IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., Plaintiff, v. ELISABETH (BETSY) DEVOS, *in her official capacity as Secretary of Education, et al.*, Defendants.	No. 1:20-cv-02310-GLR

BRIEF FOR AMICUS CURIAE U.S. HOUSE OF REPRESENTATIVES IN SUPPORT OF PLAINTIFF

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INTEREST OF AMICUS CURIAE[1]

The U.S. House of Representatives[2] has a pressing interest in this case, which concerns Congress's efforts to provide relief to schools nationwide in coping with the unprecedented burdens wrought by the COVID-19 pandemic, including increased costs and significant state and local budget shortfalls. The Spending Clause grants Congress exclusive authority to spend federal funds for "the general welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Exercising that authority, Congress allocated $16.5 billion in the CARES Act for K-12 education, and set forth the parameters for disbursing those funds to local school districts nationwide, with a focus on directing funding to those schools, teachers, and students with the greatest needs. Pub. L. No. 116-136, §§ 18001-18003, 134 Stat. 281, 564-67 (2020).

The Department of Education has attempted to circumvent Congress's express funding decisions to divert hundreds of millions of dollars in emergency aid from public school students to private school students, well beyond what the CARES Act permits.[3] The Department's unlawful actions have sown widespread confusion and delayed implementation of the CARES Act, preventing local school districts from accessing the funds they desperately need to deliver

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[1] No person or entity other than amicus and its counsel assisted in or made a monetary contribution to the preparation or submission of this brief.

[2] The Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives has authorized the filing of an amicus brief in this matter. The BLAG comprises the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority Leader, the Honorable James E. Clyburn, Majority Whip, the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican Whip, and "speaks for, and articulates the institutional position of, the House in all litigation matters." Rules of the U.S. House of Representatives (116th Cong.), Rule II.8(b), https://perma.cc/M25F-496H. The Republican Leader and Republican Whip dissented.

[3] *See* Dep't of Educ., CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39,479 (July 1, 2020) (Interim Final Rule); Dep't of Education, Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act Program (Apr. 30, 2020), https://perma.cc/XFV3-3BAV (Guidance).

educational services to students in the upcoming academic year. The House has a compelling interest in protecting its constitutional authority over the use of federal funds, in ensuring that the Department follows Congress's clear statutory mandates, and in facilitating the expeditious distribution of CARES Act funding to public schools in dire need of financial assistance.

INTRODUCTION

This case arises out of the Department of Education's brazen effort to rewrite legislation passed by Congress to divert federal aid away from Congress's intended recipients of the funds. In the CARES Act, Congress chose to allocate $16.5 billion in emergency aid for K-12 education—$13.5 billion of which is direct aid to elementary and secondary school districts—primarily on the basis of need. Specifically, Congress appropriated the bulk of CARES Act education funding for public schools, to be distributed among school districts largely based on their share of low-income students. Congress sought to aid those students whose academic progress and overall welfare has been most impeded by the pandemic.

Consistent with school districts' longstanding obligation to provide equitable services for at-risk private school students—students whose academic progress has likewise been hampered by the pandemic—Congress also allocated a portion of CARES Act funding for private school students. Congress mandated that equitable services for private school students should be provided "in the same manner" as provided under an existing statute—Section 1117 of Title I-A of the Elementary and Secondary Education Act of 1965 (ESEA) (codified at 20 U.S.C. § 6320). CARES Act § 18005(a). Section 1117 of the ESEA undisputedly requires equitable services to be calculated based on the number of *low-income* students in a school district who attend private school. Thus, as multiple courts have now concluded, Congress was clear about the manner of calculating CARES Act funds for private school students: It specified the exact formula for school districts to use by cross-referencing a statute, Section 1117, that employs that formula.

Because this formula does not suit the Department of Education's policy preferences, however, the Department has set aside the plain text of the CARES Act to create its own formula that steers more money to private schools, regardless of the number of their low-income students. The Department has purported to let school districts "choose[]" between using the formula set by Congress in Section 1117 or the Department's preferred formula, 85 Fed. Reg. at 39,482, but that choice is illusory given the prohibitive conditions the Department has imposed on using the formula in Section 1117. The Department's actions in diverting federal funds appropriated by Congress—by rewriting the plain terms of the CARES Act and conditioning funding in ways not found in the CARES Act—are unlawful. This court should join every other court to have considered the issue in rejecting the Department's effort to rewrite unambiguous legislation.

SUMMARY OF THE ARGUMENT

1. The Department's Interim Final Rule and Guidance are unlawful because they violate the plain text of the CARES Act. Since 1965, Congress in Section 1117 of the ESEA has required that local school districts allocate funding for Title I-A equitable services based on the total number of low-income students attending private schools, as a means of directing federal aid to serve disadvantaged children. The Department itself recently confirmed this long-settled approach to Title I-A equitable services. Congress employed this same method in the context of the CARES Act, and accordingly directed that local school districts receiving funds under that law provide equitable services for private school students "in the same manner as provided under Section 1117." CARES Act § 18005(a). That language unambiguously directs local school districts to allocate CARES Act funds for equitable services using the well-established formula for allocating equitable services in Section 1117. The Department's contrary approach cannot be squared with Congress's clear instructions for allocating federal funds.

2. The funding conditions in the Department's Interim Final Rule also contravene the basic constitutional principle that Congress has the exclusive authority to spend federal funds in furtherance of the public welfare. *See Helvering v. Davis*, 301 U.S. 619, 645 (1937); *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018) (Congress has "exclusive power … to impose conditions on federal grants"). In purporting to give school districts a choice between two different allocation formulas for providing equitable services to private school students, the Department has imposed conditions on the receipt of CARES Act funds that Congress did not impose. The Department has directed that school districts wishing to use the allocation formula in Section 1117 (which Congress mandated) can use CARES Act funds only for a fraction of their public schools, and must comply with "supplement not supplant" restrictions. To avoid being subject to these conditions, school districts must use the Department's preferred allocation formula for equitable services that will funnel more money to private schools.

The Department has concocted these conditions out of thin air. Because Congress neither imposed any of these conditions in the CARES Act nor delegated authority to the Department to do so, the Department's actions violate the Spending Clause and separation-of-powers principles.

ARGUMENT

I. The Funding Conditions in the Department's Interim Final Rule and Guidance Violate the Plain Language of the CARES Act

The statutory equitable services provision at the center of this case has a long pedigree. Since the Elementary and Secondary Education Act of 1965 (ESEA), Congress has consistently required local school districts receiving Title I-A funds to provide equitable services to private school students based on the number of *low-income* children in the district who attend private schools. The CARES Act directly references that provision, instructing school districts to

"provide equitable services … in the same manner as provided under section 1117" of the ESEA. CARES Act § 18005(a).

Nevertheless, in the challenged agency actions, the Department has authorized school districts to ignore Congress's clear instructions and to allocate equitable services funds based on the *total* population of private school students instead, regardless of how many of those students are low income. *See* 85 Fed. Reg. 39,481. The plain language of the CARES Act, informed by the history of equitable services under Title I-A, squarely forecloses the Department's approach. "Under our system of government, Congress makes laws," and the Executive Branch's authority to "faithfully execute" them does not permit an agency to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 327-28 (2014). The Court should therefore set aside the Department's Interim Final Rule and Guidance as "not in accordance with law." 5 U.S.C. § 706(a)(2)(A).

A. Congress Has Always Required Local School Districts to Provide Title I-A Equitable Services Based on the Number of Low-Income Students Attending Private Schools

In 1965, Congress created the Title I-A program to provide federal assistance to local school districts "serving areas with concentrations of children from low-income families," recognizing both "the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of [school districts] to support adequate educational programs." ESEA § 201, Pub. L. No. 89-10, 79 Stat. 27, 27 (1965). Consistent with that purpose, a local school district's share of Title I-A funds generally depends on the total number of children from low-income families in the district. Rebecca R. Skinner, Congressional Research Service, *The Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer* 3 (2020), https://crsreports.congress.gov/product/pdf/R/R45977/4. The program's ultimate goal is to

enable "schools [to] become a vital factor in breaking the poverty cycle by providing full educational opportunity to every child regardless of economic background." H. Rep. No. 89-143, at 3 (1965).

To that end, although the statute primarily focuses on enhancing the funds available to public school districts, the 1965 ESEA required school districts to provide some services to disadvantaged private school students as well. To receive a share of Title I-A funds, a local school district had to demonstrate that, "to the extent consistent with the number of educationally deprived children in the school district … who are enrolled in private elementary and secondary schools," the district had "made provision for including special educational services and arrangements … in which such children can participate." ESEA § 205(a)(2), 79 Stat. 30-31.

Unlike today's version of the statute, the 1965 ESEA did not mandate a method for districts to use in determining what percentage of their Title I-A funds should be used for equitable services for private school students. But neither Congress nor the Department contemplated that the scope of a district's equitable services obligation could be determined by the *total* number of private school students in the district. *See, e.g.*, H. Rep. No. 89-143, at 7 ("The extent of the broadened services will reflect the extent that there are educationally disadvantaged pupils who do not attend public schools."); *see also* Office of Education, U.S. Dep't of Health, Education, and Welfare, *Guidelines: Special Programs for Educationally Deprived Children* 25 (1965) (extent of Title I-A equitable services "should be based on the numbers of educationally deprived children enrolled in [private] schools who are in need of the services so provided").[4]

[4] *Available at* https://babel.hathitrust.org/cgi/pt?id=uc1.a0011148665&view=1up&seq=35.

In 1994, Congress endorsed and expanded upon the basic principle that equitable services are intended for disadvantaged private school students. In the Improving America's Schools Act, Congress amended the ESEA to require local school districts to provide equitable services based on the number of eligible private school children identified as having the "greatest need for special assistance"—including "[c]hildren who are economically disadvantaged, children with disabilities, migrant children[,] limited English proficient children," and children "identified by the school as failing, or most at risk of failing" to meet state standards. Pub. L. No. 103-382, §§ 1115(a)-(b), 1120(a), 108 Stat. 3518, 3539-40, 3557 (1994).

Congress also specifically set forth the manner in which local school districts must allocate funds for Title I-A equitable services: A district's expenditures on those services "shall be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from *low-income families* who attend private schools." *Id.* § 1120(a)(4), 108 Stat. 3557 (emphasis added).

Most recently, Congress reaffirmed this approach in the Every Student Succeeds Act of 2015 (ESSA), which continues to govern Title I-A programs today. Pub. L. No. 114-95, 129 Stat. 1802 (2015). The amended ESEA Section 1117 left in place the allocation formula under which expenditures for equitable services must be "based on the number of children from low-*income* families who attend private schools" in the district. 20 U.S.C. § 6320(a)(4)(A)(i) (emphasis added). The statute also continues to direct local school districts to provide the equitable services to a distinct population of private school students that is not limited to low-income students; specifically, after the allocation of equitable services is determined using the formula set forth above, the services themselves are to be provided to low-achieving students

who are economically disadvantaged, have disabilities, are migrant children, are English learners, or are at risk of failing to meet state standards. *Id.* §§ 6320(a)(1), 6315(b)(2).

In October 2019, just months before passage of the CARES Act, the Department issued guidance on the provision of equitable services under Title I-A. *See* U.S. Dep't of Education, *Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act: Providing Equitable Services to Eligible Private School Children, Teachers, and Families: Updated Non-Regulatory Guidance* 14-16 (Oct. 7, 2019), https://perma.cc/9STU-RFKU. The Department confirmed that its long-settled approach to calculating the equitable services allocation still governs. The Department explained that a local school district must first determine which of the school attendance areas within the district that are eligible for Title I-A funds will actually "participate" in the Title I-A program—typically, participating areas are those with higher poverty rates. *Id.* at 15. Each participating area receives a share of the district's Title I-A funds based on the total number of low-income students (public and private) residing in the area. *Id.* at 13-14. Each area then determines what percentage of its low-income students attend private school, and it reserves that proportional share of its Title I-A funds for equitable services. *Id.* Thus, at every step of the process, the allocation focuses on the *low-income students* in a given area.

B. The "In the Same Manner" Language in the CARES Act Unambiguously Directs Districts to Apply This Settled Approach

This historical backdrop confirms that there is only one plausible interpretation of the CARES Act language at issue. In the CARES Act, Congress required that local school districts receiving funds must "provide equitable services … *in the same manner* as provided under section 1117" of the ESEA. CARES Act § 18005(a) (emphasis added). The Supreme Court has held that when Congress directs agencies to take a particular action "in the same manner" as

another federal statute directs, that means using "the same methodology and procedures." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 545 (2012) (internal quotation marks omitted). In the CARES Act, Congress legislated against the backdrop of this settled meaning, which accords with the plain text of the phrase "in the same manner" and common sense.

Congress thus directly and unambiguously incorporated all of Section 1117's "methodologies and procedures" for providing equitable services to private school students. That includes, of course, Section 1117's allocation methodology for determining the total percentage of funds a school district can spend on equitable services. *See* 20 U.S.C. § 6320(a)(4)(A)(i). As another court considering this issue correctly noted, "Congress's reference to Section 1117 of the ESEA cannot be construed as casual or incidental; it is an explicit citation to a formula with which [school districts] are well acquainted, grounded as it is in one of the nation's flagship educational programs, providing funding for some of the nation's neediest students." *Washington v. DeVos*, -- F. Supp. 3d --, No. 2:20-cv-1119, 2020 WL 5079038, at *7 (W.D. Wash. Aug. 21, 2020).

There is no other plausible reading of the language "in the same manner." A contrary holding would not only thwart Congressional intent in the CARES Act, it could also disrupt Congress's plan in other contexts. Congress routinely uses the phrase "in the same manner" to incorporate by reference methodologies and procedures used in other statutes or authorities. For example, under 21 U.S.C. § 853, government agents may request a warrant authorizing seizure of property "in the same manner as provided for a search warrant," and a court may order witnesses relevant to a property forfeiture to be deposed "in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure." 21 U.S.C. § 853(f), (m). Although the targets of the warrants or depositions authorized by this statute are

of course different than in the cross-referenced provisions, the procedures must all be the same. Were it otherwise, courts and federal agencies directed by Congress to follow a comprehensive set of procedures could pick and choose which aspects of those procedures to incorporate and which to ignore.

Put another way, if the Department were correct that Section 18005 of the CARES Act does not "mechanistically" import all of Section 1117's procedures for providing equitable services to private school students, 85 Fed. Reg. at 39,479, 39,481, then the language would be an open invitation to the Department to decide which aspects of Section 1117's statutory scheme to apply and which to replace with the Department's own policy judgments. The Department's interpretation of Section 18005 might permit it to decide that the CARES Act does not import Section 1117's requirement that equitable services be "secular, neutral, and nonideological," 20 U.S.C. § 6320(a)(2), or that providers of equitable services be "independent … of any religious organization," *id.* § 6320(d)(2)(B).

That cannot be right. Because the statutory language clearly directs the Department to follow the procedures of Section 1117 in providing equitable services under the CARES Act, "that is the end of the matter." *Chevron v. Nat'l Resources Defense Council*, 467 U.S. 837, 842-43 (1984). "The court, as well as the agency, must give effect to the unambiguously expressed intent of Congress," which is best revealed in the language the Congress actually enacts. *Id.*

C. The Department's Arguments Misapprehend Equitable Services and Congress's Intent in the CARES Act

The Department attempts to manufacture ambiguity in the CARES Act in three principal ways. None succeeds.

First, the Department argues that, unlike Title I funds, programs funded by the CARES Act "can be available for *all* students … without regard to poverty, low achievement, or

residence in a participating Title I public school attendance area." 85 Fed. Reg. at 39,480 (emphasis added). The Department reasons that because the CARES Act does not limit equitable services to at-risk students as Section 1117 does, Congress could not have adopted Section 1117 wholesale. But the criteria for the recipients of equitable services do not represent the "manner" of providing equitable services under Section 1117. As explained above, the manner of providing equitable services refers to the procedures and methodology used to make those services available to private school students, including the procedures and methodology for determining the appropriate allocation of funds. *See, e.g.*, *Manner*, Merriam-Webster Dictionary, https://perma.cc/4E33-L85V (defining "manner" as "a mode of procedure or way of acting"); *see also Michigan v. DeVos*, -- F. Supp. 3d --, No. 3:20-cv-4478, 2020 WL 5074397, at *4 (N.D. Cal. Aug. 26, 2020) (citing this definition).

Moreover, contrary to the Department's suggestion, the student population used to calculate the allocation of equitable services under Section 1117 is always different from the student population that ultimately receive the services. Section 1117 counts low-*income* students for purposes of calculating the allocation of equitable services to be provided, but it is low-*achieving* students who typically receive services, even if they are not low-income. *See* 20 U.S.C. §§ 6315(c)(1)(B), 6320(a)(1)(A) (children eligible for equitable services are those "failing, or most at risk of failing, to meet" state standards).[5] The manner of providing equitable services under Section 1117 is always to use the number of low-income children solely to

[5] Similarly, Title I-A counts low-income students for allocation purposes but in many cases permits funds to be used for schoolwide services for *all* students in a school, rather than targeted assistance for low-achieving students within Title I schools. *See* Nat'l Center for Education Statistics, *Study of the Title I, Part A Grant Program Mathematical Formulas* xi (2019), https://perma.cc/G6Z8-6VR3 (noting that 95 percent of all students served in Title I-A participating public schools receive services in schoolwide programs).

determine the percentage of funds allocated to equitable services, and Congress required that same methodology for allocation of CARES Act funds.

Second, the Department contends that Section 18005 of the CARES Act is ambiguous concerning the extent to which the Act incorporates Section 1117 of the ESEA. The CARES Act requires that school districts "consult[] with representatives of non-public schools," § 18005(a), and that a public agency retain "control of [the] funds" provided for equitable services, § 18005(b). The Department argues that, because Section 1117 already requires both consultation and public control, those provisions of the CARES Act would be redundant unless the CARES Act is interpreted not to adopt Section 1117 wholesale. 85 Fed. Reg. at 39,481.

Even if the CARES Act creates some redundancy, the Department's argument still fails for a simple reason: "Sometimes the better overall reading of the statute contains some redundancy." *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019); *see also Navy Fed. Credit Union v. LTD Fin. Servs., LP*, --- F.3d --- , 2020 WL 5014866, at *11 (4th Cir. Aug. 20, 2020) (noting that "[r]edundancies across statutes are not unusual events in drafting" (internal quotation marks and emphasis omitted)). Congress often "employ[s] a belt and suspenders approach" to drafting statutes, *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020), and may therefore "repeat language in order to emphasize it," *Marx v. General Revenue Corp.*, 668 F.3d 1174, 1183 (10th Cir. 2011), *aff'd*, 568 U.S. 371 (2013).

The two requirements at issue—consultation with private school officials and public control of equitable services funds—are critical features of Title I-A's equitable services scheme, making them exactly the types of provisions that Congress would seek to "emphasize" by "repeat[ing]." *Id.* The public control provision dates back to the ESEA's initial enactment; the language was added to "assure" skeptics of aid to private schools that local school districts

would "maintain administrative supervision and control of the programs provided" to private school students. H. Rep. No. 89-143, at 7. And the consultation provision was added by Congress in 1994 and has been strengthened over time to address complaints by private schools about the inadequacy of equitable services. H. Rep. No. 107-63, at 296 (2001) (noting "serious disagreement among public, private, and religious school representatives on the extent to which Title I consultations have been meaningful and timely"); S. Rep. No. 114-231, at 31 (2015) (explaining that 2015 amendments "require[] more transparency into how allocations for private school students are determined during the consultation process").

It should thus be no surprise that in the CARES Act, Congress chose to emphasize the Department's continuing obligation to adhere to these requirements, notwithstanding the COVID-19 pandemic.

Finally, the Department points generally to the purpose of the CARES Act, which, in its view, seeks to provide emergency relief to students at public and private schools alike. 85 Fed. Reg. at 39,489. Although the COVID-19 pandemic has undeniably affected both public and private schools, Congress plainly took into account that schools with lower-income students would be affected more acutely. The CARES Act "explicitly provides" that a "central use[]" of the $16.5 billion ESSER fund is "to address 'the unique needs of low-income children or students' and other disadvantaged communities." *Washington*, 2020 WL 5079038, at *7 (quoting CARES Act § 18003(d)(4)).

Had Congress intended to provide equitable services to all students and schools in the manner the Department prefers, it could easily have done so. Indeed, a prior version of the CARES Act would have done exactly what the Department has now done. That bill, circulated by Senate Majority Leader Mitch McConnell but not introduced, would have required the level

of equitable services to "reflect the proportion of students residing within the boundaries of the [district] who attend non-public schools"—*i.e.*, the total number of private school students. HEN20279, § 18005(a).[6] The Department has overridden the law that Congress actually adopted in favor of a proposal that Congress could have pursued but did not.

Congress also had a readily available alternative had it sought to allocate equitable services funds based on total private school enrollment. The ESEA contains another equitable services provision—Section 8501—that applies outside the Title I-A context. *See* 20 U.S.C. § 7881(a)(1), (b)(1). Section 8501 requires school districts to provide equitable services to private school students under enumerated programs, including Title III-A English language acquisition programs and Title IV-B afterschool programs. *Id*. §§ 7881 (b)(1)(C), (E). For those programs, the statute provides that equitable services "[e]xpenditures … shall be equal, taking into account the number and educational needs of the children to be served, to the expenditures for participating public school children." *Id.* § 7881(a)(4)(A). In other words, Section 8501 requires school districts to allocate funds in proportion to *all eligible* private school students.

Had Congress wished to distribute CARES Act funds in the way set forth in the Interim Final Rule, it could have referred to Section 8501. But Congress did not do so; it chose instead to refer to Section 1117, allocating funds to districts based primarily on the Title I-A formula and to require districts to provide equitable services "in the same manner" as provided under Title I-A. CARES Act § 18005(a); *see id.* § 18002(b)(2) (40 percent of State's GEER allocation calculated based on the State's relative number of "eligible" children for purposes of awarding Title I-A grants); *id.* § 18003(b), (c) (full amount of State's ESSER allocation calculated based

[6] *Available at* Chris Johnsen & Curt Hearn, *Senate Readies Coronavirus Rescue Package, Jones Walker: Disaster Prep & Recovery* (Mar. 22, 2020), https://www.disasterprepandrecovery.com/2020/03/senate-readies-coronavirus-rescue-package/.

on prior shares of Title I-A grant funds). That is a clear demonstration of Congress's intent to prioritize emergency relief funds for students whom Congress determined to be most in need.

The Department may not agree with Congress's policy choice, but it was Congress's choice—not the Department's—to make. The Department has manufactured an ambiguity in the plain text of the CARES Act as a pretext to advance the Department's own policy preferences favoring private schools. By design, the Department's method of allocating equitable services to private school students—which is different from the method set forth in Section 1117—will siphon hundreds of millions of dollars worth of services away from public schools serving at-risk students and toward private school students, without regard to whether they need such aid or have access to other resources—including emergency resources (such as Paycheck Protection Program loans) that are not available to public schools. *See, e.g.*, Michael Griffith, *COVID-19 and School Funding: What to Expect and What You Can Do*, Learning Policy Inst. (Apr. 22, 2020), https://perma.cc/XKR9-2TC4 ("[U]nder the Department of Education's Guidance, districts would provide an additional $1.35 billion in funding for services to private schools … which amounts to an additional 10% of CARES Act funding."). The Department clearly would prefer that private schools receive emergency aid in excess of what Congress provided, but "the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals." *City & Cty. of S.F.*, 897 F.3d at 1235.

II. The Funding Conditions in the Department's Interim Final Rule Encroach on Congress's Authority Under the Spending Clause

The Interim Final Rule is unlawful for another reason: It violates the constitutional maxim that Congress, and only Congress, can impose conditions on the receipt of federal funds. Congress has provided clear instructions about how CARES Act funds are to be distributed, and

the Department has no authority to impose additional conditions on the receipt of funds that Congress did not impose.

"The United States Constitution exclusively grants the power of the purse to Congress, not the President." *City & Cty. of S.F.*, 897 F.3d at 1231 (citing U.S. Const. art. I, § 9, cl. 7 (Appropriations Clause); U.S. Const. art. I, § 8, cl. 1 (Spending Clause)). The Framers deliberately denied the Executive Branch the authority to decide how federal money would be spent—a power that Parliament had forced the British monarchy to renounce in the Bill of Rights of 1689. *See* 1 W. & M. c. 20 (1689) (rejecting King's authority to "levy[] money for and to the use of the Crown … for other time and in other manner than the same was granted by Parliament"); *The Federalist No. 58,* at 394 (J. Madison) (J. Cooke ed. 1961) (noting that House of Representatives would "hold the purse, that powerful instrument by which" Parliament had "reduc[ed] … all the overgrown prerogatives of the other branches of the government"). In the Spending Clause, the Framers authorized Congress alone to spend for the "general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, and made clear that "the concept of welfare or the opposite is shaped by Congress," *Helvering*, 301 U.S. at 645.

Accordingly, it is for Congress, not the Executive Branch, to attach conditions on the receipt of federal funds in furtherance of federal policy objectives. *See City & Cty. of S.F.*, 897 F.3d at 1231-33. "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). And if "Congress … has not delegated authority to the Executive" to impose such conditions, the Executive Branch may not do so. *City & Cty. of S.F.*, 897 F.3d at 1233; *see also City of Providence v. Barr*, 954 F.3d 23, 31 (1st Cir. 2020). "Absent congressional authorization, the [Executive Branch] may not

redistribute or withhold properly appropriated funds in order to effectuate its own policy goals." *City & Cty. of S.F.*, 897 F.3d at 1235.

Here, Congress has neither itself conditioned CARES Act funds in the ways the Department has in its Interim Final Rule nor authorized the Department to impose such conditions. Making matters worse, the Department has imposed these conditions to coerce school districts into selecting the Department's preferred "option" under the Interim Final Rule—the option that would funnel hundreds of millions of dollars of emergency aid intended for public schools to their private counterparts.

The Interim Final Rule offers districts an illusory choice between two formulas for the distribution of CARES Act funds. 85 Fed. Reg. at 39,481-82, 39,488; *see* 34 C.F.R. § 76.665(c). Under the first option, districts may allocate a proportion of funds for equitable services equal to the proportion of low-income private school students within the school district (*i.e.*, using Section 1117's method), but they must comply with two additional conditions. First, the only *public* schools that districts may serve are public schools that participate in Title I-A. Second, districts must comply with Title I-A's "supplement not supplant" requirement, which prohibits districts from reallocating state and local funds from Title I-A recipients and replacing them with Title I-A aid. 34 C.F.R. § 76.665(c)(1)(i). In other words, districts proceeding under the first option would be prohibited from using CARES Act funds to cover any costs that are not already being covered by state and local funds.

Neither of these conditions attaches under the second option in the Interim Final Rule. Under that option, districts may use funds to serve public school students in non-Title I schools, and not subject to any supplement-not-supplant requirement. But districts choosing the Department's second option must comply with the condition that they allocate funds for

equitable services based on the proportion of all private school students (not just low-income private school students, as the CARES Act requires by its reference to Section 1117) within the district's geographic area compared with all students residing in the district. *Id.* § 76.665(c)(1)(ii). This calculation method greatly favors private schools, which serve 10% of students nationwide but only 1% of low-income students. Griffith, *supra*.

None of the conditions imposed under either option appears anywhere in the text of the CARES Act. As described above, Congress did not condition CARES Act funds on school districts using the Department's preferred allocation formula for equitable services, and Congress certainly did not "unambiguously" condition the funds on using that formula. *Pennhurst*, 451 U.S. at 17. Nor did Congress limit the relevant CARES Act funds to Title I-A public schools or subject them to "supplement not supplant" requirements. And the Department does not point to *any* delegation of authority from Congress to impose such conditions. The Department cannot "coopt Congress's power to legislate" in this manner. *City & Cty. of S.F.*, 897 F.3d at 1234.

The conditions that the Department has imposed under its first "option" are so onerous that they effectively prevent districts from choosing it. In particular, according to data available from the Elementary and Secondary Information System, during the 2017-18 school year, out of 95,752 total public schools, only 59,232 provided Title I services. *See* Elementary/Secondary Information Sys., Nat'l Center for Education Statistics, https://nces.ed.gov/ccd/elsi/default.aspx. The Department's first option would therefore preclude more than 35,000 public schools from receiving any CARES Act funding at all. What's more, there are at least 10,000 low-income public schools that are eligible for Title I but that do not participate in Title I due to insufficient funding. *See id.* That is because Title I-A funds are insufficient to fully address needs at every Title I-A eligible school, so school districts must allocate money to schools with the highest

need. *See* Congressional Research Service, *Allocation of Funds Under Title I-A of the Elementary and Secondary Education Act* 4 (Sept. 17, 2018), https://crsreports.congress.gov/product/pdf/R/R44461 (noting that appropriations have been insufficient to fully cover Title I-A needs "every year beginning with FY1967"); *id.* at 16 (noting that school districts "must generally rank their public schools by their percentages of students from low-income families, and serve them in rank order"). The Department's Interim Final Rule thus gives school districts the choice between spending a disproportionate amount of their emergency aid on services to private school students and teachers (under the second option), or depriving tens of thousands of public schools—including many that serve substantial numbers of low-income students—of any emergency funding at all (under the first option). The latter is not a realistic choice that most districts can make.

Even if some districts wanted to choose the Department's first option, other practical realities may foreclose the possibility. Many state and local governments have already set their budgets based on the expectation that CARES Act funding could be used—as Congress intended—to backfill the cuts that state and local governments have made to all public school funding over the past several months.[7] State and local governments that have counted on being able to spend CARES Act funds on all public schools, not just Title I schools, would need to unwind their budgets to take advantage of the first option, and there is insufficient time to do so.

[7] *See, e.g.*, Press Release, *Gov. signs budget adjustment bill*, Office of the Governor (June 30, 2020), https://perma.cc/8HB7-RKH5 (New Mexico); Eric Stone, *Governor said federal relief would make up for an education veto. School officials say that's not the case*, KTOO (May 20, 2020), https://perma.cc/H4RW-SM3A (Alaska); *GaDOE FAQ on CARES Act & Other Federal COVID-19 Relief Bills*, at 2, Georgia Dep't of Education (May 4, 2020), https://perma.cc/3ZNG-NYN9 (Georgia); Melissa B. Taboada, *Why Texas schools won't get their $1.2 billion in federal coronavirus aid*, Statesman (June 12, 2020), https://perma.cc/JV3L-KM9M (Texas).

Even if the Interim Final Rule did give districts a reasonable choice, both options would produce outcomes that conflict with Congress's desire to provide swift emergency relief to districts to cope with the enormous burdens that the COVID-19 pandemic has imposed on schools, teachers, and students nationwide. The CARES Act reflects Congress's judgment that emergency resources should be delivered as quickly as possible to districts for K-12 education based on need—calculated either according to how heavily districts have been affected by the coronavirus, *see* CARES Act § 18002 (Governor's Emergency Education Fund), or according to the poverty-driven formulas of Title I, *see id.* § 18003 (Elementary and Secondary School Emergency Relief Fund). Those well-established formulas are designed to distribute financial assistance to those schools where it is most urgently needed to provide services to low-income and at-risk students—the very same students whose learning has been most imperiled by the ongoing disruptions of the COVID-19 pandemic. The conditions that the Interim Final Rule imposes under both of the Department's options obstruct Congress's purpose.

The Department cannot evade the constitutional limitations on its authority to condition federal funds by relying on *Dalton v. Specter*, 511 U.S. 462 (1994). *Dalton* does not stand for the sweeping proposition that any constitutional challenges to an executive action that is in excess of statutory authority are duplicative and therefore barred. It merely rejected the open-ended theory that "*whenever* the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Id*. at 471 (emphasis added). Here, the claim is not simply that the Department has exceeded its statutory authority; it is that the Department has directed that federal funds be spent in a manner contrary to the way in which Congress exercised its Spending Clause authority in the CARES Act. *Dalton* "do[es] not address situations in which the President exceeds his or her statutory authority, and in doing so, *also*

violates a specific constitutional prohibition." *Sierra Club v. Trump*, 963 F.3d 874, 890 (9th Cir. 2020).

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2020, the foregoing brief was electronically filed with the Court via the CM/ECF system, and that copies were served on all counsel of record by operation of the CM/ECF system on the same date.

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