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9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN FRANCISCO DIVISION

13 **STATE OF MICHIGAN, STATE OF**  
 14 **CALIFORNIA, et al.,**  
 Plaintiffs,  
 15  
 16 v.  
 17 **ELISABETH D. DEVOS, in her official**  
**capacity as the United States Secretary of**  
 18 **Education, and UNITED STATES**  
**DEPARTMENT OF EDUCATION,**  
 19  
 20 Defendants.

Case No. 3:20-cv-04478-JD

**PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION**

Date: August 18, 2020  
 Time: 11:30 AM  
 Judge: Hon. James Donato  
 Trial Date: None set  
 Action Filed: July 7, 2020

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**INTRODUCTION**

1  
2 Plaintiffs’ motion for preliminary injunction and the 15 declarations from education  
3 agencies across the country demonstrate that injunctive relief from the U.S. Department of  
4 Education’s (ED) unlawful rewrite of Section 18005 of the CARES Act is necessary to avoid  
5 diverting more than \$150 million in CARES Act funds intended for public schools to private  
6 schools. ED fails to produce any evidence rebutting Plaintiffs’ motion or the corresponding  
7 declarations. *See generally* Defs.’ Mem. in Opp’n to Pls.’ Mot. for Prelim. Inj., ECF No. 68  
8 (Opp.). Defendants also fail to address, let alone refute, many of the arguments asserted by  
9 Plaintiffs in support of their claims. Most pointedly, Defendants do not even reference their  
10 improper addition of a supplement-not-supplant restriction, despite the utter lack of evidence of  
11 congressional intent to impose such a restriction. Defendants also fail to refute the substance of  
12 Plaintiffs’ constitutional claims; the lack of rulemaking authority in Sections 18002, 18003, and  
13 18005 of the CARES Act; the lack of any implicit rulemaking authority; and ED’s inexplicable  
14 change in policy from that announced in its initial Guidance to the new two-pronged approach  
15 published in the Rule, including the addition of two oppressive “poison pill” restrictions on  
16 LEAs’ use of the funds if the LEAs choose to allocate the funds using the proportional-share  
17 calculation in Section 1117 of the ESEA.

18 Instead, ED erroneously claims that Section 18005 is ambiguous and therefore gives ED  
19 authority to interpret the statute through emergency rulemaking. As addressed in both Plaintiffs’  
20 principal brief and further below, ED’s faulty interpretation of Section 18005 is contrary to the  
21 plain language of the CARES Act. ED’s claim that the relevant statutory language is ambiguous  
22 is inconsistent with controlling Supreme Court and Ninth Circuit precedent. Further, Defendants’  
23 unsupported attempt to minimize the significant harms caused by ED’s Rule to public education  
24 falls flat. Plaintiffs have demonstrated significant and irreparable harm due to the Rule.

25 In short, Defendants’ arguments fail to rebut Plaintiffs’ likelihood of success on their  
26 claims, the irreparable harm they face, and the balance of equities weighing heavily in favor of an  
27 injunction. This Court should grant Plaintiffs’ motion and enjoin ED from imposing or enforcing  
28 its Guidance or Rule on Plaintiffs during the pendency of this action.

**ARGUMENT**

**I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIMS THAT THE RULE AND THE GUIDANCE ARE UNLAWFUL AND UNCONSTITUTIONAL**

**A. The Equitable Services Requirement in Section 18005 of the CARES Act Is Not Ambiguous**

Defendants’ principal argument is that Section 18005 is ambiguous, thereby requiring ED to exercise interpretative rulemaking authority to resolve the purported ambiguity. Opp. 5, 7-10. Section 18005 is unambiguous. ED’s attempt to read ambiguity into the statute so that ED can pursue its policy objective of redirecting funds to support private schools neither validates its exercise of rulemaking authority nor entitles its interpretation to any degree of deference.

**1. Section 18005 of the CARES Act Is Not Ambiguous**

The pertinent phrase in Section 18005—“in the same manner”—“has a settled and well-understood meaning in legislation.” *Wilder’s S.S. Co. v. Low*, 112 F. 161, 164 (9th Cir. 1901); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 545-46 (2012); *United States v. Timilty*, 148 F.3d 1, 3, 5 (1st Cir. 1998). Defendants offer nothing to counter this long-established precedent, under which “in the same manner” means “to use the same methodology and procedures.” *NFIB*, 567 U.S. at 545; *Wilder’s S.S. Co.*, 112 F. at 164 (“[i]t means by similar proceedings”).<sup>1</sup> Employing this well-understood construction of Section 18005, LEAs are required to adopt the procedures and methodologies of Section 1117, including the proportional-share calculation and eligibility requirements. This plain reading directly cuts against ED’s flawed interpretation and is alone sufficient for the Court to deem the phrase unambiguous.

Disregarding this binding legal precedent, Defendants argue that Section 18005 is ambiguous for two reasons. First, Defendants claim the permitted uses for GEER and ESSER funds in Sections 18002(c) and 18003(d) allow “for a broad range of services that benefit *all* students” and are purportedly in “tension” with the eligibility requirements in Section 1117, which, by their nature, limit the private-school students who receive equitable services. Opp. 7-8

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<sup>1</sup> Defendants apparently attempt to avoid this binding precedent by picking one word in the phrase (“manner”), pointing to a dictionary definition of that term, and ignoring the other words in the phrase. Opp. 9. But the *phrase* is well-understood, as confirmed in *NFIB* and the other cases cited above, rendering Defendants’ efforts to chop the phrase apart meritless.

1 (emphasis in original). Second, Defendants assert that, if Section 18005 fully incorporates Section  
2 1117, two provisions in Section 18005 are purportedly rendered superfluous because they are  
3 similar to provisions in Section 1117. Opp. 8. Neither of these arguments has merit.

4 For their first argument, Defendants incorrectly conflate the permitted uses of CARES Act  
5 funds set forth in Sections 18002(c) and 18003(d) with the eligibility requirements for equitable  
6 services under Section 1117. Section 1117's eligibility requirements and proportional-share  
7 calculation are unrelated to the use of the funds under both the CARES Act and Title I-A. These  
8 requirements from Section 1117 are incorporated into Section 18005 as they are the procedures  
9 for determining the amount of funding for equitable services and who is eligible. *See NFIB*, 567  
10 U.S. at 545; *Wilder's S.S. Co.*, 112 F. at 164. Only after the funds are allocated between public  
11 schools and equitable services for private schools, and eligibility for services is determined, do  
12 the permitted uses described in Sections 18002(c) and 18003(d) come into play.

13 While some of the permitted uses described in Sections 18002(c) and 18003(d) are only  
14 available to LEAs by their nature, *see, e.g.*, H.R. 748, 116th Cong. (CARES Act) § 18002(c)  
15 (“support the ability of such [LEAs] to continue to provide educational services to their students  
16 and to support the on-going functionality of the [LEA]”); § 18003(d)(5) (“[d]eveloping and  
17 implementing procedures and systems to improve the preparedness and response efforts of  
18 [LEAs]”), (d)(12) (“[o]ther activities that are necessary to maintain the operation of and  
19 continuity of services in [LEAs] and continuing to employ existing staff of the [LEA]”), other  
20 permitted uses mirror the available services described in Section 1117. *Compare* 20 U.S.C. §  
21 6320(a)(1)(A) *with* CARES Act § 18003(d)(1), (4), (10), (11). As the eligibility requirements  
22 incorporated into Section 18005 are unrelated to the permitted uses described in Sections  
23 18002(c) and 18003(d), the latter create no ambiguity in Section 18005.

24 Second, the inclusion of a consultation provision and public-maintenance provision in  
25 Section 18005 does not render the comparable provisions in Section 1117 superfluous. As  
26 explained in Plaintiffs' principal brief, the consultation provision is not the same in the two  
27 statutes, as Section 18005 limits the parties involved in consultation. Pls.' Mot. for Prelim. Inj.,  
28 ECF No. 35 (Mot.) 14. The public-maintenance provision is not necessarily a procedure or

1 methodology that would be incorporated into Section 18005 under a plain reading of the statute  
2 consistent with the Supreme Court and Ninth Circuit’s understanding of “in the same manner.”  
3 *Id.* at 15. Thus, these provisions do not create ambiguity.

4 In addition, Defendants’ contention that the term “equitable” in and of itself means all  
5 students should have access to services using the CARES Act funds mischaracterizes the broader  
6 context of the statute and ignores that “equitable services” is a well-understood term of art. *See*  
7 *Opp.* 10; *see also* Amici Private School Associations’ and Advocacy Groups’ Amicus Br. in  
8 *Supp. of Defs.* and in *Opp. to Prelim. Inj.*, ECF No. 60-1 at 8-9. The ESSER funds are provided  
9 to the states, then the LEAs, through well-established Title I formulas that are based on the  
10 number of low-income students in the states and LEAs. *See* CARES Act § 18003(c). If an LEA  
11 did not receive Title I-A funds in the previous fiscal year, it will not necessarily receive ESSER  
12 funds. Thus, Defendants’ argument that Congress’s use of the term “equitable” means that *all*  
13 students should benefit from CARES Act funds does not comport with Congress’ choice to direct  
14 funds to low-income students or the fact that not all LEAs will receive CARES Act funds for  
15 public- or private-school students. Congress’s vision of what an “equitable” funding allocation  
16 consists of—not ED’s vision—controls.

17 Defendants further fail to explain why ED incorporates the proportional-share calculation  
18 described in Section 8501 of the ESEA (based on total enrollment of students), and not Section  
19 1117 (based on enrollment of low-income students). Instead, Defendants deflect, arguing that if  
20 Congress had referenced Section 8501, rather than Section 1117, the same allegedly superfluous  
21 provisions described above would still render Section 18005 ambiguous. But Defendants miss the  
22 point: the Guidance and Rule incorporate the proportional-share calculation from Section 8501,  
23 despite the CARES Act specifically referencing Section 1117. No rationale supports this  
24 interpretation and, again, Congress’s policy choice governs here.<sup>2</sup>

25 Moreover, Defendants’ argument that Section 18005 is ambiguous and that all students  
26 should receive services using CARES Act funds does not square with ED’s Rule. For example,

27 <sup>2</sup> Further evidencing that ED’s Rule departs from congressional intent, at least 100  
28 members of Congress submitted comments to the Rule expressing their disagreement with ED’s  
interpretation of Section 18005. *See* *Suppl. Req. for Judicial Notice Exs.* 1-21.



1 ED's theory that Section 18005 requires all private-school students be counted for purposes of  
2 allocating funds is negated by Option #1 of the Rule, which permits LEAs to calculate the  
3 proportional share based on the number of low-income students only. ED provides no explanation  
4 for this discrepancy. Likewise, in the phrase ED seeks to interpret, "manner" is singular, so no  
5 support exists for the Rule's two options ("manners") for proportioning the funds. Further, the  
6 supplement-not-supplant restriction that ED includes with Option #1 under the Rule is not  
7 referenced or included in any relevant section of the CARES Act, while Congress expressly  
8 incorporated supplement-not-supplant requirements for uses of other CARES Act funding outside  
9 K-12 education. ED invented this restriction, which has no basis in the statute, and seems  
10 designed to push LEAs to proportion funds under Option #2, the only option ED offered in its  
11 Guidance.

12 Section 18005 is clear: LEAs should follow the procedures and methodologies set forth in  
13 Section 1117 for providing equitable services to private-school students. ED's attempt to sow  
14 discord and confusion about Section 18005 is unsupported, and its Guidance and Rule make no  
15 sense under its own interpretation of Section 18005.

## 16 2. The Rule is Not Entitled to Deference.

17 Assuming *arguendo* that Section 18005 is ambiguous (it is not), ED's interpretation is not  
18 entitled to deference. *Chevron* deference "is warranted *only* 'when it appears that Congress  
19 delegated authority to the agency generally to make rules carrying the force of law, *and* that the  
20 agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *United States v. Mead Corp.*, 533  
21 U.S. 218, 226-27 (2001)) (emphasis added). Defendants cannot meet either requirement here.

22 To support its claim that Congress has delegated its authority here, ED points to two  
23 provisions in its organic act, 20 U.S.C. Ch. 31, to justify its rulemaking. First, ED cites provisions  
24 allowing the Secretary to "make, promulgate, [and] issue . . . rules and regulations governing the  
25 manner of operation of, and governing the applicable programs administered by, the  
26 Department." Opp. 9 (quoting 20 U.S.C. § 1221e-3). However, a court in this Circuit has  
27 expressly rejected ED's efforts to apply this provision in the context of the CARES Act. *See*  
28

1 *Washington v. DeVos*, No. 2:20-CV-0182-TOR, 2020 WL 3125916, at \*9 (E.D. Wash. June 12,  
2 2020). That decision correctly noted that “courts have expressed skepticism where an agency  
3 attempts to impose special conditions on grants absent express authority to do so, as such a broad  
4 interpretation would be antithetical to the concept of a formula grant.” *Id.* (quoting *City of Los*  
5 *Angeles v. Barr*, 941 F.3d 931, 942 (9th Cir. 2019) (punctuation omitted).

6 Second, ED cites its general administrative delegation to promulgate rules “necessary or  
7 appropriate to manage the functions of the Secretary or the Department.” Opp. 9 (quoting 20  
8 U.S.C. § 3474). This delegation is limited, restricted to the functions of the Secretary or ED. *See*  
9 *Gonzales*, 546 U.S. at 264-65 (“When Congress chooses to delegate a power [to interpret a  
10 statute], it does so not by referring back to the administrator’s functions, but by giving authority  
11 over the provisions of the statute [the administrator] is to interpret”). The activities of LEAs are  
12 not “the functions of the Secretary or the Department.” Lacking congressional authority to  
13 interpret Section 18005, *Chevron* deference is not warranted.

14 Even if Congress had provided authority to ED to interpret the CARES Act, courts must  
15 still use the “traditional tools of statutory construction” to determine whether “the intent of  
16 Congress is clear” and “give effect to the unambiguously expressed intent of Congress.” *Chevron*  
17 *U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). When a statute is  
18 ambiguous to some extent and the agency has authority to interpret the statute, an agency cannot  
19 offer an interpretation that contradicts the portion of the statute that is unambiguous. *See Whitman*  
20 *v. Am. Trucking Ass’ns*, 531 U.S. 457, 481 (2001). As discussed above and in Plaintiffs’ motion,  
21 *see* Mot. 12-15, even if some aspects of Section 18005 are ambiguous (they are not), in directing  
22 LEAs to provide equitable services “in the same manner as” provided under Section 1117, when  
23 it could have instead referenced Section 8501, Congress unambiguously demonstrated its intent  
24 that equitable services be provided using the proportions provided by Section 1117 of the ESEA.

25 Finally, although not argued by Defendants, their interpretation could theoretically be  
26 entitled to more limited *Skidmore* deference, which courts may grant to agency interpretations to  
27 the extent that their reasoning is persuasive. *See Sierra Club v. Trump*, 929 F.3d 670, 692 (9th  
28 Cir. 2019) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Under *Skidmore*, courts afford

1 deference “depend[ing] upon the thoroughness evident in [the agency’s] consideration, the  
2 validity of its reasoning, its consistency with earlier and later pronouncements, and all those  
3 factors which give it power to persuade.” 323 U.S. at 140. As discussed throughout Plaintiffs’  
4 principal brief and herein, ED’s interpretation and Rule lack any indicia of thoroughness or valid  
5 reasoning, and are inconsistent not only with Section 18005 itself, but with ED’s own prior  
6 interpretations. The Rule is thus not entitled to *Skidmore* deference.

7 **B. Defendants Fail to Offer Any Viable Argument Contesting Plaintiffs’**  
8 **Constitutional Claims**

9 Defendants fail to provide any substantive response to Plaintiffs’ multiple constitutional  
10 claims. Rather, Defendants cite *Dalton v. Specter*, 511 U.S. 462 (1994), for the sweeping  
11 proposition that if a plaintiff makes a constitutional challenge to an action by the federal  
12 government which also implicates a lack of statutory authority, the constitutional challenge is  
13 barred. *See* Opp. 12. The Ninth Circuit recently rejected this exact argument. *See Sierra Club v.*  
14 *Trump*, 963 F.3d 874, 889-90 (9th Cir. 2020).

15 As the Ninth Circuit explained, *Dalton* is limited to instances in which plaintiffs’ claim is  
16 one “simply alleging that the [executive branch] has exceeded [its] statutory authority.” *Id.* at 890  
17 (quoting *Dalton*, 511 U.S. at 473) (quotation marks omitted). But Plaintiffs’ constitutional  
18 challenge here is “address[ing a] situation[] in which the [executive branch] exceeds [its]  
19 statutory authority, and in doing so, also violates a specific constitutional prohibition,” *id.*;  
20 namely, the Spending Clause and separation of powers. *See* Mot. 10, 16-20. *Dalton* is accordingly  
21 inapplicable.

22 **C. ED’s Actions Are Arbitrary and Capricious in Violation of the APA**

23 Defendants barely address Plaintiffs’ arguments that their actions are arbitrary and  
24 capricious for numerous reasons in addition to their inconsistency with the CARES Act. *Compare*  
25 Opp. 11-12 *with* Mot. 21-23. To the extent they even discuss those issues, Defendants’ skeletal  
26 arguments fail.

27 First, Defendants repeatedly urge this Court not to “second guess” ED’s “policy judgment”  
28 under the APA’s arbitrary and capricious standard. Opp. 11 (citing *FCC v. Fox Television*

1 *Stations, Inc.*, 556 U.S. 502, 530 (2009)). To be sure, under that standard “a court is not to  
2 substitute its judgment for that of the agency.” *Dep’t of Homeland Sec. v. Regents of the Univ. of*  
3 *Cal. (Regents)*, 140 S. Ct. 1891, 1905 (2020) (quoting *Fox Television Stations*, 556 U.S. at 513)  
4 (internal quotation marks omitted). However, courts are obligated to make a “searching and  
5 careful” inquiry, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), into  
6 “whether the decision was based on a consideration of the relevant factors and whether there has  
7 been a clear error of judgment,” *Regents*, 140 S. Ct. at 1905 (quoting *Citizens to Preserve*  
8 *Overton Park*, 401 U.S. at 416) (internal quotation marks omitted). That review includes whether  
9 the agency “failed to consider important aspects of the problem,” *Regents*, 140 S. Ct. at 1910  
10 (internal punctuation omitted), and “whether there was legitimate reliance” on ED’s prior  
11 policies; on the latter point, if those policies “have engendered serious reliance interests,” they  
12 “must be taken into account.” *Id.* at 1913 (citing, inter alia, *Fox Television Stations*, 556 U.S. at  
13 515) (internal quotation marks omitted).

14 Defendants refute none of these legal principles, nor dispute that they failed to consider the  
15 myriad issues that Plaintiffs set forth in their motion, supported by declarations from multiple  
16 LEAs and SEAs. *See* Mot. 9, 17-19, 21-23, 27-29. Instead, Defendants argue only that Plaintiffs’  
17 assessment of harms is “one-sided,” in that it “ignores [harms] suffered by private school students  
18 and teachers during the pandemic.” *Opp.* 11. In stark contrast to Plaintiffs’ robust evidentiary  
19 presentation, Defendants provide not a shred of evidence of these ostensible harms, nor cite to  
20 any evidence that such harms drove Congress’s passage of the CARES Act. Even leaving this  
21 failure aside, the fact that private school students and teachers’ interests may *also* be a relevant  
22 factor for ED to take into account when it promulgated the Guidance and Rule does not excuse  
23 ED’s failure to take into account the serious and uncontested harms that its actions cause to public  
24 school students, teachers, and schools.<sup>3</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm*

25 \_\_\_\_\_  
26 <sup>3</sup> Nor does Defendants’ sweeping statement that “Congress directed that use of CARES  
27 Act funds be equitable,” *Opp.* 11, undermine Plaintiffs’ arguments on this score. As discussed  
28 above, Defendants point to nothing in the CARES Act’s text or legislative history to support their  
interpretation. *Supra* at 4. Further, the equitable services provisions themselves manifest  
Congress’s intent that federal education funds are equitably distributed for services to appropriate

(continued...)

1 *Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (if an agency fails to consider “an important aspect of  
2 the problem” in issuing a rule, that rule is arbitrary and capricious).

3 Defendants’ claim that they have not changed their prior policies, Opp. 11-12, also falls  
4 flat. Most critically, Defendants completely ignore and have no response to the fact that they are  
5 reversing course on their earlier explicit statement that supplement-not-supplant restrictions  
6 would not apply to CARES Act funds, *see* Mot. 22 (citing Req. for Judicial Notice, ECF No. 35-3  
7 (RJN) Ex. A at 5), apparently conceding this point. This alone renders their actions arbitrary and  
8 capricious.

9 Further, Defendants’ argument that they neither formally altered their general interpretation  
10 of Section 1117’s equitable services provisions nor their interpretation of the use of Title I funds  
11 for those services, Opp. 11, is a non sequitur, as Plaintiffs are not contending that they did so.  
12 Rather, as Plaintiffs demonstrated in their motion and discuss further herein, *supra* at 2-5, via the  
13 Guidance and Rule Defendants seek to enact a *sub silentio* change to those interpretations (i.e.,  
14 that LEAs are only required to provide equitable services to private school students who are (1) at  
15 risk, and (2) reside in Title I public school attendance areas) based on a mistaken view that, in the  
16 CARES Act, Congress created a massive exception to the general statutory requirements. Indeed,  
17 Defendants’ arguments only reinforce that ED has failed to “display awareness that it is changing  
18 position,” *Fox Television Stations*, 556 U.S. at 515, a hallmark of arbitrary and capricious action.

19 Tellingly, Defendants do not even contest Plaintiffs’ evidence—supported by multiple  
20 declarations—that LEAs and SEAs justifiably took budgetary actions in reliance on ED’s extant  
21 policies. *See* Mot. 22. Defendants failed to take this reliance into account when they took their  
22 actions, and it was “arbitrary and capricious to ignore such matters.” *Regents*, 140 S. Ct. at 1913  
23 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)).

#### 24 **D. ED Did Not Have Good Cause to Issue the Rule as an Interim Final Rule**

25 Defendants claim the same emergency requiring the issuance of an injunction here was the  
26 basis for issuing the Rule as an interim final rule. Opp. 12. However, the COVID pandemic and  
27 private-school students. Defendants make no showing that Congress empowered them to adopt  
28 additional measures that in Defendants’ view somehow enhance “equity.”

1 its unprecedented economic effects on public education did not necessitate the Rule, unlike the  
 2 need for an injunction. ED’s creation of uncertainty regarding the allocation of ESSER and GEER  
 3 funds through the issuance of the Guidance and the Rule does not support the issuance of the Rule  
 4 absent notice-and-comment procedures. Uncertainty is not sufficient good cause normally, let  
 5 alone when the uncertainty is solely created by ED, as it is here. *United States v. Valverde*, 628  
 6 F.3d 1159, 1166 (9th Cir. 2010) (uncertainty “is not a reasonable justification for bypassing  
 7 notice and comment”). Having no good cause to issue the Rule without notice-and-comment, the  
 8 Rule is unlawful. 5 U.S.C. § 706(2)(D).

## 9 **II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM**

10 Defendants do not contest that Plaintiffs are subject to significant harm as a result of the  
 11 Rule. Rather, Defendants argue that these harms—caused by significant diversions of funding  
 12 away from the public schools—are not irreparable. Opp. 13-14. Defendants’ argument is  
 13 unsupported by any evidence and conflicts with legal precedent.

14 The loss of more than \$150 million in emergency funding is irreparable harm as Plaintiffs  
 15 will not be able to recover damages from ED or funds improperly diverted to private schools.  
 16 *California v. Azar*, 911 F.3d 558, 581 (2018) (“harm is irreparable here because the states will not  
 17 be able to recover monetary damages connected to the IFRs”)<sup>4</sup>; *see also, e.g., Washington v.*  
 18 *Trump*, 441 F. Supp. 3d 1101, 1126 (W.D. Wash. 2020) (loss of tax revenue and federal  
 19 government funding of a local project constituted irreparable harm). Defendants’ characterization  
 20 of this diversion of these funds as merely an “economic injury,” Opp. 13, is “terribly misguided”  
 21 as these “are not funds appropriated to carry out secondary or residual government functions” but  
 22 “are monies that Congress appropriated on an emergency basis to assist [] governments in  
 23 providing core public services” in response to the pandemic. *Confederated Tribes of the Chehalis*  
 24 *Reservation v. Mnuchin*, No. 20-cv-01002, 2020 WL 1984297, at \*8 (D.D.C. Apr. 27, 2020)  
 25 (holding tribes suffered irreparable harm due to an agency’s action reducing their share of

26 <sup>4</sup> Defendants’ attempt to distinguish *Azar* lacks merit. Opp. 14 n.4. Just like the plaintiffs  
 27 in *Azar*, Plaintiffs here are unable to recover economic damages and will be required to expend  
 28 their own resources to compensate for the loss of funds driven by the Guidance and Rule. *See*  
 Guerrant Decl. ¶ 26; Jackson Decl. ¶ 26; Jones Decl. ¶ 29; Kaneshiro-Erdmann Decl. ¶ 25; Makin  
 Decl. ¶ 27; Oates Decl. ¶ 22; Stem Decl. ¶ 27; Stewart Decl. ¶¶ 25-26.



1 CARES Act funding). This loss of funding is immediate: Plaintiffs and their public schools must  
 2 make *immediate* decisions to address the pandemic’s effects on education, particularly with the  
 3 imminent start of the school year. With the steep drop in funding available for public education  
 4 available at the state and local level, *see* Guerrant Decl. ¶¶ 12, 15, 26; Constancio Decl. ¶ 16;  
 5 Goldson Decl. ¶¶ 10, 13; Gordon Decl. ¶ 12; Hoffmann Decl. ¶ 13; Jackson Decl. ¶ 26; Jones  
 6 Decl. ¶ 14; Kaneshiro-Erdmann Decl. ¶¶ 15, 25; Oates Decl. ¶ 10; Salmon Decl. ¶ 11; Stem Decl.  
 7 ¶ 27; Wallace Decl. ¶ 12, LEAs must use all available resources including ESSER and GEER  
 8 funds to meet the current and unprecedented demands, *see* Guerrant Decl. ¶ 28; Gordon Decl.  
 9 ¶ 24; Jackson Decl. ¶ 15; Jones Decl. ¶¶ 14, 29; Kaneshiro-Erdmann Decl. ¶ 25; Makin Decl.  
 10 ¶¶ 16-17, 29; Oates Decl. ¶ 24; Salmon Decl. ¶ 22; Stem Decl. ¶ 14; Stewart Decl. ¶ 26. While  
 11 Defendants suggest that the LEAs could “reapportion unobligated GEER and ESSER funds” at  
 12 the conclusion of the litigation, LEAs do not have the luxury of waiting or “unobligat[ing]” funds.  
 13 Opp. 13. The need for funds is desperate and immediate.<sup>5</sup> Guerrant Decl. ¶ 26; Jackson Decl.  
 14 ¶ 26; Jones Decl. ¶ 29; Kaneshiro-Erdmann Decl. ¶ 25; Makin Decl. ¶ 27; Oates Decl. ¶ 22; Stem  
 15 Decl. ¶ 27; Stewart Decl. ¶¶ 25-26.

16 Separate from the irreparable economic harm the Rule will cause, Defendants fail to  
 17 address the irreparable harm caused by the imposition of the supplement-not-supplant restriction  
 18 on LEAs who choose Option #1 for appropriating the CARES Act funds. *See* 34 C.F.R.  
 19 § 76.665(c)(3). This restriction threatens the loss of future Title I funding if the LEAs use the  
 20 CARES Act funds for non-Title I schools, including for district-wide expenditures like purchases  
 21 of remote learning equipment, transportation, and facility sanitation. *See, e.g.*, Oates Decl. ¶ 17;  
 22 Hoffmann Decl. ¶¶ 41-42; Jones Decl. ¶ 38; Jackson Decl. ¶ 35; Constancio Decl. ¶ 34. Such a  
 23 Hobson’s choice constitutes irreparable harm where the threat of civil enforcement and loss of  
 24 future funding looms large. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992);

25 \_\_\_\_\_  
 26 <sup>5</sup> Congress continues to recognize the immediate need for additional funding for public  
 27 education, as shown by the stimulus package proposals currently under consideration; both  
 28 versions proposed by the parties include tens of billions of dollars for education. *See* HEROES  
 Act, H.R. 6800, 116th Cong., title IV (2020); *see also* Phyllis W. Jordan, *What Congressional  
 Covid Funding Means for K-12 Schools*, Future Ed (July 29, 2020), [https://www.future-  
 ed.org/what-congressional-covid-funding-means-for-k-12-schools/](https://www.future-ed.org/what-congressional-covid-funding-means-for-k-12-schools/).

1 *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1057 (9th Cir. 2009).

2 Finally, as discussed in Plaintiffs' principal brief, the Rule places Plaintiffs in legal  
3 jeopardy because they cannot comply with both the Rule and Section 18005. Defendants assert  
4 that Plaintiffs cannot demonstrate ED would "mount a legal challenge" if a plaintiff did not  
5 comply with the Rule. Opp. 14. But Defendants do not categorically renounce ED's ability to  
6 enforce the Rule against Plaintiffs during the pendency of this litigation, and the certifications that  
7 Plaintiffs executed remain legally binding on Plaintiffs. Guerrant Decl. Ex. A; Constancio Decl.  
8 Ex. A; Stewart Decl. Ex. A; Kaneshiro-Erdmann Decl. Ex. A; Makin Decl. Ex. A; Salmon Decl.  
9 Ex. A; Goldson Decl. Ex. A; Baca Decl. Ex. A; Stem Decl. Ex. A; Jones Decl. Ex. A; Jackson  
10 Decl. Ex. A; Gordon Decl. Ex. A. In fact, ED asks the Court to deny granting the preliminary  
11 injunction *so that* Defendants may "continue implementing" the CARES Act in order to "ensure[]  
12 that *all* students benefit from the CARES Act funds."<sup>6</sup> Opp. 15. Thus, Plaintiffs remain stuck,  
13 unable to comply with the Rule and Section 18005 while the threat of ED's potential enforcement  
14 remains looming.

15 Plaintiffs' 15 declarations make clear that the Rule has caused and continues to cause  
16 irreparable harm. Defendants submit no evidence to counter these declarations and fail to show  
17 how the significant loss of funds for Plaintiffs' public-school students does not amount to  
18 irreparable harm.

### 19 **III. THE PUBLIC INTEREST WEIGHS HEAVILY IN FAVOR OF PROVISIONAL RELIEF**

20 For the equity elements, Defendants' arguments rely heavily on their contention that  
21 private schools, like public schools, are also adversely impacted by the COVID-19 pandemic. *See*  
22 Opp. 14-15. Plaintiffs do not contest that private schools are likely impacted by the pandemic—  
23 however, the low-income students targeted to receive Title I and CARES Act funds have faced  
24 significantly greater health and economic impacts from the virus than many private school  
25 students. *See* RJN Exs. G, J; Jones Decl. ¶ 12. Defendants disregard that Congress provided

26 <sup>6</sup> As discussed above, Defendants' implementation of the CARES Act does not ensure that  
27 "all" students benefit from the CARES Act funds at issue. Because only LEAs that received Title  
28 I-A funding in the previous school year were allocated ESSER funds, *see* CARES Act §  
18003(c), students who reside in an LEA that did not receive Title I-A funds (whether they attend  
public or private schools) will not necessarily receive a benefit under the Rule.



1 private schools with access to other emergency funds in the CARES Act, which are not available  
2 to public schools. Specifically, Congress authorized the Paycheck Protection Program (PPP),  
3 which numerous private schools are eligible for and have taken advantage of. CARES Act  
4 § 1102; *see also* The Council of The Great City Schools Amicus Curiae Br. in Supp. of Pls.’ Mot.  
5 for Prelim. Inj., ECF No. 47-1 at 9-10 & Ex. B; Hoffmann Decl. ¶¶ 47-48. PPP is not available to  
6 public schools. Since private schools have access to PPP funding that public schools do not, it is  
7 not equitable for private schools to receive ESSER and GEER funds on an equal basis as public  
8 schools.

9 Finally, the public interest is served by having Congress’s intended appropriations  
10 implemented and not thwarted by ED’s efforts to meet its own policy goals. *Cf. Sierra Club*, 929  
11 F.3d at 707 (“The public interest in ensuring protection of this separation of powers is  
12 foundational and requires little elaboration.”). The equitable factors weigh heavily in favor of  
13 Plaintiffs.

#### 14 CONCLUSION

15 For the foregoing reasons, and those addressed in Plaintiffs’ principal brief, Plaintiffs  
16 request this Court grant their motion.

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