁰ Wash. PI Order at 19 (quoting *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1071 n.12 (9th Cir. 2010)).

³¹¹ *Supra*, Section II.A.2.

³¹² Wash. PI Order at 19.

³¹³ CARES Act § 2201(a).

funds, it knew how.³¹⁴ It chose not to. “That Congress specifically included language to exclude noncitizens from eligibility for individual cash payments, but failed to include specific language to exclude noncitizens from eligibility for HEERF funds, indicates that the omission was intentional.”³¹⁵ Additionally, other sections of the CARES Act explicitly address eligibility criteria, but Congress declined to set eligibility criteria in Section 18004(c).³¹⁶

And applying the “notwithstanding” clause would require “different meanings to the term ‘students’ throughout a single section of the CARES Act.”³¹⁷ This, of course, is contrary to the “normal rule of statutory construction,” under which “identical words used in different parts of the same act are intended to have the same meaning.”³¹⁸ “[I]t would be contrary to the canons of statutory construction, common sense, and logic to find that the same students included in the calculation of an IHE’s allocation nevertheless would be excluded from receipt of such funds pursuant to Section 1611(a).”³¹⁹ In line with the ordinary meaning of Section 18004(a), the Department included “[n]onresident aliens” in making its allocations, when it easily could have subtracted them out. The Center for American Progress estimates that undocumented students helped their IHEs to receive as much as \$132.6 million in the stimulus bill.³²⁰

In addition, the “legislative history of [Section 1611 itself] does not” support the application of the “notwithstanding” clause.³²¹ Section 1611, and PRWORA as a whole, was enacted “with the objective of decreasing *long-term* dependency on public benefits.”³²² PRWORA is predicated upon a “government interest to remove the incentive for [undocumented] immigration provided by the availability of public benefits.”³²³ PRWORA’s goal was thus “limit[ing] *lifetime* welfare benefits.”³²⁴ That rationale is wholly inapplicable to one-time HEERF assistance. No person would come to the United States and enroll in an IHE because of the possibility of receiving a one-off emergency financial aid grant during “a national public health crisis.”³²⁵ HEERF assistance is not the type of assistance that Section 1611 seeks to bar; this, too, is compelling evidence against applying the “notwithstanding” clause.

³¹⁴ See *id.*

³¹⁵ Wash. PI Order at 19 (quoting *Gozlon-Peretz*, 498 U.S. at 404); see *supra*, Section II.A.2.

³¹⁶ Cal. PI Order at 23-24 n.29 (collecting examples).

³¹⁷ Wash. PI Order at 19-20.

³¹⁸ *Id.* at 20 (quoting *Dep’t of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 342 (1994)); see *supra*, Section II.A.2.

³¹⁹ Cal. PI Order at 23 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Bostock v. Clayton Cty.*, No. 17-1618 (June 15, 2020), slip op. 24).

³²⁰ Anguiano, *supra* note 218.

³²¹ See *Golden Nugget, Inc. v. Am. Stock Exchange, Inc.*, 828 F.2d 586, 589 (9th Cir. 1987).

³²² Cal. PI Order at 24 & n.30.

³²³ 8 U.S.C. § 1601(6).

³²⁴ H.R. Rep. No. 104-651, at 3 (1996) (emphasis added).

³²⁵ See Cal. PI Order at 24 n.30.

In its analysis, the Department does not consider that Section 1611 was enacted decades ago, that PRWORA is a different statute, or that the CARES Act does not incorporate Section 1611. In Section 18004(c), Congress directed that HEERF funds be awarded to “students,” the plain meaning of which is understood to encompass noncitizens. This specific direction should be “construed as an exception to the general” bar of Section 1611.³²⁶ Last, the Department’s application of Section 1611 is contrary to congressional intent.³²⁷

Second, HEERF assistance is not a “[f]ederal public benefit.”³²⁸

In an analogous context, the federal government has found that Section 1611 does “not encompass benefits targeted to certain communities or sectors of the population rather than particular ‘eligibility units’ (i.e., an individual, household, or family ‘unit’ that met specified qualifications.”³²⁹ Thus, the federal government concluded a “grant for providing health care services to low-income mothers, children, and families” was not a “[f]ederal public benefit,” but rather a “benefit targeted to *certain populations* based on their characteristics.”³³⁰

The Department should treat HEERF funds the same way. First, the funds are awarded to certain “communities”—IHE students bodies—rather than to individuals. And second, the funds are targeted to a “certain population” based on that population’s common characteristics. As the Secretary put it, there are “millions of students, [DREAMers] included, that are struggling in this time period.”³³¹ The “millions of students . . . that are struggling” amount to a “certain population,” and CARES Act funding is targeted to them based on their common characteristics of being students in need.³³²

* * *

³²⁶ RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012); *see also, e.g.*, In re Morrissey, 717 F.2d 100, 103 & n.4 (3d Cir. 1983) (“To the extent that [a later statute] conflicts with the declaration that [an earlier statute] has effect [n]otwithstanding any provision of law to the contrary[,] we hold that [the later] statute must control.”); In re Ionosphere Clubs, Inc., 922 F.2d 984, 991 (2d Cir. 1990) (“[W]hen two statutes are in irreconcilable conflict, we must give effect to the most recently enacted statute since it is the most recent indication of congressional intent.”). That is especially so here, where the Department is seeking to impose an ambiguous funding condition, in contravention of *Pennhurst*. *See supra*, Section II.A.4.

³²⁷ *See supra*, Section II.A.2; *see also, e.g.*, Chao v. Bremerton Metal Trades Council, AFL-CIO, 294 F.3d 1114, 1119 (9th Cir. 2002) (“When there is a potential conflict between two federal statutes . . . the ultimate resolution [of the conflict] depends on an analysis of congressional intent.”) (quotation marks and citations omitted).

³²⁸ *See* Cal. PI Order at 23.

³²⁹ Cal. PI Order at 22 (emphases omitted) (quoting *Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)*; *Interpretation of “Federal Public Benefit”*, 63 Fed. Reg. 41,658, 41,659 (Aug. 4, 1998)).

³³⁰ *Id.* (quoting same).

³³¹ *Education Secretary Betsy DeVos Says CARES Act Funding Will Go To Students*, *supra* note 256, at 5:26 to 5:39.

³³² *Accord* DeVos Letter (encouraging IHEs to “prioritize [] students with the greatest need”).

The Department's Section 1611 argument is irrelevant to this interim final rule's legality, which fails on the multiple bases discussed above. In any event, it is off the mark: Section 1611's "notwithstanding" clause does not apply, and HEERF funds should not be treated as "[f]ederal public benefits."

III. Conclusion

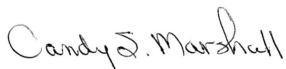
For the reasons provided above, the Department should promptly withdraw this interim final rule. The Department's extratextual requirement is unsound policy and would do great harm to students across the board, and especially to undocumented and DACA students, as well as to institutions. Moreover, the rule is unlawful as a matter of both substance and procedure. At a minimum, the Department must reissue this rule, allowing for notice and comment, and delaying the effective date.

Please do not hesitate to contact Miriam Feldblum (miriam@presidentsalliance.org) at the Presidents' Alliance, Candy Marshall (candy.marshall@thedream.us) at TheDream.US, or Jill CasnerLotto (Jill.CasnerLotto@cccie.org) at CCCIE for further information.

Thank you.



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