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11  
12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**

14  
15 AMERICAN FEDERATION OF  
TEACHERS, CALIFORNIA  
16 FEDERATION OF TEACHERS, ISAI  
BALTEZAR, & JULIE CHO,

17 *Plaintiffs,*

18 vs.

19 ELISABETH DEVOS, *in her official*  
20 *capacity as Secretary of Education,* &  
21 UNITED STATES DEPARTMENT OF  
EDUCATION,

22 *Defendants.*

Case No.: 5:20-cv-455

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

[Administrative Procedure Act Case]

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## INTRODUCTION

1  
2           1.       The United States is facing a growing student debt crisis. The cost of  
3 college is rising. Student loan balances are rising. Student loan defaults are rising.  
4 Newspapers report almost daily about systemic failures by the companies that  
5 service student debt, mismanagement in the Public Service Loan Forgiveness  
6 program, and fraud and deceptive practices by for-profit colleges.

7           2.       Since at least 1965, with the passage of the Higher Education Act  
8 (“HEA”), the federal government has played a central role in our system of higher  
9 education. Each year, under Title IV of the HEA, Defendant United States  
10 Department of Education (the “Department”) provides billions of dollars in federal  
11 funding in the form of grants (*e.g.*, Pell Grants) and loans (*e.g.*, Federal Direct  
12 Loans) to help students pay for and finance programs of postsecondary education.

13           3.       As it created and expanded the Title IV student aid programs over  
14 time, Congress established numerous, common sense safeguards to ensure that  
15 federal funding did not go to institutions or programs that offer students and society  
16 minimal value. *See, e.g., Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d  
17 427, 433–34 (D.C. Cir. 2012) (“[S]chools receive the benefit of accepting tuition  
18 payments from students receiving federal financial aid, regardless of whether those  
19 students are ultimately able to repay their loans. Therefore, Congress codified  
20 statutory requirements in the HEA to ensure against abuse by schools.”). Congress  
21 also vested the Department with clear authority to promulgate regulations  
22 governing Title IV programs. *See, e.g., 20 U.S.C. §§ 1221e-3, 3474.*

23           4.       In 2014, the Department adopted regulations to implement one such  
24 statutory requirement, *i.e.*, that certain postsecondary institutions can only  
25 participate in Title IV programs (and serve as conduits for students to receive  
26 federal student loans and grants) with respect to educational programs that  
27 “prepare students for gainful employment in a recognized occupation.” *See Program*  
28 *Integrity: Gainful Employment*, 79 Fed. Reg. 64,890 (Oct. 31, 2014), *corrected by* 79

1 Fed. Reg. 71,957 (Dec. 4, 2014) (collectively, the “Gainful Employment Rule”). *See*  
2 *also infra* ¶ 70 (defining “gainful employment program”).

3 5. In 2015, the Gainful Employment Rule took effect and began  
4 benefiting students and taxpayers alike. The Gainful Employment Rule required  
5 institutions to certify compliance for all new gainful employment programs; the  
6 Department began testing existing programs to determine whether they were in  
7 compliance with the rule; and students began receiving disclosures required under  
8 the Gainful Employment Rule, as well as warnings if their programs were at risk of  
9 losing Title IV eligibility due to non-compliance with the rule. Critically, this meant  
10 that prospective and enrolled students could assess if a particular program would  
11 provide a reasonable return on investment (both financial and time).

12 6. Despite abundant evidence that the Gainful Employment Rule was  
13 benefitting prospective students, enrolled students, and taxpayers, on July 1, 2019,  
14 the Department issued a final rule eliminating it entirely. *See generally* Program  
15 Integrity: Gainful Employment, 84 Fed. Reg. 31,392 (July 1, 2019) (the “Repeal”).

16 7. The consequences of the Repeal are immense for prospective and  
17 enrolled students. The Department has admitted that because of the Repeal, “some  
18 students may choose sub-optimal programs” that “have demonstrated a lower  
19 return on the student’s investment, either through higher upfront costs, reduced  
20 earnings, or both.” 84 Fed. Reg. at 31,445. Similarly, as a direct result of the Repeal,  
21 according to the Department, students could have “greater difficulty in repaying  
22 loans, increasing the use of income-driven repayment plans or risking defaults and  
23 the associated stress, increased costs, and reduced spending and investment on  
24 other priorities.” 84 Fed. Reg. at 31,445.

25 8. The consequences are also immense for taxpayers. As the Department  
26 stated in proposing the Repeal, the “estimated net budget impact from the [Repeal]  
27 is \$5.3 billion cost [due] . . . primarily [to] the elimination of the ineligibility

28 ///

1 provision of the GE regulations.” Program Integrity: Gainful Employment, 83 Fed.  
2 Reg. 40,167, 40,180 (Aug. 14, 2018) (the “2018 NPRM”).

3 9. In issuing the Repeal, the Department has acted arbitrarily,  
4 capriciously, and not in accordance with law, all in violation of the Administrative  
5 Procedure Act (“APA”), 5 U.S.C. § 706. The Department has:

- 6 • Disregarded prior judicial holdings regarding the meaning of the HEA  
7 (Count 1);
- 8 • Conceded that it has no intention of implementing a statutory  
9 mandate (Count 2);
- 10 • Based the Repeal on its own view of higher education policy, which  
11 disregards the statutory requirements set by Congress regarding Title  
12 IV eligibility (Count 3);
- 13 • Failed to adequately explain its departure from prior factual  
14 assertions, consider obvious alternatives, and base the Repeal on  
15 substantial evidence (Counts 4–9);
- 16 • Taken positions that are undeniably inconsistent with positions it is  
17 taking in ongoing litigation in this District and in its approach to  
18 denying full debt relief to students who have been defrauded by  
19 predatory colleges (Count 10); *and*
- 20 • Failed to provide members of the public an adequate opportunity to  
21 comment on the proposed Repeal (Count 11).

22 10. It is rare for a federal agency to publish a rule that is so replete with  
23 errors, makes so many unsubstantiated assertions, and takes so many unlawful  
24 shortcuts. For these reasons, Plaintiffs file this necessarily lengthy complaint to  
25 describe the Department’s many failures in publishing the Repeal and seek a  
26 declaration that it violates the HEA and is arbitrary, capricious, and contrary to  
27 law. Plaintiffs also request an order vacating the Repeal in its entirety.

28 ///

**JURISDICTION AND VENUE**

1  
2 11. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal  
3 question jurisdiction) and 5 U.S.C. § 702 (the APA).

4 12. An actual controversy exists between the parties within the meaning of  
5 28 U.S.C. § 2201(a) and this Court may grant declaratory, injunctive, and other  
6 relief pursuant to 28 U.S.C. §§ 2201–2202 and 5 U.S.C. § 706.

7 13. INTRADISTRICT ASSIGNMENT: Pursuant to Civil Local Rule 3-2(c),  
8 assignment to the San Jose Division is appropriate because named plaintiff Isai  
9 Baltezar resides in Santa Cruz County, California and no exclusion to the rule  
10 applies.

11 **PARTIES**

12 14. Plaintiff American Federation of Teachers, AFL-CIO (“AFT”) is a  
13 membership organization representing 1.7 million Pre-K through 12th grade  
14 teachers, early childhood educators, paraprofessionals, and other school-related  
15 personnel; higher education faculty and professional staff; federal, state, and local  
16 government employees; and nurses and other healthcare professionals. Among  
17 AFT’s central purposes is to promote economic opportunity and education for  
18 students, their members, families, and communities.

19 15. As part of its organizational mission, AFT has long taken a leading  
20 role in fighting for the financial rights of public service workers, particularly when  
21 it comes to the cost of higher education and student loan debt.

22 16. For example, in 2016, AFT adopted a resolution highlighting the  
23 extent to which a “college education is one of the most important vehicles for  
24 economic and social mobility in the United States, for preparing students to fulfill  
25 their civic responsibilities, and for enabling students to achieve their dreams for  
26 themselves and their families.” As part of that resolution, AFT resolved that it

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1 would “continue to work . . . to hold for-profit educational institutions accountable  
2 for poor educational outcomes, fraudulent practices, and high student debt.”<sup>1</sup>

3 17. In 2016, AFT also published a report entitled *Regulating Too Big to*  
4 *Fail Education*, discussing the crisis in federal oversight of for-profit higher  
5 education. Among the findings in that report, AFT highlighted the extent to which  
6 more should be done to prevent mismanaged for-profit colleges from escaping the  
7 Department’s oversight.

8 18. AFT has long and consistently focused its attention on the Gainful  
9 Employment Rule.

10 19. For example, AFT submitted comments during the Department’s  
11 rulemakings on the 2011 and 2014 Gainful Employment Rules. AFT has spoken out  
12 publicly and to the media about the importance of the Gainful Employment Rule.<sup>2</sup>  
13 Indeed, in its 2012–2014 “State of the Union,” AFT referred to itself as a  
14 “knowledgeable voice and advocate in the framing of policy around gainful  
15 employment regulations that would protect students and veterans from the  
16 predatory recruitment practices of for-profit institutions.”

17 20. On July 10, 2017, AFT President Randi Weingarten testified at a  
18 public hearing at the Department, during which she highlighted, *inter alia*, the  
19 importance of the Gainful Employment Rule to AFT and its members:

20 The gainful employment regulation is about two things, transparency,  
21 providing students information, and second, stopping federal funding  
22 to programs that leave students with a mountain of debt and a  
23 worthless degree. AFT members teach in these programs that are  
subject to the gainful employment standards, and our members want  
them enforced. Why? Because we know the difference between the real  
educations that institutions provide and dead end make work [sic] that

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24 <sup>1</sup> AFT Resolution, The Fight Against Student Loan Debt and for Public  
25 Investment in Higher Education (2016), [https://www.aft.org/resolution/fight-  
against-student-loan-debt-and-public-investment-higher-education](https://www.aft.org/resolution/fight-against-student-loan-debt-and-public-investment-higher-education).

26 <sup>2</sup> See, e.g., Michael Stratford & Paul Fain, *Backed Into a Corner*, Inside Higher  
27 Educ. (May 7, 2014), [https://www.insidehighered.com/news/2014/05/07/gainful-  
employment-fight-profits-make-familiar-arguments-against-different-landscape](https://www.insidehighered.com/news/2014/05/07/gainful-employment-fight-profits-make-familiar-arguments-against-different-landscape).

1 bad actors in the sector do. Repealing the gainful employment  
2 regulation will cost the American people over \$1.3 billion over ten  
3 years, so why does the Department of Education want to do away with  
4 a rule that protects students' and taxpayers' investments in higher  
5 education? . . . The Department should protect students and taxpayers  
6 by rigorously enforcing the . . . the gainful employment rule. Abandon,  
7 please abandon the plans to delay, weaken, or otherwise roll back  
8 these regulations.<sup>3</sup>

9 21. AFT submitted comments in September 2018 in response to the  
10 proposed Repeal.

11 22. AFT brings this suit in an organizational capacity and on behalf of its  
12 members who are enrolled at, or who will soon enroll at, programs of study that are  
13 covered by the Gainful Employment Rule.

14 23. Plaintiff California Federation of Teachers (“CFT”) is a union of  
15 professionals affiliated with AFT. CFT comprises California’s 145 local unions  
16 chartered by the AFT. Through its local unions, CFT represents more than 120,000  
17 employees at educational institutions working at every level of public and private  
18 education, from Head Start to the University of California. CFT is committed to  
19 promoting high-quality education and securing the conditions necessary to provide  
20 the best services to California’s students.

21 24. As part of its mission, CFT has taken a leading role in fighting for the  
22 financial rights of public service workers, including when it comes to the growing  
23 cost of higher education and student debt.

24 25. CFT brings this suit on behalf of its members who are enrolled at, or  
25 will soon enroll at, programs of study that are covered by the Gainful Employment  
26 Rule.

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26 <sup>3</sup> See U.S. Dep’t of Educ., *Transcript of Public Hearing on Intent to Establish*  
27 *Negotiated Rulemaking Committees* 1, 46–48 (July 10, 2017), available at:  
28 <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/july10dchearingtranscript.docx>.

1           26. As a result of provisions in their collective bargaining contracts, AFT  
2 and CFT members may be eligible for salary or wage increases following the  
3 successful completion of higher education programs.

4           27. Plaintiff Isai Baltezar is a full-time fifth grade teacher at De La Vega  
5 Elementary School in Santa Cruz, California. He is a member of both AFT and CFT.  
6 Mr. Baltezar is a natural person who resides in Santa Cruz, California.

7           28. Mr. Baltezar is planning on applying to a certificate program in K-12  
8 School Administration in order to boost his earnings potential and move into an  
9 administrative leadership position in either his, or another, school. Mr. Baltezar is  
10 currently researching programs to apply to and hopes to enroll in such a program  
11 during 2020. Because of the cost of such programs, Mr. Baltezar is considering  
12 programs that will allow him to receive loans from the Department in order to  
13 finance his attendance.

14           29. Mr. Baltezar has researched numerous certificate programs offered by  
15 institutions of higher education in order to decide in which program to enroll. To  
16 assist him in comparing programs and making a decision, Mr. Baltezar is interested  
17 in reviewing and assessing information about the programs' completion and  
18 withdrawal dates; the programs' length; the number of clock or credit hours  
19 required by the various programs; the total number of students enrolled during the  
20 most recent award year; the loan repayment rate for students who enrolled,  
21 completed, and/or withdrew from the programs; the total cost of tuition and fees;  
22 the programs' job placement rates; the number of students receiving federal and  
23 private loans; the median loan debt for students who completed and/or withdrew  
24 from each program; the mean or median earnings for the same group within each  
25 program; annual earnings rates for each program; whether various programs meet  
26 professional licensure requirements in California; and whether each program is  
27 programmatically accredited.

28 ///

1           30. In particular, and in order to assist him in choosing a program, Mr.  
2 Baltezar is interested in information that would enable to him to compare the  
3 amount of debt incurred by program enrollees or graduates with their post-  
4 graduation incomes. Mr. Baltezar is similarly interested in information that would  
5 enable him to compare debt and earnings information from similar programs across  
6 institutions in order to help him make an informed decision about which program to  
7 enroll in. Mr. Baltezar is looking for this information because he is concerned about  
8 his ability to pay back any federal loans he incurs to help finance his education.

9           31. Mr. Baltezar is researching programs to apply to, and in which he may  
10 enroll, but he has been unable to locate any such information about the programs he  
11 is considering.

12           32. Mr. Baltezar does not know whether the programs he is considering  
13 provide training to their students that lead to earnings sufficient to allow students  
14 to pay back their student loan debts.

15           33. Mr. Baltezar does not know whether any program he is considering is  
16 at risk of losing eligibility to participate in the Title IV student loan programs  
17 because it is not providing a program of training that prepares students for gainful  
18 employment in a recognized occupation.

19           34. If Mr. Baltezar had access to this information, he would carefully  
20 review it. His review of that information would affect his decision to enroll in a  
21 particular program.

22           35. Plaintiff Julie Cho is a part-time university lecturer at the University  
23 of California at Irvine, where she teaches both Film and Media Studies and Asian  
24 American Studies. She is a member of both AFT and CFT. Ms. Cho is a natural  
25 person who resides in Irvine, California.

26           36. Ms. Cho is currently assessing a career change into either disability  
27 services counseling or teaching students with special needs. To facilitate such a  
28 change, she is actively considering enrolling in one of a number of postsecondary

1 programs, including certificate programs in Special Education or Special Education  
2 Psychology. Ms. Cho is researching programs to apply to and hopes to enroll during  
3 2020. Because of the cost of such programs, Ms. Cho is considering programs that  
4 will allow her to receive loans from the Department in order to finance her  
5 attendance.

6 37. Ms. Cho has researched numerous certificate programs offered by  
7 institutions of higher education in order to decide where to enroll. To assist her in  
8 comparing programs and making a decision, Ms. Cho is interested in reviewing and  
9 assessing information about the programs' completion and withdrawal dates; the  
10 programs' length; the number of clock or credit hours required by the various  
11 programs; the total number of students enrolled during the most recent award year;  
12 the loan repayment rate for students who enrolled, completed, and/or withdrew  
13 from the programs; the total cost of tuition and fees; the programs' job placement  
14 rates; the number of students receiving federal and private loans; the median loan  
15 debt for students who completed and/or withdrew from each program; the mean or  
16 median earnings for the same group within each program; annual earnings rates for  
17 each program; whether various programs meet professional licensure requirements  
18 in California; and whether each program is programmatically accredited.

19 38. In particular, and in order to assist her in choosing a program, Ms. Cho  
20 is interested in information that would enable to her to compare the amount of debt  
21 incurred by program enrollees or graduates with their post-graduation incomes. Ms.  
22 Cho is similarly interested in information that would enable her to compare debt  
23 and earnings information from similar programs across institutions in order to help  
24 her make an informed decision about which program to enroll in. Ms. Cho is looking  
25 for this information because she is concerned about her ability to pay back any  
26 federal loans she incurs to help finance her education.

27 ///

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1           39. Ms. Cho is researching programs to apply to, and in which she may  
2 enroll, but she has been unable to locate any such information about the programs  
3 she is considering.

4           40. Ms. Cho does not know whether the programs she is considering  
5 provide training to their students that lead to earnings sufficient to allow students  
6 to pay back their student loan debts.

7           41. Ms. Cho does not know whether any program she is considering is at  
8 risk of losing eligibility to participate in the Title IV student loan programs because  
9 it is not providing a program of training that prepares students for gainful  
10 employment in a recognized occupation.

11           42. If Ms. Cho had access to this information, she would carefully review  
12 it. Her review of such information would affect her decision to enroll in a particular  
13 program.

14           43. Plaintiffs Baltezar and Cho will be referred to as the “Individual  
15 Plaintiffs.”

16           44. The Repeal has injured and will continue to injure AFT members, CFT  
17 members, and Individual Plaintiffs who are actively considering whether to enroll  
18 in, or continue their enrollment in, programs of higher education that, but for the  
19 Repeal, would be required to make certain disclosures under the Gainful  
20 Employment Rule. Because of the Repeal, AFT members, CFT members, and  
21 Individual Plaintiffs will no longer receive these mandated disclosures, including  
22 about gainful employment programs’ completion rates, length, total cost, loan  
23 repayment rates, and job placement rates, as well as whether these programs  
24 satisfy certain state licensure or certification requirements.

25           45. The disclosure of this information would help AFT members, CFT  
26 members, and Individual Plaintiffs identify programs that offer credentials that  
27 potential employers recognize and value. Repealing these disclosures will reduce  
28 market information that will assist prospective and enrolled students and their

1 families in making critical decisions about their educational investments and the  
2 potential outcomes of those investments. Repealing these disclosures will also  
3 impair market information about gainful employment programs, decreasing the  
4 transparency of student outcomes for better decision making by prospective and  
5 enrolled students and their families, thereby leading to a less competitive  
6 marketplace that discourages self-improvement.

7       46. With the elimination of these disclosures, AFT members, CFT  
8 members, Individual Plaintiffs, and other interested members of the public  
9 (including family members of AFT members, CFT members, and Individual  
10 Plaintiffs) will have to seek out the information they need, and the information that  
11 interests them, to make critical decisions about the programs they are considering,  
12 rather than being provided the information they are entitled to receive under the  
13 Gainful Employment Rule.

14       47. The Gainful Employment Rule also includes eligibility sanctions that  
15 make certain programs ineligible participants in Title IV programs. Because of the  
16 elimination of these sanctions and the fact that non-passing programs remain  
17 accessible, AFT members, CFT members, Individual Plaintiffs, and other interested  
18 members of the public (including family members of AFT members, CFT members,  
19 and Individual Plaintiffs) are at risk of attending programs that are “sub-optimal.”  
20 These sub-optimal programs have demonstrated a lower return on students’  
21 investment, either through higher upfront costs, reduced earnings, or both.

22       48. Because of the Repeal, AFT members, CFT members, and Individual  
23 Plaintiffs are at higher risk of difficulty repaying loans and a higher risk of loan  
24 default.

25       49. Because of the Repeal, AFT members, CFT members, and Individual  
26 Plaintiffs are also at risk of being forced to reduce spending and investment on  
27 other priorities.

28 ///

1           50. Because of the Repeal, AFT members, CFT members, and Individual  
2 Plaintiffs will no longer receive required warnings that a gainful employment  
3 program is at risk of becoming ineligible to participate in Title IV programs during  
4 the next Title IV award year.

5           51. Because of the Repeal, AFT members, CFT members, and Individual  
6 Plaintiffs have a greater likelihood of making poor educational investments and  
7 decisions.

8           52. Because of the Repeal, AFT members, CFT members, and Individual  
9 Plaintiffs also face a substantial risk of incurring debt to attend programs of higher  
10 education without knowing that such programs fail to prepare students for gainful  
11 employment in a recognized occupation.

12           53. AFT also brings this suit in its organizational capacity.

13           54. The Department's issuance of the Repeal has caused AFT to divert its  
14 limited resources and alter its resource allocation from other mission-centric efforts  
15 toward increased outreach and education of its members. AFT's outreach and  
16 education focuses on members who are prospective and enrolled students in gainful  
17 employment programs who, but for the Department's Repeal, would be able to  
18 access critical information regarding these programs, including whether potential  
19 programs were failing to provide a program of training that prepares students for  
20 gainful employment in a recognized occupation.

21           55. AFT has devoted substantial financial resources to developing,  
22 organizing, staffing, and promoting student debt clinics across the nation that  
23 provide its members, and their family members, with, *inter alia*, information on  
24 student debt management, including information on enrollment in income-driven  
25 student loan repayment plans and Public Service Loan Forgiveness. AFT has also  
26 partnered with a social enterprise company called "Summer," which helps student  
27 loan borrowers navigate the loan repayment process by partnering with colleges

28 ///



1 and employers to help borrowers track their loans and enroll in the optimal  
2 repayment plan.

3 56. Prior to the Repeal, AFT's efforts regarding student debt focused  
4 largely on helping its members navigate the complicated loan repayment and  
5 forgiveness systems in order to manage their student debt effectively.

6 57. Because the Repeal leaves AFT members, including Individual  
7 Plaintiffs, at a substantially higher risk of incurring debt that they will be unable to  
8 repay, AFT has been forced to divert and devote its resources to activities that  
9 guard against the likely increase in members in need of counseling to remedy  
10 student debt-related problems. Part of AFT's response to counteract the effects of  
11 the Repeal has been to launch its #doyourhomework campaign (the "Campaign").

12 58. As part of the Campaign, AFT has developed and promoted a website  
13 that addresses the loss of information provided to prospective and enrolled students  
14 because of the Repeal. This website, <http://www.aftcontinuinged.org>, provides  
15 information relevant to choosing programs of higher education that are likely to  
16 lead to earnings that bear a relationship to the cost of the program and the amount  
17 of debt that students are likely to incur in order to pay for the program.

18 59. AFT has promoted this website to its members and staff on social  
19 media and through other electronic sources.

20 60. AFT has hosted webinars for its members and staff to learn more  
21 about the Campaign.

22 61. To develop the original content for this website and promote it to AFT  
23 members, AFT has diverted resources—including staff time and AFT funds—from  
24 other mission-centric activities that AFT undertakes for its members, including,  
25 without limitation, resources that otherwise would have been put towards activities  
26 to help its members navigate the complicated loan repayment and forgiveness  
27 systems in order to manage their student debt effectively. But for the Repeal, the

28 ///

1 costs that AFT devoted to the Campaign would have been spent on these other  
2 activities.

3 62. As part of the Campaign, AFT has also developed content for its local  
4 affiliates, including CFT, to use in webinars and other materials in order to educate  
5 their members on making quality choices regarding higher education programs.  
6 That content addresses how prospective and enrolled students can obtain  
7 information about programmatic costs, the amount of debt that students are likely  
8 to incur, and programmatic outcomes.

9 63. AFT has also encouraged its affiliates to consider collective bargaining  
10 proposals that require school districts to provide assistance to employees on how to  
11 choose the best programs of continuing education. AFT has similarly encouraged its  
12 affiliates to consider collective bargaining proposals that require school districts to  
13 provide additional training and resources for high school students and their families  
14 on the financial aid system in higher education.

15 64. Through these and other efforts, and because of the Repeal, AFT has  
16 diverted resources, including both financial resources and time of its staff, towards:  
17 (i) helping its members identify programs that—although granted eligibility by the  
18 Department—are not actually preparing students for gainful employment in a  
19 recognized occupation; (ii) promoting awareness among its members of the fact that  
20 certain programs of higher education may not prepare students for gainful  
21 employment in a recognized occupation; *and* (iii) helping members choose  
22 institutions and programs of higher education that lead to post-graduation or post-  
23 completion earnings that are commensurate with the cost of the program and/or the  
24 amount of debt incurred to attend.

25 65. Defendant Elisabeth (Betsy) DeVos is the Secretary of the United  
26 States Department of Education and is being sued in her official capacity. Her  
27 official address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

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1           66. Defendant United States Department of Education is an executive  
2 agency of the United States government and an agency of the United States within  
3 the meaning of the APA. The Department's principal address is 400 Maryland  
4 Avenue, S.W., Washington, D.C. 20202.

5           67. Defendant DeVos and Defendant United States Department of  
6 Education shall be collectively referred to as the "Defendants" or the "Department."

### 7                                       **FACTUAL ALLEGATIONS**

#### 8       **1. The Higher Education Act**

9           68. Each year, under Title IV of the HEA, the Department provides  
10 billions of dollars in federal funding in the form of grants and loans to help students  
11 pay for and finance programs of postsecondary education. *See generally* 20 U.S.C.  
12 § 1001 *et seq.*

13           69. Title IV funding does not flow directly to students. Rather, under the  
14 HEA, funding goes from the Department to an eligible institution of higher  
15 education, which must meet an array of statutory and regulatory requirements. For  
16 purposes of determining eligibility to participate in Title IV programs, institutions  
17 are classified into three categories: (i) "public or other nonprofit" institutions;  
18 (ii) proprietary institutions, which are private, for-profit institutions; and  
19 (iii) postsecondary vocational institutions, which may be either public or private,  
20 non-profit institutions. *See* HEA §§ 101–102, 20 U.S.C. §§ 1001–1002.

21           70. By definition, in order to be an eligible participant in Title IV  
22 programs, both a proprietary institution and a postsecondary vocational institution  
23 must provide "an eligible program of training to prepare students for gainful  
24 employment in a recognized occupation" (a "gainful employment program"). HEA  
25 § 102(b)(1)(A)(i), (c)(1)(A), 20 U.S.C. § 1002(b)(1)(A)(i), (c)(1)(A). By definition, in  
26 order to be an eligible participant in Title IV programs, public and private non-  
27 profit institutions that are not reliant on being a postsecondary vocational  
28 institution must provide either: (i) an associate, bachelor's, graduate, or professional

1 degree; (2) at least a two-year program that is acceptable for full credit toward a  
2 bachelor's degree; or (3) at least a one-year training program that leads to a degree  
3 or certificate (or other recognized educational credential) and is a gainful  
4 employment program. HEA § 101(a)–(b), 20 U.S.C. § 1001(a)–(b). Taken together,  
5 these provisions establish the criteria for determining which programs (*i.e.*, “gainful  
6 employment programs” or “GE programs”) must “prepare students for gainful  
7 employment in a recognized occupation” in order for students who attend those  
8 programs to be the beneficiaries of federal student loans and grants. *See also* 34  
9 C.F.R. § 668(c)–(d) (defining eligible programs).<sup>4</sup>

## 10 2. The 2011 Gainful Employment Rule

11 71. For decades, the Department left the statutory phrase “prepare  
12 students for gainful employment in a recognized occupation” undefined, thereby  
13 leaving undefined what it means to be a “gainful employment program.”

14 72. By 2011, however, the Department recognized “growing concerns about  
15 unaffordable levels of loan debt for students” who attended gainful employment  
16 programs. *See, e.g.*, Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616,  
17 43,619 (July 26, 2010); Program Integrity: Gainful Employment–Debt Measures, 76  
18 Fed. Reg. 34,386, 34,392 (June 13, 2011) (recognizing in 2011 that the rules  
19 “address harms to students that were identified by the [Government Accountability  
20 Office] and were identified in the public hearings and in comments submitted in  
21 response to the program regulations”). At that same time, the Department also  
22 recognized that “significant advances in electronic reporting and analysis . . .  
23 allow[ed] [it] to collect accurate and timely data that could not have been utilized in  
24 the past.” 76 Fed. Reg. at 34,392–93. This, the Department reasoned, created a new

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25  
26 <sup>4</sup> This provision of the Department’s regulations, 34 C.F.R. § 668.8(c)–(d),  
27 predates the adoption of the Gainful Employment Rule and took effect in 1994. *See*  
28 58 Fed. Reg. 22,348–01, 1994 WL 155008 (Apr. 29, 1994).

In addition, except as specifically alleged, all references to the Code of  
Federal Regulations are to the version effective July 1, 2019.

1 ability to “provide the Department, students, and the institutions offering these  
2 programs with information about how well the programs are performing under the  
3 measures,” 76 Fed. Reg. at 34,392–93, and thus enabled the Department to create a  
4 metrics-based approach to define what it means for a program to prepare students  
5 for gainful employment in a recognized occupation.

6         73. On May 26, 2009, the Department announced it would convene a  
7 negotiated rulemaking committee, as required by 20 U.S.C. § 1098a, to develop  
8 regulations regarding program integrity in Title IV programs, including regulations  
9 regarding preparing students for gainful employment in a recognized occupation.  
10 Negotiated Rulemaking Committees: Establishment, 74 Fed. Reg. 24,728 (May 26,  
11 2009). On September 9, 2009, the Department established that committee. Office of  
12 Postsecondary Education; Notice of Negotiated Rulemaking for Programs  
13 Authorized Under Title IV of the Higher Education Act of 1965, as Amended, 74  
14 Fed. Reg. 46,399 (Sept. 9, 2009). After that committee failed to reach consensus on  
15 proposed rules, the Department published its own proposal. *See* Program Integrity  
16 Issues, 75 Fed. Reg. 34,806 (June 18, 2010) (proposing reporting and disclosure  
17 regulations); Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616 (July 26,  
18 2010) (proposing measures for determining whether certain postsecondary  
19 educational programs lead to gainful employment in recognized occupations and the  
20 conditions under which these educational programs remain eligible for the student  
21 financial assistance programs authorized under Title IV of the HEA).

22         74. In final rules published in 2010 and 2011, the Department established  
23 a series of reporting and disclosure requirements for gainful employment programs,  
24 a “program approval” rule whereby a school must notify the Secretary at least  
25 ninety days before the first day of class when it intends to add an educational  
26 program that prepares students for gainful employment in a recognized occupation,  
27 and a framework to assess whether a program provides training that leads to  
28 gainful employment in a recognized occupation, as measured by factors consisting of

1 debt-to-earnings ratios of a program’s graduates and the loan repayment rates for  
2 students who attended a program. *See* Program Integrity: Gainful Employment—  
3 New Programs, 75 Fed. Reg. 66,665 (Oct. 29, 2010); Program Integrity Issues, 75  
4 Fed. Reg. 66,832 (Oct. 29, 2010); Program Integrity: Gainful Employment—Debt  
5 Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (collectively, the “2011 GE Rule”). At  
6 that time, the Department stated that “[a]dopting a definition now gives meaning to  
7 an undefined statutory term, thereby fulfilling the Department’s duty to enforce the  
8 provisions of the HEA in a clear and meaningful way.” 76 Fed. Reg. at 34,393.

9         75. Under the 2011 GE Rule, an educational program was “considered to  
10 provide training that leads to gainful employment in a recognized occupation” if the  
11 relevant cohort of students met certain eligibility metrics, namely: (i) a loan  
12 repayment rate of at least thirty-five percent; or (ii) the program’s annual loan  
13 payment was less than or equal to thirty percent of discretionary income *or* twelve  
14 percent of annual earnings; or (iii) the data needed to make these determinations  
15 was not available. *See* 76 Fed. Reg. at 34,448 (codified at 34 C.F.R. § 668.7(a)).

16         76. The 2011 GE Rule set consequences for programs that did not meet the  
17 eligibility metrics, including requiring institutions to issue warnings to enrolled and  
18 prospective students for programs that fail once, 76 Fed. Reg. at 34,452 (codified at  
19 34 C.F.R. § 668.7(j)(1)), or that fail two consecutive years or two out of three  
20 consecutive years, 76 Fed. Reg. at 34,452 (codified at 34 C.F.R. § 668.7(h)(2)). Under  
21 the 2011 GE Rule, a failing program would become ineligible if it did not meet any  
22 of the minimum eligibility requirements for three out of the four most recent fiscal  
23 years. 76 Fed. Reg. at 34,452 (codified at 34 C.F.R. § 668.7(i)).

### 24 **3. Legal Challenges to the 2011 Gainful Employment Rule**

25         77. After the 2011 GE Rule was published, the Association of Private  
26 Sector Colleges and Universities (“APSCU”) filed suit under the APA, advancing a  
27 number of arguments as to why the 2011 GE Rule was unlawful. *See generally*  
28 *Compl., Ass’n of Private Sector Colls. & Univs. v. Duncan*, 870 F. Supp. 2d. 133

1 (D.D.C. 2012) (No. 1:11-cv-01314-RC) (“*APSCU I*”). Some of those arguments are  
2 relevant to whether the rationales that the Department has advanced to justify the  
3 Repeal do, in fact, satisfy the APA.

4 78. APSCU first argued that the eligibility metrics exceeded the  
5 Department’s statutory authority under the *Chevron* framework. In this regard,  
6 APSCU asserted that the term “gainful employment” meant “a job that pays” and  
7 that “the Department’s attempt to define the phrase in terms of debt and income . . .  
8 exceed[ed] its statutory authority.” *APSCU I*, 870 F. Supp. 2d at 145. In response,  
9 the Department asserted that “Congress did not provide a precise definition of what  
10 it means to ‘prepare students for gainful employment in a recognized occupation.’”  
11 *Id.* The Department also argued that “the operative statutory phrase [wa]s not  
12 simply ‘gainful employment[,]’ but rather ‘gainful employment in a recognized  
13 occupation.’” *Id.* at 145–46. The Department further stated that the phrase “gainful  
14 employment in a recognized occupation” was “ambiguous.” *Id.* at 146.

15 79. In *APSCU I*, the District Court upheld aspects of the 2011 GE Rule  
16 and vacated others. In doing so, the District Court held: (1) “the relevant statutory  
17 command is that a given program ‘prepare students for gainful employment in a  
18 recognized occupation,’” *id.* at 146; (2) that phrase is ambiguous insofar as “[t]he  
19 means of determining whether a program ‘prepare[s] students for gainful  
20 employment in a recognized occupation’ is a considerable gap, which the  
21 Department has promulgated rules to fill,” *id.* at 146; (3) the 2011 GE regulations  
22 “are a reasonable interpretation of an ambiguous statutory command,” *id.* at 149;  
23 (4) both the disclosure requirements and the debt-to-earnings component of the  
24 eligibility metrics were lawfully promulgated and supported, *id.* at 154–56; and  
25 (5) the Department had not provided a reasonable explanation for the repayment  
26 rate component of the eligibility metrics, thus acting arbitrarily and capriciously, *id.*  
27 at 153–54.

28 ///

1           80. In *APSCU I*, because the repayment rate metric could “not be severed  
2 from the other debt metrics,” which, in turn, could not be severed from the reporting  
3 requirements, the District Court vacated the eligibility metrics in their entirety,  
4 along with the associated reporting requirements. *Id.* at 154–57.

5           81. The Department subsequently moved to amend the holding of *APSCU*  
6 *I* with respect to the reporting requirements and portions of the debt measures.  
7 That motion was denied. *See generally Ass’n of Private Sector Colls. & Univs. v.*  
8 *Duncan*, 930 F. Supp. 2d 210 (D.D.C. 2013) (“*APSCU II*”).

#### 9   4. The 2014 Gainful Employment Rule

10           82. Following the decisions in *APSCU I* and *APSCU II*, the Department  
11 restarted the regulatory process.

12           83. On March 25, 2014, the Department issued a notice of proposed  
13 rulemaking that noted, *inter alia*, “growing concerns about educational programs  
14 that, as a condition of eligibility for [T]itle IV, HEA program funds, are required by  
15 statute to provide training that prepares students for gainful employment in a  
16 recognized occupation (GE programs), but instead are leaving students with  
17 unaffordable levels of loan debt in relation to their earnings, or leading to default.”  
18 Program Integrity: Gainful Employment, 79 Fed. Reg. 16,426 (Mar. 25, 2014) (the  
19 “2014 NPRM”).

20           84. Following a period of public comment, the Department published the  
21 Gainful Employment Rule on October 31, 2014. At that time, the Department stated  
22 that it was “concerned that a number of GE programs: (1) do not train students in  
23 the skills they need to obtain and maintain jobs in the occupation for which the  
24 program purports to provide training, (2) provide training for an occupation for  
25 which low wages do not justify program costs, and (3) are experiencing a high  
26 number of withdrawals or ‘churn’ because relatively large numbers of students  
27 enroll but few, or none, complete the program, which can often lead to default.” 79  
28 Fed. Reg. at 64,890. The Department further stated that it was “also concerned



1 about the growing evidence, from Federal and State investigations and *qui tam*  
2 lawsuits, that many GE programs are engaging in aggressive and deceptive  
3 marketing and recruiting practices. As a result of these practices, prospective  
4 students and their families are potentially being pressured and misled into critical  
5 decisions regarding their educational investments that are against their interests.”  
6 79 Fed. Reg. at 64,890.

7 85. To address these and other concerns, the Gainful Employment Rule  
8 defined what it means to “prepare students for gainful employment in a recognized  
9 occupation,” and, in doing so, established two key “frameworks:” an “Accountability  
10 Framework” and a “Transparency Framework.” 79 Fed. Reg. at 64,890.

#### 11 **4.1 The Gainful Employment Definition**

12 86. The Gainful Employment Rule provides that a “program provides  
13 training that prepares students for gainful employment in a recognized occupation  
14 if the program” satisfies applicable certification requirements and “is not an  
15 ineligible program” under an aspect of the Accountability Framework known as the  
16 “D/E Rates Measure.” 34 C.F.R. § 668.403(a); *see also infra* ¶¶ 101–110 (describing  
17 the D/E Rates Measure).

18 87. The Gainful Employment Rule defined a “gainful employment  
19 program” as an educational program offered by an institution under 34 C.F.R.  
20 § 668.8(c)(3) or (d) and identified by a combination of: (i) the institution’s six-digit  
21 Office of Postsecondary Education ID (“OPEID”) number; (ii) the program’s six-digit  
22 CIP code, *see infra* ¶¶ 91–96, as assigned by the institution or determined by the  
23 Secretary; and (iii) the program’s credential level. 34 C.F.R. § 668.402.

24 88. The Department’s regulations at 34 C.F.R. § 668.8(c)(3) provide that  
25 one type of program offered by non-profit and public universities that is eligible to  
26 participate in Title IV is “a one-academic year [or more] training program that leads  
27 to a certificate, or other nondegree recognized credential, and *prepares students for*  
28 *gainful employment in a recognized occupation.*” *Id.* (emphasis added).

1           89. The Department’s regulations at 34 C.F.R. § 668.8(d) provide that to be  
2 eligible for Title IV, with a limited exception, *see id.* § 668.8(d)(4), a “program  
3 provided by a proprietary institution of higher education or postsecondary  
4 vocational institution” must provide “training that *prepares a student for gainful*  
5 *employment in a recognized occupation.*” *Id.* (emphasis added).

6           90. The regulatory distinction in 34 C.F.R. § 668.8—between non-profit  
7 and public schools in subsection (c) and proprietary (or for-profit) schools in  
8 subsection (d)—reflects distinctions in the HEA. *See supra* at ¶ 70.

9           91. The six-digit CIP code is a “taxonomy of instructional program  
10 classifications and descriptions developed by the U.S. Department of Education’s  
11 National Center for Education Statistics [(“NCES”).” 34 C.F.R. § 668.402 (defining  
12 “[c]lassification of instructional program (CIP) code”).

13           92. CIP codes can be two, four, or six digits. As described by NCES, the  
14 six-digit CIP code is the “most detailed” classification of postsecondary programs  
15 and “represent[s] specific instructional programs.” Nat’l Ctr. For Educ. Statistics,  
16 *Introduction to the Classification of Instructional Programs: 2010 Edition (CIP-*  
17 *2010)* 1, 2 (2010), [https://nces.ed.gov/ipeds/cipcode/Files/Introduction\\_CIP2010.pdf](https://nces.ed.gov/ipeds/cipcode/Files/Introduction_CIP2010.pdf).

18           93. NCES has also described the six-digit CIP code as the “basic unit of  
19 analysis used by NCES and institutions in tracking and reporting program  
20 completions and fields of study data.” *Id.* In contrast, four-digit CIP codes represent  
21 only “intermediate groupings” of similar programs. *Id.*

22           94. By way of example only, the four-digit CIP code 13.04 corresponds to  
23 programs that are for “Educational Administration and Supervision.” Within that  
24 category, however, the six-digit CIP codes further classify<sup>5</sup> programs into fourteen  
25 subcategories at a more granular level of specialty:

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26  
27           <sup>5</sup> Nat’l Ctr. for Educ. Statistics, *IPEDS Detail for CIP Code 13.04*,  
28 <https://nces.ed.gov/ipeds/cipcode/cipdetail.aspx?y=56&cipid=90415>.

1	13.0401	Educational Leadership and Administration, General
2	13.0402	Administration of Special Education
3	13.0403	Adult and Continuing Education Administration
4	13.0404	Educational, Instructional, and Curriculum Supervision
5	13.0406	Higher Education/Higher Education Administration
6	13.0407	Community College Administration
7	13.0408	Elementary and Middle School Administration/Principalship
8	13.0409	Secondary School Administration/Principalship
9	13.0410	Urban Education and Leadership
10	13.0411	Superintendency and Educational System Administration
11	13.0412	International School Administration/Leadership
12	13.0413	Education Entrepreneurship
13	13.0414	Early Childhood Program Administration
14	13.0499	Educational Administration and Supervision, Other

15 95. Similarly, the four-digit CIP code 13.13 corresponds to programs that  
 16 are for “Teacher Education and Professional Development, Specific Subject Areas.”  
 17 Within that category, however, the six-digit CIP codes further classify<sup>6</sup> programs  
 18 into forty subcategories at a more granular level of specialty:  
 19

20	13.1301	Agricultural Teacher Education
21	13.1302	Art Teacher Education
22	13.1303	Business and Innovation/Entrepreneurship Teacher Education
23	13.1304	Driver and Safety Teacher Education
24	13.1305	English/Language Arts Teacher Education
25	13.1306	Foreign Language Teacher Education
26	13.1307	Health Teacher Education
27	13.1308	Family and Consumer Sciences/Home Economics Teacher Education
28	13.1309	Technology Teacher Education/Industrial Arts Teacher Education
	13.1310	Sales and Marketing Operations/Marketing and Distribution Teacher Education
	13.1311	Mathematics Teacher Education
	13.1312	Music Teacher Education
	13.1314	Physical Education Teaching and Coaching
	13.1315	Reading Teacher Education

<sup>6</sup> Nat'l Ctr. for Educ. Statistics, *IPEDS Detail for CIP Code 13.13*,  
<https://nces.ed.gov/ipeds/cipcode/cipdetail.aspx?y=56&cipid=90457>.

1	13.1316	Science Teacher Education/General Science Teacher Education
2	13.1317	Social Science Teacher Education
3	13.1318	Social Studies Teacher Education
4	13.1319	Technical Teacher Education
5	13.1320	Trade and Industrial Teacher Education
6	13.1321	Computer Teacher Education
7	13.1322	Biology Teacher Education
8	13.1323	Chemistry Teacher Education
9	13.1324	Drama and Dance Teacher Education
10	13.1325	French Language Teacher Education
11	13.1326	German Language Teacher Education
12	13.1327	Health Occupations Teacher Education
13	13.1328	History Teacher Education
14	13.1329	Physics Teacher Education
15	13.1330	Spanish Language Teacher Education
16	13.1331	Speech Teacher Education
17	13.1332	Geography Teacher Education
18	13.1333	Latin Teacher Education
19	13.1334	School Librarian/School Library Media Specialist
20	13.1335	Psychology Teacher Education
21	13.1337	Earth Science Teacher Education
22	13.1338	Environmental Teacher Education
23	13.1339	Communication Arts and Literature Teacher Education
24	13.1399	Teacher Education and Professional Development, Specific Subject Areas, Other.

25 96. In 2014, the Department recognized that using a six-digit CIP code to  
 26 define “gainful employment programs” would yield a different result than if the  
 27 Department used a four-digit CIP code. For example, the Department stated that  
 28 “about 32 percent of students in in-person zone and failing programs will not have  
 nearby transfer options to an in-person program with the same six-digit CIP code  
 and credential level. This decreases to about 10 percent when in-person programs in  
 the same four-digit CIP code are included.” 79 Fed. Reg. at 65,074. Understanding  
 the difference—and the result of the difference—between defining programs at a  
 six-digit level, as opposed to a four-digit level, the Department chose to define what  
 constitutes a “gainful employment program” at the six-digit CIP code level.

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## 4.2 The Accountability Framework

97. The Accountability Framework created a process by which an institution establishes a gainful employment program's initial eligibility for Title IV participation (the "Certification Requirement"), as well as a process by which the Department determines whether a program can remain eligible to participate (the "Eligibility Metrics").

98. The Certification Requirement mandates that an institution establish the eligibility of a GE program by certifying, among other things, that the program is included in the institution's accreditation, satisfies applicable state or federal program-level accrediting requirements, and satisfies any state licensing or certification requirements for the occupations for which the program is designed to prepare students to enter. *See* 34 C.F.R. § 668.414. With respect to institutions offering programs that were already in existence, the Department established a "[t]ransitional certification," whereby institutions had to provide certifications of compliance to the Department as to each of the programs currently considered eligible. *Id.* § 668.414(a).

99. The Department noted in 2014 that the Certification Requirement, in addition to requiring institutions to provide certain information to the Department, "creat[ed] an enforcement mechanism for the Department to take action if a required approval [was] lost, or if a certification that was provided was false." 79 Fed. Reg. at 64,989. The Department also noted that these requirements had "minimal" burden on institutions and that "any burden [wa]s outweighed by the benefits of the requirements[,] which . . . will help ensure that programs meet minimum standards for students to obtain employment in the occupations for which they receive training." 79 Fed. Reg. at 64,989.

100. The Department referred to the Certification Requirement as an "independent pillar of the accountability framework . . . that complement[s] the metrics-based standards." 79 Fed. Reg. at 64,990.

1           101. In 2014, the Department also established the Eligibility Metrics to tie  
2 the continued eligibility of a GE program to the amount of debt students who  
3 completed the program incurred to attend that program in comparison to those  
4 same students' discretionary and annual earnings after completion.

5           102. The Eligibility Metrics establish thresholds that a program has to meet  
6 in order to remain eligible to participate in Title IV programs. The thresholds are  
7 premised on the debt-to-earnings rate or "D/E rates measure," which establishes a  
8 formula for calculating both the "annual earnings rate" and the "discretionary  
9 income rate."

10           103. The annual earnings rate was calculated as follows: "annual loan  
11 payment / the higher of the mean or median annual earnings." 34 C.F.R.  
12 § 668.404(a)(2).

13           104. The discretionary income rate was calculated as follows: "annual loan  
14 payment / (the higher of the mean or median annual earnings – (1.5 x Poverty  
15 Guideline[s])). 34 C.F.R. § 668.404(a)(1).

16           105. The "annual loan payment" is a component of both the discretionary  
17 income rate and the annual earnings rate calculations, the precise determination of  
18 which is subject to a methodology set forth in 34 C.F.R. § 668.404(b). That section  
19 sets out a process by which the median loan debt for a program is amortized over a  
20 period of time, the length of which is set in coordination with the type of program  
21 for which the debt was incurred (*i.e.*, ten years for a program that leads to certain  
22 certificates or associate degrees, fifteen years for programs that lead to bachelor's or  
23 master's degrees, and twenty years for programs that lead to a doctoral or first  
24 professional degree). 34 C.F.R. § 668.404(b)(2)(i).

25           106. The amortization of the median loan debt uses an interest rate that is  
26 the average of the annual statutory interest rates on federal Direct unsubsidized  
27 loans in effect during a specific period of time. 34 C.F.R. § 404(b)(2)(ii). The length  
28 of this period is set in coordination with the type of program for which the debt was

1 incurred (*i.e.*, three years for a program that leads to certain certificates, an  
2 associate degree, or a master’s degree and six years for programs that lead to a  
3 bachelor’s, doctoral, or first professional degree). The interest rate also depends on  
4 whether the loans were incurred with respect to graduate or undergraduate  
5 education.

6 107. Under the Eligibility Metrics, a program is considered passing if: (i) its  
7 annual earnings rate is less than or equal to eight percent; *or* (ii) its discretionary  
8 income rate is less than or equal to twenty percent. 34 C.F.R. § 668.403(c)(1).

9 108. Under the Eligibility Metrics, a program is considered failing if: (i) its  
10 annual earnings rate is greater than twelve percent or the denominator of the  
11 annual earnings rate is zero; *and* (ii) its discretionary income rate is greater than  
12 thirty percent (or the “income for the denominator of the [discretionary earnings  
13 rate] is negative or zero”). 34 C.F.R. § 668.403(c)(2).

14 109. Under the Eligibility Metrics, a program is considered “in the zone” if  
15 it is not a passing program and: (i) its annual earnings rate is greater than eight  
16 percent, but less than or equal to twelve percent; *or* (ii) its discretionary income rate  
17 is greater than twenty percent, but less than or equal to thirty percent. 34 C.F.R.  
18 § 668.403(c)(3).

19 110. Under the Accountability Framework, a GE program becomes  
20 ineligible if either: (i) it fails the Eligibility Metrics for two out of three consecutive  
21 years for which the program’s D/E rates are calculated; *or* (ii) has a combination of  
22 in the zone and failing D/E rates for four consecutive award years for which the  
23 program’s D/E rates are calculated. 34 C.F.R. § 668.403(c)(4).

24 111. Except as provided elsewhere in the Department’s regulations, “an  
25 institution may not disburse [T]itle IV, HEA program funds to students enrolled in  
26 an ineligible program.” 34 C.F.R. § 668.410(b)(1).

27 112. The Department “engaged in a thorough rulemaking process before  
28 promulgating its debt-to-earnings regulations” and the “final rule is replete with

1 explanations for the chosen metrics.” *Ass’n of Private Sector Colls. & Univs. v.*  
 2 *Duncan*, 110 F. Supp. 3d 176, 190–91 (D.D.C. 2015) (“*APSCU III*”).

3 113. As part of the Accountability Framework, an institution is required to  
 4 provide a warning to enrolled and prospective students if the Secretary notifies that  
 5 institution that one of its GE programs could become ineligible during the following  
 6 award year, based on its final D/E rates measure. 34 C.F.R. § 668.410(a). The  
 7 regulations include provisions regarding the content of these warnings, the  
 8 language (*i.e.*, alternatives to English) to use in making these warnings, and the  
 9 means of delivery to both prospective and enrolled students. 34 C.F.R.  
 10 § 668.410(a)(2)–(6).

11 114. In 2014, the Department stated that such a warning was “essential”  
 12 for students and would provide “currently enrolled students with important  
 13 information about program outcomes and the potential effect of those outcomes on  
 14 the program’s future eligibility for [T]itle IV, HEA program funds.” 79 Fed. Reg. at  
 15 64,964. The Department further highlighted how the “warnings will provide  
 16 consumers with information of the kind that Congress has already determined  
 17 necessary to make an ‘informed judgment about the educational benefits available  
 18 at a given institution.’” 79 Fed. Reg. at 64,967 (quoting Student Right-To-Know and  
 19 Campus Security Act, Pub. L. No. 101-542, § 102, 104 Stat. 2381 (1990)).

#### 20 **4.2.1 The Department Cited Substantial Support for the Eight Percent Annual** 21 **Earnings Threshold**

22 115. The Department noted in the Gainful Employment Rule that the eight  
 23 percent threshold in the Eligibility Metrics “has long been referred to as a limit for  
 24 student debt burden” and that “[s]everal studies of student debt have accepted the 8  
 25 percent standard.” 79 Fed. Reg. at 64,919. Specifically, the Department cited to the  
 26 following sources:

- 27 • Keith Greiner, *How Much Student Loan Debt Is Too Much?*, 26 J. of  
 28 Student Fin. Aid 1, 7–19 (1996) (cited at 79 Fed. Reg. at 64,919 n.100);



- 1 • Patricia M. Scherschel, *Student Indebtedness: Are Borrowers Pushing*  
2 *the Limits?*, USA Group Found. (Nov. 1998) (cited at 79 Fed. Reg. at  
3 64,919 n.101);
- 4 • Steven A. Harrast, *Undergraduate Borrowing: A Study of Debtor*  
5 *Students and their Ability to Retire Undergraduate Loans*, 34 J. of  
6 Student Fin. Aid 1, 21–37 (2004) (cited at 79 Fed. Reg. at 64,919  
7 n.102); and
- 8 • Tracey King & Ivan Frishberg, *Big Loans, Bigger Problems: A Report*  
9 *on the Sticker Shock of Student Loans*, The State PIRG’s Higher  
10 Education Project (Mar. 2001), available at:  
11 [www.pirg.org/highered/highered.asp?id2=7973](http://www.pirg.org/highered/highered.asp?id2=7973) (cited at 79 Fed. Reg. at  
12 64,919 n.103).

13 116. The Department also cited to the fact that, in 1986, the National  
14 Association of Student Financial Aid Administrators identified eight percent of  
15 gross income as a limit for excessive debt burden. 79 Fed. Reg. at 64,919 n.104 &  
16 accompanying text.

17 117. In addition, the Department cited a study by Sandy Baum and Marie  
18 O’Malley that determined that borrowers typically feel overburdened when the  
19 debt-to-earnings ratio is in excess of eight percent. 79 Fed. Reg. at 64,919 n.105 &  
20 accompanying text.

21 118. The Department also responded to comments suggesting that “the  
22 paper by [Sandy] Baum and [Saul] Schwartz that [the Department] rel[ies] on for  
23 support of the 20 percent discretionary income rate threshold rejects the 8 percent  
24 annual earnings rate threshold and that for this reason, a higher threshold for the  
25 annual earnings rate is more appropriate.” 79 Fed. Reg. at 64,919 n.106 &  
26 accompanying text. The Department considered this comment and noted that Baum  
27 and Schwartz “specifically acknowledge the widespread acceptance of the 8 percent  
28 standard and conclude that, although it is not as precise as a standard based on a

1 function of discretionary earnings, it is ‘not . . . unreasonable.’” 79 Fed. Reg. at  
2 64,919 n.107 & accompanying text (ellipses in original). The Department also noted  
3 that Baum and Schwartz “recommend[ed] a sliding scale limit for debt-to-earnings,  
4 based on the level of discretionary earnings, that results in a ‘maximum Debt-  
5 Service Ratio’ standard generally stricter than 8 percent.” 79 Fed. Reg. at 64,919.

6 119. In adopting the eight percent annual earnings threshold, the  
7 Department likewise looked to guidance from financial regulators regarding the size  
8 of debt service payments for non-mortgage debt, specifically noting that the Federal  
9 Housing Administration’s underwritings standards set total debt at an amount not  
10 exceeding forty-three percent of annual income. The Department further noted that,  
11 with housing debt comprising thirty-one percent of total income, twelve percent  
12 would be left for all other debt, including student loan debt, car loans, and other  
13 consumer debt. 79 Fed. Reg. at 64,919 n.109 & accompanying text. The Department  
14 then highlighted how eight percent was an appropriate standard because it fell  
15 “reasonably within the 12 percent of gross income attributable to non-housing debt  
16 under current lending standards, as well as the 9.75 percent of gross income  
17 attributable to non-credit card debt.” 79 Fed. Reg. at 64,919 n.109 & accompanying  
18 text.

19 120. The Department’s reliance on these studies vis-à-vis the eight percent  
20 threshold were also consistent with the characterization of that figure by Baum and  
21 Schwartz, who, in their paper cited by the Department, noted that “[a] number of  
22 other studies have also accepted the 8 percent rule, either explicitly or implicitly.”  
23 Sandy Baum & Saul Schwartz, *How Much Debt is Too Much? Defining Benchmarks*  
24 *for Managing Student Debt*, College Board 1, 2 (2006), available at:  
25 <https://files.eric.ed.gov/fulltext/ED562688.pdf>.

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#### 4.2.2 The Department Cited Substantial Support for the Twenty Percent Discretionary Income Threshold

121. The Department based its support for the twenty percent discretionary income threshold on a 2006 study in which Baum and Schwartz proposed a benchmark for a manageable debt level of not more than twenty percent of discretionary income. 79 Fed. Reg. at 64,919 (highlighting that Baum and Schwartz “proposed that borrowers have no repayment obligations that exceed 20 percent of their income, a level they found to be unreasonable under virtually all circumstances”).

122. The Department had previously relied upon the Baum and Schwartz study in promulgating the 2011 GE Rule, when it increased the twenty-percent measure by fifty percent (from twenty to thirty percent) in order to make certain that a program’s debt levels were not excessive. In *APSCU I*, the District Court held that the discretionary income threshold from the 2011 GE Rule was “based upon expert studies and industry practice—objective criteria upon which the Department could reasonably rely.” 870 F. Supp. 2d at 153.

123. In 2014, the Department eliminated that fifty-percent buffer and instead created a “three-tier pass, zone, fail construction” to “make it unnecessary to create [a] buffer by raising the passing thresholds.” 79 Fed. Reg. at 64,920.

#### 4.2.3 The Department Considered Alternative Metrics

124. The Department considered numerous alternative eligibility metrics in 2014. *See* 79 Fed. Reg. at 64,912 (including a section entitled “Alternative Metrics”).

125. In the 2014 NPRM, the Department proposed to include an eligibility metric *in addition* to the D/E rates measure—the “pCDR measure” or the program-level cohort default rate—which examines the rate at which borrowers who previously enrolled in the program default” on their federal student loans. 79 Fed. Reg. at 16,540. Unlike the D/E rates measure, the pCDR measure was designed to “evaluate the default rate of former students enrolled in a GE program, regardless

1 of whether they completed the program.” 79 Fed. Reg. at 16,540. As the Department  
2 stated in 2014, the pCDR measure applied to “those programs that have relatively  
3 high enrollments but no or few completions such that students are left with debt  
4 they cannot repay.” 79 Fed. Reg. at 16,442.

5 126. The 2014 NPRM proposed that, in order for a GE program to remain  
6 eligible for purposes of Title IV, it would have to pass *both* the D/E rates measure  
7 *and* the pCDR measure.

8 127. In response to comments, the Department reaffirmed its view about  
9 the “importance of holding GE programs accountable for the outcomes of students  
10 who do not complete a program and ensuring that institutions make strong efforts  
11 to increase completion rates.” 79 Fed. Reg. at 64,915. At the same time, based on  
12 the “wealth of feedback” submitted during the comment period, the Department  
13 determined that “further study is necessary before we adopt pCDR or another  
14 accountability metric that would take into account the outcomes of students who do  
15 not complete a program.” 79 Fed. Reg. at 64,915.

16 128. The Department considered numerous other alternatives in response  
17 to comments. For example, as noted in the Gainful Employment Rule, commenters  
18 proposed—and the Department considered—alternative metrics “closely linked to  
19 student academic achievement, loan repayment behavior, or employment outcomes  
20 like job placement rates.” 79 Fed. Reg. at 64,912. Commenters suggested, and the  
21 Department considered, metrics that accounted for local labor market conditions.  
22 *Id.* Still other commenters suggested that metrics should be tailored to measure  
23 student outcomes in specific occupational fields, such as cosmetology or medical  
24 professions, or use licensure exam pass rates. Still other alternatives were  
25 suggested and considered. *See, e.g.*, 79 Fed. Reg. at 65,091 (“As part of the  
26 development of these regulations, the Department engaged in a negotiated  
27 rulemaking process in which we received comments and proposals from non-Federal  
28 negotiators representing institutions, consumer advocates, students, financial aid

1 administrators, accreditors, and State Attorneys General. The non-Federal  
2 negotiators submitted a variety of proposals relating to placement rates, protections  
3 for students in failing programs, exemptions for programs with low borrowing or  
4 default rates, rigorous approval requirements for existing and new programs, as  
5 well as other issues. . . . In addition to the proposals from the non-Federal  
6 negotiators and the public, the Department considered alternatives to the  
7 regulations based on its own analysis, including alternative provisions for the D/E  
8 rates measure, as well as alternative metrics.”).

9       129. In addition to considering alternative eligibility metrics, in 2014 the  
10 Department contemplated alternative methods for calculating the D/E rates  
11 measure. For example, the Department looked at alternatives to the “n-size,” which  
12 represents the minimum number of students that completed a program during a  
13 four-year period in order for the Department to issue D/E rates with respect to a  
14 program. *See* 34 C.F.R. § 668.404(f)(1). In 2014, the Department considered the  
15 implications of using an “n-size of 10” for two-year cohort periods, and “although the  
16 Department believe[d],” in 2014, that “an n-size of 10 would be reasonable for the  
17 D/E rates measure, [it] elected to retain the n-size of 30 and to include those who  
18 completed over a four-year period if needed to achieve a 30-student cohort for a  
19 given program.” 79 Fed. Reg. at 65,092.

20       130. The Department also considered several options for the interest rate to  
21 apply to the “annual loan payment” component of the D/E rates measure  
22 calculation. In the 2014 NPRM, the Department used the average interest rate over  
23 the six years prior to the end of the applicable cohort period on federal Direct  
24 unsubsidized loans. This proposal was designed to approximate the interest rate  
25 that a large percentage of students in the calculation received, even those students  
26 who attended four-year programs, and to mitigate against year-to-year fluctuations  
27 in interest rates that could lead to volatility in the D/E rates measure results. After  
28 receiving comments suggesting the use of a sliding scale, whereby interest rates

1 would be averaged over a number of years that corresponded to program length, the  
2 Department changed its position in the final rule. 79 Fed. Reg. at 65,092–93.

3 131. The Department likewise considered several options regarding the  
4 amortization period for the annual loan payment component of the D/E rates  
5 measure. For example, in the 2014 NPRM, the Department invited comment on  
6 using a 10-year amortization for all programs, which it believed to be a “reasonable  
7 assumption,” as well as a 20-year amortization period for all programs. 79 Fed. Reg.  
8 at 65,093. As the Department stated:

9 Although the prevalence of the standard 10-year repayment plan and  
10 data related to older cohorts could support a 10-year amortization  
11 period for all credential levels, the Department has retained the split  
12 amortization approach in the regulation. Growth in loan balances, the  
13 introduction of plans with longer repayment periods than were  
14 available when those older cohorts were in repayment, and some  
15 differentiation in repayment periods by credential level in more recent  
16 cohorts contributed to this decision.

17 79 Fed. Reg. at 65,093; *see also* 79 Fed. Reg. at 65,094–95 (including tables  
18 demonstrating the Department’s analysis of amortization periods).

19 132. The Department also conducted an extensive analysis of student  
20 demographics. Although it acknowledged that student characteristics could play a  
21 role in postsecondary outcomes, “based on . . . regression and descriptive analyses,”  
22 the Department could not “conclude that the D/E rates measure is unfair towards  
23 programs that graduate high percentages of students who are minorities, low-  
24 income, female, or nontraditional or that demographic characteristics are largely  
25 determinative of results.” 79 Fed. Reg. at 65,057. Instead, in 2014, the Department  
26 concluded that:

27 [There was] a negative association between the proportion of low-  
28 income students and the annual earnings rate when controlling for  
29 other demographic and non-demographic factors, similar passing rates  
30 across all quartiles of low-income variables, and similar demographic  
31 profiles in passing, zone, and failing programs for almost all of the  
32 variables examined. These and other results of our analyses suggest  
33 that the regulation is not primarily measuring student demographics.

34 79 Fed. Reg. at 65,057.

#### 1 4.2.4 The Department Implemented an “Alternate Earnings Appeals” Process

2 133. The Gainful Employment Rule also included a process (the “Alternate  
3 Earnings Appeals” process) for an institution to appeal the Department’s  
4 calculation of its D/E rates, which allowed an institution to use “alternate earnings”  
5 data from “institutional survey[s]” or a state-sponsored data system to recalculate a  
6 program’s final D/E rates and appeal a “zone” or “failing” determination. *See*  
7 *generally* 34 C.F.R. § 668.406.

#### 8 4.3 The Transparency Framework

9 134. The second component of the Gainful Employment Rule, the  
10 Transparency Framework, was designed to “increase the quality and availability of  
11 information about the outcomes of students enrolled in GE programs,” which the  
12 Department believed would benefit “[s]tudents, prospective students, and their  
13 families, as they make critical decisions about their educational investments; the  
14 public, taxpayers, and the Government, by providing information that will enable  
15 better protection of the Federal investment in these programs; and institutions, by  
16 providing them with meaningful information that they can use to help improve  
17 student outcomes in their programs.” 79 Fed. Reg. at 64,890.

18 135. To accomplish this goal, the Department established both reporting  
19 and disclosure requirements. *See* 34 C.F.R. § 668.411 (detailing the “Reporting  
20 Requirements”); *id.* § 668.412 (detailing the “Disclosure Requirements”).  
21 Accordingly, the Gainful Employment Rule “establishes the rules and procedures  
22 under which . . . [a]n institution reports information about the program to the  
23 Secretary” and “[a]n institution discloses information about the program to students  
24 and prospective students.” *Id.* § 668.401(b)–(c).

25 136. Under the Reporting Requirements, in accordance with procedures  
26 established by the Secretary, institutions were required to report information to the  
27 Department, including student-level information regarding GE programs,

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1 programmatic job placement rates, and “any other information the Secretary  
2 requires the institution to report.” 34 C.F.R. § 668.411.

3 137. Under the Disclosure Requirements, institutions were required to post  
4 or provide a copy of a “disclosure template provided by the Secretary” on certain  
5 program webpages, in certain promotional materials, and, in certain circumstances,  
6 directly to prospective students through procedures set forth via regulation. This  
7 information included, but was not limited to: (i) the primary occupations that the  
8 program prepares students to enter; (ii) the programmatic completion rates (as  
9 calculated by the Department); (iii) the length of the program; (iv) the number of  
10 clock or credit hours required; (v) the number of individuals enrolled in the program  
11 in the most recent year; (vi) the loan repayment rate, as calculated by the Secretary  
12 for various cohorts; (vii) information on the cost of tuition, books, fees, etc.; (viii) job  
13 placement rates; (ix) the percentage of students receiving Title IV funds; (x) median  
14 loan debt for certain groups; (xi) median earnings of certain groups; (xii) the most  
15 recent program-level cohort default rate; (xiii) the most recent annual earnings rate;  
16 (xiv) information regarding licensure requirements; (xv) information regarding  
17 accreditation; and (xvi) a link to the Department’s College Navigator website, its  
18 successor, or other similar federal resource. *See* 34 C.F.R. § 668.412.

19 138. Because gainful employment programs are defined at the six-digit CIP  
20 code level, *see* 34 C.F.R. § 668.402, institutions had to make any required  
21 disclosures regarding those programs at the six-digit CIP code level, rather than at  
22 the four-digit CIP code level. *See supra* ¶¶ 91–95.

#### 23 **4.4 The Department Directly Addressed Challenges to its Statutory Authority**

24 139. After proposing the Gainful Employment Rule, the Department  
25 received comments from the public asserting that the Department was exceeding its  
26 statutory authority. *See* 79 Fed. Reg. at 64,892 (describing comments asserting, for  
27 example, that the HEA does not support the Department’s action to define gainful  
28 employment and that Congress did not intend for the Department to measure



1 whether a program leads to gainful employment based on debt and earnings). In  
2 response, the Department asserted that the statutory authority for the rule derived  
3 from three sources, namely provisions of the HEA, the General Education  
4 Provisions Act, and the Department of Education Organization Act. 79 Fed. Reg. at  
5 64,892. The Department also asserted that *APSCU I* and *APSCU II* had “confirmed”  
6 its authority to regulate. With regard to those lawsuits, the Department noted  
7 “[s]pecifically” that *APSCU I* “concluded that the phrase ‘gainful employment in a  
8 recognized occupation’ is ambiguous” and that “Congress delegated interpretive  
9 authority to the Department.” 79 Fed. Reg. at 64,892–93; *see also* 79 Fed. Reg. at  
10 64,891 (“The Department’s authority for the regulations is also informed by the  
11 legislative history of the provisions of the HEA . . . as well as the rulings of the U.S.  
12 District Court for the District of Columbia in [*APSCU I & II*].”).

13 140. In proposing the Gainful Employment Rule, the Department also  
14 received comments questioning the Department’s differential treatment of for-profit  
15 institutions and public institutions. In response, the Department affirmed that the  
16 coverage lines in the Gainful Employment Rule were drawn “by statute” and that it  
17 “d[id] not have the authority to exclude” certain programs from the regulations. 79  
18 Fed. Reg. at 64,897. The Department also stated that the fact that “similar  
19 programs offered by for-profit institutions and public institutions” were treated  
20 differently under the regulations “reflects the treatment of these programs under  
21 the HEA and a policy decision made by Congress.” 79 Fed. Reg. at 64,898.

#### 22 **4.5 The Department Carefully Considered the Source of Data Underlying the** 23 **Gainful Employment Rule**

24 141. In proposing the Gainful Employment Rule, the Department received  
25 comments regarding the reliance on data from the Social Security Administration  
26 Master Earnings File (“SSA earnings data”) and, more specifically, comments  
27 questioning whether the rule should be based on a different data source, such as  
28 data from the Bureau of Labor Statistics (“BLS”). 79 Fed. Reg. at 64,941. In

1 response, the Department considered BLS data as well as other sources of earnings  
2 data that commenters had not even proposed, but found no sources superior to the  
3 SSA earnings data. *See* 79 Fed. Reg. at 64,941–42 (explaining why the Department  
4 declined to use data from the BLS); 79 Fed. Reg. at 64,956 (noting that the  
5 Department conferred with SSA, but it did not have data superior to the SSA  
6 earnings data).

## 7 **5. Numerous Courts Upheld the Gainful Employment Rule**

8 142. After the Gainful Employment Rule was published, the Association of  
9 Proprietary Colleges (“APC”) filed suit to challenge the regulations under the APA.  
10 *See Ass’n of Proprietary Colls. v. Duncan*, 107 F. Supp. 3d 332 (S.D.N.Y. 2015)  
11 (“*APC v. Duncan*”). APSCU also filed suit again to challenge the Gainful  
12 Employment Rule. *See APSCU III*, 110 F. Supp. 3d 176 (D.D.C. 2015).

13 143. In *APC v. Duncan*, APC asserted three arguments: (1) the Gainful  
14 Employment Rule violated the Due Process Clause of the United States  
15 Constitution; (2) the regulation exceeded the Department’s authority under the  
16 HEA; and (3) the regulation constituted arbitrary and capricious decision making  
17 under the APA. *APC v. Duncan*, 107 F. Supp. 3d at 345.

18 144. After rejecting APC’s constitutional arguments, the District Court  
19 turned to APC’s argument that the statutory phrase at issue (*i.e.*, the “gainful  
20 employment” phrase) was unambiguous, and even if ambiguous, the Department’s  
21 interpretation of that phrase was unreasonable and contrary to legislative intent.  
22 107 F. Supp. 3d at 358. With respect to the question of statutory ambiguity, the  
23 District Court found the *APSCU I* analysis regarding the meaning of that phrase to  
24 be “thorough,” “faithful to Supreme Court precedent,” and with “persuasive” logic  
25 and reasoning. *Id.* at 359.

26 145. As a result, the District Court held the phrase “prepares students for  
27 gainful employment in a recognized occupation” to be the “relevant statutory  
28 command” left ambiguous by Congress. *Id.* at 359–60. The District Court concluded

1 that the Gainful Employment Rule was “a reasonable interpretation of [that]  
2 ambiguous statutory command.” *Id.* at 363.

3 146. In *APSCU III*, the District Court first considered whether the term  
4 “prepare students for gainful employment in a recognized occupation” had a “plain  
5 meaning that the Department (and the Court) must simply implement,” or whether  
6 the “language was ambiguous such that the Court should accept the Department’s  
7 interpretation—assuming, of course, that its interpretation is a reasonable one.”  
8 110 F. Supp. 3d at 184. The District Court agreed with the Department, *APSCU I*,  
9 and *APC v. Duncan*, holding that the phrase was “ambiguous” and “leaves a policy  
10 gap” for the Department to fill. 110 F. Supp. 3d at 186. The District Court also held  
11 that the Department’s interpretation of that statutory phrase was reasonable under  
12 step two of the *Chevron* framework.

13 147. In *APSCU III*, the District Court next considered whether the Gainful  
14 Employment Rule was arbitrary and capricious under the APA. The Court  
15 considered and rejected APSCU’s thirteen separate arguments that the Gainful  
16 Employment Rule was arbitrary and capricious. 110 F. Supp. 3d at 190–98. The  
17 Court likewise rejected a host of arguments that the Department’s reporting,  
18 disclosure, and certification requirements were arbitrary and capricious. *Id.* at 198–  
19 204.

20 148. In *APSCU III*, the District Court also considered the Department’s use  
21 of the SSA earnings data, holding that the Department had determined that no  
22 better data existed and had done so “only after rejecting other possible sources of  
23 data as inadequate.” *Id.* at 195 (citing to the Department’s description of “problems  
24 with alternative data from the [BLS]”).

25 149. The *APSCU III* decision was upheld in its entirety by the United  
26 States Court of Appeals for the D.C. Circuit. *APSCU v. Duncan*, 640 Fed. App’x 5  
27 (D.C. Cir. 2016) (“*APSCU Appeal*”).

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## 6. Pre-Repeal Developments

### 6.1 The Gainful Employment Rule Was Working

150. On January 9, 2017, the Department released the first set of D/E rates measures for GE programs participating in Title IV. At the time, the Department noted that “[t]he data show that, while many postsecondary programs offer value to students, there are a significant number of career training programs—specifically for-profit programs—that do not provide their graduates with a reasonable return on investment.”<sup>7</sup>

151. The 2017 data release further indicated “that over 800 programs serving hundreds of thousands students fail the Department’s accountability standards with an annual loan payment that is at least greater than 30 percent of discretionary income and greater than 12 percent of total earnings.”<sup>8</sup> The Department also noted that “[n]inety-eight percent of these failing GE programs are offered by for-profit institutions.”<sup>9</sup> Moreover, the Department highlighted that “[a]n additional 1,239 programs received a ‘zone’ rate, with an annual loan payment that is between 20 and 30 percent of discretionary income or between 8 and 12 percent of total earnings.”<sup>10</sup>

152. The January 2017 data release established that the Gainful Employment Rule was working as intended.

153. When the Department proposed to rescind the Gainful Employment Rule, Steve Gunderson, the President of Career Education Colleges and

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<sup>7</sup> See Press Release, U.S. Dep’t of Educ., *Education Department Releases Final Debt-to-Earnings Rates for Gainful Employment Programs* (Jan. 9, 2017), <https://www.ed.gov/news/press-releases/education-department-releases-final-debt-earnings-rates-gainful-employment-programs>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

1 Universities, formerly known as APSCU, reportedly stated: “The reality is every  
 2 school that has a program that was failing gainful employment metrics—and they  
 3 knew it couldn’t be fixed—they’ve already closed. **The sector today is so much**  
 4 **better.**”<sup>11</sup>

5 154. Other data available to the Department provides further evidence that  
 6 the Gainful Employment Rule was working as intended. For example, in 2012—  
 7 after the publication of the 2011 GE Rule—ITT Technical Institute noted in a  
 8 Securities and Exchange Commission annual filing that “[t]he GE Requirements  
 9 have and will continue to put downward pressure on tuition prices, so that students  
 10 do not incur debt that exceeds the levels required for a program to remain eligible  
 11 under Title IV Programs.”<sup>12</sup> A study by New America, provided to the Department  
 12 during the 2018 comment period, established that sixty-five percent of failing  
 13 programs in the first cohort of GE data were no longer enrolling students as of  
 14 August 2018.<sup>13</sup>

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 16 <sup>11</sup> See Erica Green, *Devos Ends Obama-Era Safeguards Aimed at Abuses by*  
 17 *For-Profit Colleges*, N.Y. Times (Aug. 18, 2018),  
 18 <https://www.nytimes.com/2018/08/10/us/politics/betsy-devos-for-profit-colleges.html>  
 19 (emphasis added); see also Comment from Hon. Raja Krishnamoorthi, Member of  
 20 Congress, to U.S. Dep’t of Educ., Docket No. ED-2018-OPE-0042 1, 2 & n.9 (Sept.  
 21 10, 2018), available at: [https://www.regulations.gov/document?D=ED-2018-OPE-](https://www.regulations.gov/document?D=ED-2018-OPE-0042-12124)  
 22 [0042-12124](https://www.regulations.gov/document?D=ED-2018-OPE-0042-12124) (highlighting Mr. Gunderson’s remark in a comment to the  
 23 Department).

24 <sup>12</sup> ITT Technical Servs., Inc., Annual Report (Form 10-K) (Dec. 31, 2011),  
 25 *quoted in* Comment from Inst. for Coll. Access & Success, to U.S. Dep’t of Educ.,  
 26 Docket No. ED-2018-OPE-0042 1, 7 n.26 (Sept. 13, 2018), available at:  
 27 [https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-](https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13819&attachmentNumber=1&contentType=pdf)  
 28 [13819&attachmentNumber=1&contentType=pdf](https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13819&attachmentNumber=1&contentType=pdf).

<sup>13</sup> Comment from New Am. Found., to U.S. Dep’t of Educ., Docket No. ED-2018-  
 OPE-0042 1, 16 (Sept. 14, 2018), available at:  
[https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-](https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13659&attachmentNumber=1&contentType=pdf)  
[13659&attachmentNumber=1&contentType=pdf](https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13659&attachmentNumber=1&contentType=pdf). See also, e.g., Kevin Carey, *Door*  
*Opens for Predatory Colleges*, N.Y. Times, July 1, 2017, at A11 (noting that the  
 Gainful Employment rule has “prove[n] more effective at shutting down bad college  
 programs than even the most optimistic backers could have hoped”).

1           155. Evidence that post-dates the Repeal is consistent with evidence  
2 establishing that the Gainful Employment Rule was working. For example, in  
3 November 2019, Robert Kelchen, an associate professor at Seton Hall University,  
4 and Zhuoyao Liu, a Ph.D. candidate at the same university, released a paper  
5 showing that for-profit college programs that passed gainful employment metrics  
6 were associated with a lower likelihood of closing. As Professor Kelchen stated, “for-  
7 profit colleges, possibly encouraged by accrediting agencies and/or state authorizing  
8 agencies, closed lower-performing programs and focused their resources on their  
9 best-performing programs.”<sup>14</sup>

10           156. On December 17, 2019, Jonathan Kaplan, former President of for-  
11 profit Walden University, wrote a paper highlighting how the Gainful Employment  
12 Rule had been “achieving one of its stated policy goals,” *i.e.*, “encouraging for-profits  
13 to examine with more intention the financial return of their programs for  
14 students.”<sup>15</sup> As Mr. Kaplan stated:

15           I believe the gainful-employment regulation imposed reasonable  
16 constraints and accountability standards on proprietary institutions,  
17 notwithstanding the fact that I led a for-profit university for years.  
18 While its debt-to-earnings metric was an imperfect proxy for academic  
19 quality, in my view, the rule’s repeal by the Trump administration is  
20 misguided.<sup>16</sup>

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21           <sup>14</sup> See Madeline St. Armour, *Study: Gainful Employment Associated with*  
22 *Closures*, Inside Higher Educ. (Nov. 12, 2019),  
23 [https://www.insidehighered.com/quicktakes/2019/11/12/study-gainful-employment-](https://www.insidehighered.com/quicktakes/2019/11/12/study-gainful-employment-associated-closures)  
24 [associated-closures](https://www.insidehighered.com/quicktakes/2019/11/12/study-gainful-employment-associated-closures) (discussing Robert Kelchen & Zhuoyao Liu, *Did Gainful*  
25 *Employment Regulations Result in College and Program Closures? An Empirical*  
26 *Analysis* (Nov. 2019), available at:  
27 [https://kelchenoneducation.files.wordpress.com/2019/11/kelchen\\_liu\\_nov19.pdf](https://kelchenoneducation.files.wordpress.com/2019/11/kelchen_liu_nov19.pdf)).

28           <sup>15</sup> Jonathan Kaplan, *The Misguided Repeal of Gainful Employment*, Inside  
Higher Educ. (Dec. 17, 2019), [https://www.insidehighered.com/views/2019/12/17/](https://www.insidehighered.com/views/2019/12/17/repealing-gainful-employment-regulation-mistake-it-was-imperfect-good-policy)  
[repealing-gainful-employment-regulation-mistake-it-was-imperfect-good-policy](https://www.insidehighered.com/views/2019/12/17/repealing-gainful-employment-regulation-mistake-it-was-imperfect-good-policy).

<sup>16</sup> *Id.*

1 **6.2 The Gainful Employment Rule Covered Thousands of Programs: Public, Non-**  
 2 **Profit, and For-Profit**

3 157. According to a chart the Department published in April 2018, the  
 4 Gainful Employment Rule covered the following numbers of programs in 2015,  
 5 broken down by type of program:

Type of Institution	Number of GE Programs
Private, Non-Profit <2 Years	78
Private, Non-Profit 2–3 Years	173
Private, Non-Profit 4+ Years	212
<b>Total Private, Non-Profit</b>	<b>463</b>
Private, For-Profit <2 Years	1,460
Private, For-Profit 2–3 Years	2,042
Private, For-Profit 4+ Years	2,174
<b>Total Private, For-Profit</b>	<b>5,676</b>
Public, <2 Years	293
Public, 2–3 Years	1,898
Public, 4+ Years	302
<b>Total Public</b>	<b>2,493</b>
<b>Total Foreign Schools</b>	<b>5</b>

14  
 15 **6.3 The Department Delayed the Enforcement and Operation of the Gainful**  
 16 **Employment Rule**

17 158. Following President Trump’s inauguration, and the nomination and  
 18 confirmation of Defendant Secretary DeVos, the Department took a number of steps  
 19 to delay the enforcement and operation of the Gainful Employment Rule.

20 159. For example, in March 2017, the Department published a notice in the  
 21 *Federal Register* announcing that it would allow additional time—until July 1,  
 22 2017—for institutions to submit an alternate earnings appeal and comply with the  
 23 Disclosure Requirements. *See Program Integrity: Gainful Employment*, 82 Fed.  
 24 Reg. 13,227 (Mar. 10, 2017).

25 160. In May 2017, the Department’s “Regulatory Reform Task Force,”  
 26 which it convened following the February 24, 2017, issuance of Executive Order  
 27 13,777, announced that the Department had already identified the Gainful

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1 Employment Rule to consider for “repeal, replacement, or modification” and that  
2 aspects of the rule had been “delay[ed].”<sup>17</sup>

3 161. In July 2017, the Department published a notice in the *Federal*  
4 *Register* announcing that it would further delay—until July 1, 2018—the time for  
5 institutions to comply with certain Disclosure Requirements in the Gainful  
6 Employment Rule. Program Integrity: Gainful Employment, 82 Fed. Reg. 30,975,  
7 30,976 (July 5, 2017). The Department also extended the time for institutions to  
8 submit alternate earnings appeals again. 82 Fed. Reg. at 30,976. The Department’s  
9 justification regarding the alternate earnings appeals delay was premised on a  
10 ruling in *American Association of Cosmetology Schools v. DeVos*, which ordered the  
11 Department not to enforce aspects of the alternate earnings appeals process against  
12 institutions that were members of the American Association of Cosmetology  
13 Schools. 258 F. Supp. 3d 50, 56, 76 (D.D.C. 2017) (noting twice that the limited  
14 relief would “avoid[] upending the entire” GE regulatory scheme and would  
15 narrowly provide greater flexibility to AACCS members schools to challenge the D/E  
16 rates).

17 162. Except as to alternate earnings appeals for AACCS member schools,  
18 AACCS did not invalidate the Certification Requirements, Eligibility Metrics,  
19 Reporting Requirements, or Disclosure Requirements.

20 163. Despite the limited applicability of AACCS, the Department’s July 2017  
21 extension, *see supra* ¶ 161, applied to *all* programs governed by the Gainful  
22 Employment Rule.

23 164. In August 2017, the Department published a notice in the *Federal*  
24 *Register* establishing October 6, 2017, as the deadline for institutions to submit a

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28 <sup>17</sup> U.S. Dep’t of Educ., *Regulatory Reform Task Force Progress Report* 1, 4, 48  
(May 2017), available at: <https://www2.ed.gov/documents/press-releases/regulatory-reform-task-force-progress-report.pdf>.



1 notice of intent to file an alternate earnings appeal. The Department also  
2 established February 1, 2018, as the deadline to actually file such an appeal.  
3 Program Integrity: Gainful Employment, 82 Fed. Reg. 39,362, 39,363 (Aug. 18,  
4 2017).

5 165. In the August 2017 notice, the Department announced new  
6 requirements for the substance of alternate earnings appeals, designed expressly  
7 “[t]o comply with the Court Order” in *AACS*. 82 Fed. Reg. at 39,363.

8 166. A coalition of eighteen state attorneys general filed suit to challenge  
9 the Department’s constructive revocation of the Gainful Employment Rule without  
10 engaging in the processes required by the APA. *See generally* Compl., *Maryland v.*  
11 *U.S. Dep’t of Educ.*, No. 1:17-cv-02139 (D.D.C. Oct. 17, 2017). That action remains  
12 pending.

13 167. In June 2018, the Department published a notice in the *Federal*  
14 *Register* announcing that it would allow additional time for institutions to comply  
15 with the Disclosure Requirements in 34 C.F.R. § 668.412(d)–(e). Program Integrity:  
16 Gainful Employment, 83 Fed. Reg. 28,177, 28,178 (June 18, 2018). The Department  
17 also announced that the “requirements in 34 C.F.R. § 668.412(a), (b), and (c) that  
18 schools post disclosures on their program websites using the approved disclosure  
19 template provided by the Department and that those disclosures be updated  
20 annually remain in effect.” 83 Fed. Reg. at 28,178.

21 168. In May 2019, just two months before the Repeal was announced, the  
22 Department released the 2019 disclosure template, which it asserted would  
23 “provid[e] the data that we believe are especially meaningful to students while  
24 reducing administrative burden for schools.”<sup>18</sup>

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26 <sup>18</sup> U.S. Dep’t of Educ., Fed. Student Aid, *Gainful Employment Electronic*  
27 *Announcement No. 119 – Release of the 2019 GE Disclosure Template* (May 9,  
28 2019), <https://ifap.ed.gov/eannouncements/050919GEAnnounce119Release2019GEDisclosureTemplate.html>.

## 7. Delays Turned into Repeal

169. After giving poor-performing institutions the benefit of these delays, *supra* ¶¶ 158–168, the Department has now taken a final action (*i.e.*, the Repeal) to eliminate the Gainful Employment Rule in its entirety, asserting that the rule would “penaliz[e] programs” and “create an approach to institutional accountability that could potentially be used to manipulate the higher education marketplace.” 84 Fed. Reg. at 31,410–11.

170. Section 492 of the HEA, 20 U.S.C. § 1098a, requires the Secretary to involve the public in the development of proposed regulations affecting Title IV, HEA programs. The statute requires the Secretary to subject regulatory proposals to a negotiated rulemaking process, subject to exceptions inapplicable here.

171. On August 30, 2017, the Department announced its intention to establish two negotiated rulemaking committees to prepare proposed Title IV regulations. One such committee (the “Committee”) would consider specific changes to the Gainful Employment Rule. *See* Negotiated Rulemaking Committees; Negotiator Nominations and Schedule of Committee Meetings-Borrower Defenses, Financial Responsibility, and Gainful Employment, 82 Fed. Reg. 41,194 (Aug. 30, 2017).

172. Under the HEA, if negotiators reach consensus on proposed regulations, the Department agrees to publish those regulations without alteration, unless the Secretary reopens the process or provides a written explanation to the participants stating why the Secretary has decided to depart from the agreement reached during negotiations. *See* HEA § 492(b), 20 U.S.C. § 1098a(b).

173. Regardless of whether consensus is reached, any proposed rules are subject to the standard “notice and comment” rulemaking procedures set forth in § 553 of the APA.

174. The Committee met to consider and develop proposed regulations on December 4–7, 2017, February 5–8, 2018, and March 12–15, 2018.

1 175. During its meetings, the Committee considered many proposals,  
2 including the Department’s draft regulatory language, and Committee members’  
3 alternative language and suggestions.

4 176. At the final meeting, on March 15, 2018, the Committee did not reach  
5 consensus on proposed regulations.

6 177. On August 14, 2018, the Department published the 2018 NPRM in the  
7 *Federal Register*, see *supra* ¶ 8, in which it proposed to rescind the Gainful  
8 Employment Rule in its entirety. 83 Fed. Reg. at 40,167.

9 178. In connection with the 2018 NPRM, the Department required  
10 interested parties to provide comments within thirty days—by September 13,  
11 2018—instead of employing the standard 60-day period contemplated by Executive  
12 Order 12,866. See Exec. Order No. 12,866, § 6(a)(1), 58 Fed. Reg. 51,735 (Oct. 4,  
13 1993) (publishing the Executive Order dated Sept. 30, 1993). This 30-day period was  
14 shorter than the 45-day period used in either 2014 or 2011.

15 179. The Department received 13,966 comments in response to the 2018  
16 NPRM.

17 180. After the 2018 NPRM, but before the Repeal was published, the  
18 Department’s Office of the Inspector General (“OIG”) described the proposed repeal  
19 as a “Significant Management Decision[ ] with Which the OIG Disagreed.”

20 181. In a November 2018 report to Congress, OIG stated that it “notified  
21 the Department [in May 2018] of our disagreement with its proposal to eliminate  
22 the Gainful Employment regulations without an adequate replacement to ensure  
23 accountability.” U.S. Dep’t of Educ., Office of the Inspector Gen., *Semiannual Report*  
24 *to Congress*, No. 771, 65 (Nov. 2018), available at:

25 <https://www2.ed.gov/about/offices/list/oig/semiann/sar77.pdf>. The OIG also  
26 highlighted how:

27 [She] and her predecessors have testified before Congress on issues  
28 involving proprietary schools over the years, and the sector continues  
to be a high-risk area for the Department. OIG resources devoted to

1 postsecondary school investigations continue to be disproportionately  
2 devoted to fraud and abuse in the proprietary sector. The sector also  
3 represents a disproportionate share of student loan defaults. In  
4 addition, findings of misrepresentation of job placement rates and  
5 guaranteed employment by Corinthian Colleges and other schools  
6 provide a clear demonstration of the need for particular accountability.

7 *Id.*

8 182. The Department’s findings with respect to Corinthian Colleges related  
9 to its misrepresentation of job placement statistics that were required to be  
10 disclosed because of the 2011 GE Rule.

11 183. Rather than respond meaningfully to the extensive opposition to the  
12 2018 NPRM and abandon its proposal to rescind the Gainful Employment Rule, the  
13 Department made no changes to the proposed rule. Instead, on July 1, 2019—291  
14 days after the conclusion of an abbreviated comment period—the Department took  
15 a final agency action to rescind the Gainful Employment Rule in its entirety by  
16 publishing the Repeal in the *Federal Register*.

17 184. After the Repeal was issued, OIG stated that it “disagreed with the  
18 [Repeal] without including an adequate replacement to ensure accountability and  
19 compliance with the requirements of the HEA.” U.S. Dep’t of Educ., Office of the  
20 Inspector Gen., *Semiannual Report to Congress, No. 79* 1, 68 (Nov. 2019), *available*  
21 *at*: <https://www2.ed.gov/about/offices/list/oig/semiann/sar79.pdf>.

22 185. The effective date of the Repeal is July 1, 2020, due to the statutory  
23 requirement known as the “Master Calendar Rule.” The Master Calendar Rule  
24 provides that regulations affecting Title IV programs must be published in final  
25 form by November 1, prior to the start of the July 1 award year in which they  
26 become effective. *See* HEA § 482(c), 20 U.S.C. § 1089(c). Nevertheless, in publishing  
27 the Repeal, the Secretary exercised her authority to designate certain parts of the  
28 Repeal for “early implementation” at the discretion of each institution. 84 Fed. Reg.  
at 31,395–96.

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1           186. The Department acknowledged that the Repeal would harm  
2 prospective and enrolled students. The Department admitted that, “[t]o the extent  
3 non-passing programs remain accessible with the rescission of the 2014 Rule, some  
4 students may choose sub-optimal programs” that “have demonstrated a lower  
5 return on the student’s investment, either through higher upfront costs, reduced  
6 earnings, or both.” 84 Fed. Reg. at 31,445. The Department further acknowledged  
7 that “this could lead to greater difficulty in repaying loans, increasing the use of  
8 income-driven repayment plans or risking defaults and the associated stress,  
9 increased costs, and reduced spending and investment on other priorities.” 84 Fed.  
10 Reg. at 31,445.

11           187. As described below, the Repeal is arbitrary, capricious, and contrary to  
12 law because it departs, without consideration, from settled judicial precedent on the  
13 issue of whether the phrase in the HEA “prepare students for gainful employment  
14 in a recognized occupation” is ambiguous and requires interpretation by the agency;  
15 fails to consider obvious known alternatives; fails to provide a reasoned (or in some  
16 cases, any) support for the changes; relies on factors Congress did not intend for the  
17 Department to consider; demonstrates inconsistencies with other agency positions;  
18 fails to consider important aspects of the problem the Gainful Employment Rule  
19 was intended to address; rests on explanations that run counter to the evidence  
20 before the Department; and relies on explanations so implausible that they could  
21 not be ascribed to a difference of view or the product of agency expertise. Moreover,  
22 in adopting the Repeal, the Department—due to certain failures alleged herein—  
23 deprived members of the public of an adequate opportunity to comment on the  
24 Repeal and the substantive bases on which it relied.

#### 25 **7.1 The Department Provided No Basis for its Repeal of the Accountability** 26 **Framework and Failed to Consider Evidence Before It**

27           188. None of the Department’s justifications is sufficient to satisfy the  
28 requirements of the APA.

1 **7.1.1 The Department Ignored Judicial Precedent and Concluded the Statute is No**  
2 **Longer Ambiguous**

3 189. The Department asserted that it did “not need[] to define the term  
4 ‘gainful employment’ beyond what appears in the statute” and that, through the  
5 Repeal, it was “confirm[ing] that it, in fact, *is* enforcing the law as written and as  
6 intended.” 84 Fed. Reg. at 31,401 (emphasis in original). Yet, in making this  
7 determination, the Department failed to consider or acknowledge the holdings of  
8 *APSCU I*, *APSCU III*, *APSCU Appeal* (affirming *APSCU III*), and *APC v. Duncan*,  
9 all of which held that the relevant statutory phrase is ambiguous, leaving a  
10 substantial gap for the Department to fill.

11 190. In fact, prior to the issuance of the Repeal, the Department agreed—  
12 repeatedly and consistently in *Federal Register* notices and court filings alike—that  
13 the statutory language (“prepare students for gainful employment in a recognized  
14 occupation”) was ambiguous. As alleged *supra*, in each of *APSCU I*, *APSCU III*,  
15 *APSCU Appeal* (affirming *APSCU III*), and *APC v. Duncan*, federal courts agreed  
16 with the Department that the language was ambiguous.

17 191. In the Repeal, however, the Department reversed course, asserting  
18 that it previously “incorrectly described legislative intent.” 84 Fed. Reg. at 31,402.  
19 As the only contemporaneous examples of Congressional intent regarding the scope  
20 of the HEA, the Department asserted that, “in 1972[,] when the National Vocational  
21 Student Loan Insurance Act (NVSLIA) was passed, Congress decided to incorporate  
22 vocational education programs into the HEA, by allowing their participation in the  
23 Educational Opportunity Grants as well as the student loan programs.” 84 Fed.  
24 Reg. at 31,401. According to the Department, the “House conference report” for the  
25 1972 passage also lent credence to the Department’s view that the inclusion of  
26 proprietary schools in the HEA was an “important step toward achieving the goals  
27 of providing equitable access to postsecondary education, for all students, regardless

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1 of whether their interests were in the traditional trades or vocations, or in typical  
2 degree programs.” 84 Fed. Reg. at 31,401.

3 192. The Department’s recitation of Congressional intent in the Repeal is  
4 riddled with inaccuracies and non sequiturs. *First*, despite the reference to the  
5 “House conference report,” the ascribed quotation is actually to a statement from a  
6 single member discussing the 1972 legislation. *See* 84 Fed. Reg. at 31,401 n.52 &  
7 accompanying text (quoting the statement of Representative Ogden Reid, while  
8 erroneously describing that statement as the “House conference report”). *Second*,  
9 the NVSLI did not *pass* in 1972, but was *amended* that year (after it passed in  
10 1965). *Third*, and perhaps most egregiously, the Department does not provide any  
11 explanation of how or why the 1972 amendments or the quoted text impacts the  
12 limitation that, as a condition of participation in Title IV, certain programs must  
13 “prepare students for gainful employment in a recognized occupation.” Although the  
14 Department cites the 1972 inclusion of proprietary schools in Title IV grant  
15 programs as a step toward achieving the goals of providing additional access, it does  
16 not address the limitation that such programs need to provide programs that  
17 “prepare students for gainful employment in a recognized occupation.”

18 193. The Department’s other rationalizations regarding legislative intent  
19 are similarly misguided because they do not actually demonstrate the intent of  
20 Congress. For example, a 2011 letter from 113 members of Congress (*i.e.*, a minority  
21 of members of one chamber), which the Department cited, is not a reasonable source  
22 of legislative intent. Nor is the introduction—and subsequent failed passage—of  
23 legislation that would have prohibited the implementation of the 2011 GE Rule. 84  
24 Fed. Reg. at 31,402. Nevertheless, the Department relied on these events to justify  
25 its purportedly new reading of legislative intent.

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1 **7.1.2 The Department Disregarded the Statutory Scope and Claimed Disparate**  
2 **Impact on For-Profit Schools**

3 194. A primary rationale for the Repeal is the extent to which the Gainful  
4 Employment Rule disproportionately impacts for-profit or proprietary institutions.  
5 For example, the Department asserted that “the GE regulations have a disparate  
6 impact on proprietary institutions and the students these institutions serve.” 84  
7 Fed. Reg. at 31,392. Similarly, the Department noted how “[t]he GE regulations  
8 failed to equitably hold *all* institutions accountable [for] student outcomes, such as  
9 student loan repayment.” 84 Fed. Reg. at 31,394 (emphasis added). The Department  
10 also “agree[d] with commenters who expressed concern that the GE regulations  
11 established policies that unfairly target career and technical education programs.”  
12 84 Fed. Reg. at 31,397; *see also* 84 Fed. Reg. at 31,392 (asserting that the GE Rule  
13 “wrongfully targets some academic programs and institutions while ignoring other  
14 programs”).

15 195. The Department also noted that the Gainful Employment Rule created  
16 an “uneven playing field,” given that public institutions of higher education “benefit  
17 from direct appropriations” from states in the form of “taxpayer subsidies.” 84 Fed.  
18 Reg. at 31,397 & n.23. The Department went on to argue that taxpayer  
19 subsidization of public institutions “may fool students into enrolling in a program  
20 that has passing D/E rates without realizing that the earnings generated by the  
21 program do not justify the direct, indirect, or opportunity costs of obtaining that  
22 education.” 84 Fed. Reg. at 31,397.

23 196. The Department also asserted that the Repeal was necessary because  
24 the scope of the Gainful Employment Rule was underinclusive insofar as there was  
25 “ample evidence that any transparency and accountability framework must be  
26 expanded to include all [T]itle IV programs since student loan repayment rates are  
27 unacceptably low across all sectors of higher education and because a student may  
28 ///



1 unknowingly select a non-GE program with poor outcomes because no data are  
2 available. “ 84 Fed. Reg. at 31,400.

3 197. The Department also stated that its “review of student loan repayment  
4 rates makes it clear that the problem of students borrowing more than they can  
5 repay through a standard repayment period is not limited to students who attend  
6 proprietary institutions or who participate in [career and technical education].” 84  
7 Fed. Reg. at 31,398.

8 198. None of the asserted differences in how the Gainful Employment Rule  
9 affects for-profit schools in comparison to non-profits and public institutions  
10 provides a basis for the Repeal. The Gainful Employment Rule does not  
11 discriminate between for-profit and other schools—it applies the *same standards* to  
12 gainful employment programs at all types of institutions. Any disparate impact  
13 results from *statutory* distinctions, created by Congress, for Title IV eligibility  
14 between types of schools and types of programs.

15 199. The Department acknowledged in the Repeal that it “could not simply  
16 expand the GE regulations to include all [T]itle IV programs since the term ‘gainful  
17 employment’ is found only in section 102 of the HEA.” 84 Fed. Reg. at 31,394; *see*  
18 *also* 84 Fed. Reg. at 31,394 (“[W]ithout a statutory change, there was no way to  
19 expand the GE regulations to apply to all institutions.”); 84 Fed. Reg. at 31,400  
20 (“Since the GE regulations cannot be expanded to include all institutions, and since  
21 negotiators could not come to consensus on a GE-like accountability and  
22 transparency framework that was substantiated by research and applicable to all  
23 [T]itle IV programs, the Department decided to take another approach.”). But the  
24 Department’s “[o]ther approach” was to repeal the Gainful Employment Rule in an  
25 attempt to treat *similarly* institutions and programs that Congress had sought to  
26 treat *differently*.

27 200. The Department’s position in the Repeal—without acknowledgment or  
28 justification—is squarely at odds with a position it took in 2015. In its briefing in

1 *APC v. Duncan*, the Department rejected the notion that the Gainful Employment  
 2 Rule was arbitrary because it disproportionately affected vocationally oriented  
 3 programs:

4 As to plaintiff's opinion that the rules are arbitrary because many  
 5 traditional colleges would have low D/E rates, *see* Pl.'s Opp'n at 32,  
 6 plaintiff overlooks Congress' determination that a vocational student is  
 7 "not like . . . the typical college liberal arts student," S. Rep. No. 89-  
 8 758 at 4. In contrast to liberal arts students, vocational students "feel  
 9 the primary reason they are in school is for purposes of acquiring job  
 10 skills which will allow them to enter and compete successfully in our  
 increasingly complex occupational society." *Id.* Congress accordingly  
*intended* vocational programs to face eligibility criteria above and  
 beyond the criteria affecting non-vocational programs. *See, e.g.*, 20  
 U.S.C. § 1002(b)(1)(A)(i). It is not arbitrary for the Department to hold  
 vocational programs to statutory requirements [when] Congress  
 intended to reach only those programs.

11 Defs.' Reply in Supp. of Their Cross Mtn. for Summ. J. at 27–28, *APC v. Duncan*,  
 12 107 F. Supp. 3d (S.D.N.Y. 2015 ) (1:14-cv-08838-LAK).

13 201. Moreover, to the extent the Gainful Employment Rule affected gainful  
 14 employment programs differently at for-profit schools than non-profit schools, that  
 15 was a product of their performance, not the rule. Analysis that was part of the  
 16 public record—and submitted to the Department during the comment period—  
 17 established that, "[b]ased on data on student earnings and debt outcomes released  
 18 by the Department of Education in 2017, among certificate programs where all  
 19 programs are subject to the rule regardless of institutional control, 779 of the 869  
 20 programs that did not pass the debt-to-earning standard . . . were operated by for-  
 21 profit colleges."<sup>19</sup> The same analysis also noted (again, in a comment provided to the  
 22 Department) that "98 percent of the students enrolled in programs that did not  
 23 meet this standard were in for-profit programs."<sup>20</sup>

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25 <sup>19</sup> *See* Comment from Sandra E. Black, *et al.*, to U.S. Dep't of Educ., Docket No.  
 26 ED-2018-OPE-0042 1, 7 (Sept. 12, 2018), *available at*:  
 27 [https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-  
 13499&attachmentNumber=1&contentType=pdf](https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13499&attachmentNumber=1&contentType=pdf).

28 <sup>20</sup> *Id.*

1           202. Even further, the Department relied on a report that found that  
2 graduates of certificate programs at for-profit institutions have both higher net  
3 tuition and lower earnings, on average, than public institutions' graduates. This  
4 same report concluded that “even if the median debt burdens across both types of  
5 institutions were equalized”—taking into consideration the Department’s view that  
6 tuition subsidies at public institutions unfairly improve D/E rates measures for  
7 public institutions—“a disparity would still remain in GE pass rates” between  
8 proprietary and public institutions.<sup>21</sup>

9           203. To the extent the Department’s rationale was based on the purported  
10 fact that “the term ‘gainful employment’ is found only in section 102 of the HEA,”  
11 the Department erred in failing to recognize the numerous other references in Title  
12 IV that use the “gainful employment” language. *See, e.g.*, HEA § 101(b)(1), 20  
13 U.S.C. § 1001(b)(1) (referring, in the context of public and nonprofit institutions, to  
14 programs that “prepare students for gainful employment in a recognized  
15 occupation”); HEA § 481(b)(1)(A)(i), 20 U.S.C. § 1088(b)(1)(A)(i) (referring to  
16 programs of training that “prepare students for gainful employment in a recognized  
17 profession”).

### 18 **7.1.3 The Department Misconstrued the Evidence Supporting the Accountability** 19 **Framework**

20           204. The Department highlighted its view that there was insufficient  
21 evidentiary support—at the time of adoption and at present—for the Accountability  
22 Framework, both in its entirety and with respect to certain components. But in this  
23 regard, the Department both: (i) erroneously took issue with evidence considered in  
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25           <sup>21</sup> Preston Cooper & Jason D. Delisle, *Measuring Quality or Subsidy? How*  
26 *State Appropriations Rig the Gainful Employment Test*, American Enterprise  
27 Institute 1, 10 (Mar. 2017), [http://www.aei.org/wp-](http://www.aei.org/wp-content/uploads/2017/03/Measuring-Quality-or-Subsidy.pdf)  
28 [content/uploads/2017/03/Measuring-Quality-or-Subsidy.pdf](http://www.aei.org/wp-content/uploads/2017/03/Measuring-Quality-or-Subsidy.pdf) (cited at 84 Fed. Reg.  
at 31,397, 31,402, 31,430–31).

1 2014; and (ii) simultaneously relied on new materials that were insufficient to  
2 justify and substantiate the Repeal.

### 3 **7.1.3.1 Supposed Flaws with the Evidence Supporting the 2014 Rule**

4 205. In numerous places in the Repeal, the Department attempted to  
5 debunk evidentiary findings that it once relied on to support the Gainful  
6 Employment Rule. For example, the Department asserted that its reliance in 2014  
7 on studies comparing costs and debt levels among students who enrolled at  
8 community colleges with those who enrolled at proprietary institutions was  
9 “illegitimate” because “research published by the Brown Center in 2016 shows that  
10 there are considerable differences between the characteristics of students who  
11 enroll at proprietary institutions and those who enroll at two-year public  
12 institutions.” 84 Fed. Reg. at 31,393 (citing Stephanie Riegg Cellini & Rajeev  
13 Darolia, *Different degrees of debt: Student borrowing in the for-profit, nonprofit,*  
14 *and public sectors*, Brown Center on Education Policy at Brookings (June 2016) (the  
15 “Cellini & Darolia Paper”).

16 206. The Department asserted that the Cellini & Darolia Paper supports  
17 the Repeal because it shows that “differences in characteristics” (*e.g.*, financial  
18 independence, minority group status, single-parent status) “may explain disparities  
19 in student outcomes, including higher borrowing levels and student loan defaults  
20 among students who enroll at proprietary institutions.” 84 Fed. Reg. at 31,393. But  
21 the Cellini & Darolia Paper does the *opposite*, stating and showing that “the  
22 relatively high *for-profit cost (mostly tuition) is by far the largest predictor* of this  
23 explained variation” in borrowing rates between for-profit and public two-year  
24 colleges. *See* Cellini & Darolia Paper at 11 (emphasis added); *see also id.* (“Costs  
25 continue to explain the vast majority of variation between the for-profit sector and  
26 community colleges, with every other factor remaining small and in the opposite  
27 direction. These results suggest that observable demographics, academics, location,

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1 and even student resources contribute much less to differences in borrowing  
2 between sectors when compared to the net costs of attendance.”).

### 3 7.1.3.2 New “Analysis” and Research Insufficiently Supported the Repeal

4 207. The Repeal is not based on enough factual support or relevant evidence  
5 for a reasonable mind to accept it as adequate to support a conclusion.

6 208. For example, the Department asserted that there was “research  
7 published in 2014[,] . . . but not considered during the Department’s development of  
8 the 2014 Rule,” that undercut part of the Department’s 2014 rationale for the  
9 Gainful Employment Rule. 84 Fed. Reg. at 31,393. But the Department’s lone  
10 citation in this regard is to a non-final “working paper” of the National Bureau of  
11 Economic Research by Lance Lochner and Alexander Monge-Naranjo (the “Lochner  
12 Paper”) that was not subject to peer review and has never been published  
13 elsewhere, despite the fact that it was released by the authors nearly six years  
14 ago.<sup>22</sup> Moreover, the data cited in the Lochner Paper was over twenty-five years old,  
15 was from a period when the proprietary sector was remarkably different (*i.e.*, there  
16 were no online institutions and few large corporate chains), and included only  
17 students who completed bachelor’s degrees (and not graduate programs, certificate  
18 programs, or associate programs). As one group of commenters pointed out, citing to  
19 data from the Department, between 2000 and 2010, “fall enrollments at for-profit  
20 institutions more than tripled, compared to a growth of about [twenty-eight percent]  
21 among all institutions.”<sup>23</sup>

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24 <sup>22</sup> Lance Lochner & Alexander Monge-Naranjo, *Default and Repayment Among*  
25 *Baccalaureate Degree Earners*, (Nat’l Bureau of Econ. Research, Working Paper No.  
19,882, 2014), *available at*: <https://www.nber.org/papers/w19882.pdf>.

26 <sup>23</sup> Comment from Sandra E. Black, *et al.*, to U.S. Dep’t of Educ., Docket No. ED-  
27 2018-OPE-0042 1, 6 (Sept. 12, 2018), *available at*:  
28 [https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-  
13499&attachmentNumber=1&contentType=pdf](https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13499&attachmentNumber=1&contentType=pdf).

1           209. Moreover, the Lochner Paper explicitly acknowledged deficiencies with  
2 its sample size (consisting of only thirty-three students from for-profit schools) that  
3 led the authors to conclude that “we cannot statistically distinguish” between  
4 graduates of proprietary institutions and non-profit institutions. Lochner Paper at  
5 12.

6           210. Elsewhere in the Repeal, the Department asserts that “many of the  
7 studies” provided by commenters have “serious limitations that, in some cases,  
8 reduce the validity and reliability of their conclusions.” 84 Fed. Reg. at 31,405. But  
9 again, the Department only points to a single study. 84 Fed. Reg. at 31,405 nn.75–  
10 76 & accompanying text (citing Stephanie Cellini & Nicolas Turner, *Gainfully*  
11 *Employed? Assessing the Employment and Earnings of For-Profit College Students*  
12 *Using Administrative Data* (Nat’l Bureau of Econ. Research, Working Paper No.  
13 22,287, 2018)) (the “Cellini & Turner Working Paper”).

14           211. The Department criticizes the Cellini & Turner Working Paper, for  
15 example, on the ground that it was “not available for full peer review.”  
16 Notwithstanding the fact that the Department simultaneously relied upon the  
17 Lochner Paper that *expressly* acknowledges that it was not peer-reviewed, the  
18 Department cites only to the January 2018 “working draft” version of Cellini and  
19 Turner’s analysis, entirely disregarding the fact that the final paper *was* peer-  
20 reviewed and published in the Journal of Human Resources. *See* Stephanie Cellini  
21 & Nicolas Turner, *Gainfully Employed? Assessing the Employment and Earnings of*  
22 *For-Profit College Students Using Administrative Data*, 54 J. of Human Res. 342  
23 (2019) (the “Cellini & Turner Study”). Citations to both the working paper and the  
24 final, peer-reviewed paper were provided to the Department during the comment  
25 period.

26           212. Following its publication in the Journal of Human Resources, an  
27 Associate Professor at the University of Michigan’s Gerald Ford School of Public  
28 ///

1 Policy referred to the Cellini & Turner Study as “the definitive study” on for-profit  
2 colleges.<sup>24</sup>

3 213. In contrast to the Lochner Paper’s sample size of thirty-three students  
4 from for-profit colleges, the Cellini & Turner Study relied on a sample size of  
5 566,571 individual students from for-profit colleges. Cellini & Turner Study at 353  
6 (Table 1, Column 1).

7 214. The Department asserts that the Cellini & Turner Study “was  
8 comparing what employees earn in fields that may pay very different prevailing  
9 wages.” 84 Fed. Reg. at 31,405. In reality, that study compared students in the  
10 *same fields* attending similar certificate programs at for-profit and community  
11 colleges. Cellini & Turner Study at 351.

12 215. The Department also asserts that the Cellini & Turner Study “admits  
13 that [the] methodology for creating demographically matched comparison groups  
14 relied on the use of zip codes and birthdates, but every one of the same age in the  
15 same zip code is not otherwise socioeconomically and demographically matched.” 84  
16 Fed. Reg. at 31,405. But the Cellini & Turner Study matched students using  
17 earnings and other demographics, including zip code and age. *See* Cellini & Turner  
18 Study at 351 (describing how the research “generate[d] propensity scores based on  
19 up to seven years of prior earnings and demographic characteristics (for example,  
20 married, number of children, male, and years prior to enrollment)” and noting that  
21 they “identify a matched control for each for-profit student within gender-age-CIP-  
22 zip cells[, *i.e.*,] each for-profit student is matched with one public sector student  
23 with similar prior earnings and demographics in the same cell”).

24 216. Compounding the substantive errors, the Repeal is also premised on  
25 additional, vague citations to “analysis” or unnamed research. In one example, the  
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27 <sup>24</sup> Kevin Stange (@kevin\_stange), Twitter (Oct. 1, 2019, 10:09 PM),  
28 [https://twitter.com/kevin\\_stange/status/1179216891145080833?s=20](https://twitter.com/kevin_stange/status/1179216891145080833?s=20).

1 Department asserted in the 2018 NPRM that “[r]esearch published subsequent to  
2 the promulgation of the GE regulations adds to the Department’s concern about the  
3 validity of using D/E rates . . . to determine whether or not a program should be  
4 allowed to continue to participate in [T]itle IV programs.” 83 Fed. Reg. at 40,171.  
5 When challenged under the Information Quality Act to provide a source for this  
6 point, the Department failed to do so, instead claiming that it “has used well-  
7 respected, peer-reviewed references to substantiate its reasons throughout these  
8 final regulations for believing that D/E rates could be influenced by a number of  
9 factors other than program quality.” 84 Fed. Reg. at 31,427.

10         217. In other places, the Department cites to its own “analysis” without  
11 additional information or description. For example, the Department cites data it  
12 claims came from “analysis provided by Federal Student Aid,” with a footnote that  
13 simply says “Federal Student Aid, 2018.” 84 Fed. Reg. at 31,398 & n.27. Moreover,  
14 although the Department acknowledges in the Repeal that it received a  
15 “bibliography” of papers that it “agree[d]” concluded that “students who attend  
16 proprietary institutions, in many instances, have outcomes that are inferior to  
17 students who attend other institutions,” 84 Fed. Reg. at 31,405, it countered that its  
18 “analysis of the outstanding student loan portfolio demonstrates that poor outcomes  
19 are not limited to these institutions or the small number, relative to total  
20 postsecondary enrollment, of students who attend them.” 84 Fed. Reg. at 31,405.  
21 But the Department never discloses or describes this “analysis,” nor did it subject  
22 this “analysis” to public comment.

23         218. Still further, the Department asserted in the 2018 NPRM that “[o]ther  
24 research findings suggest that D/E rates-based eligibility creates unnecessary  
25 barriers for institutions or programs that serve larger proportions of women and  
26 minority students,” 79 Fed. Reg. at 40,171, but failed to identify such findings.  
27 Although the Department included a reference to a 2016 study from the College  
28 Board in the 2018 NPRM, the Department concedes in the Repeal that the cited



1 research “did not address GE programs specifically,” 84 Fed. Reg. at 31,427, and  
2 therefore could not have been about D/E rates-based eligibility.

#### 3 **7.1.4 The Department Concluded That the D/E Rates Measure is No Longer a** 4 **Valid Metric**

5 219. The Department asserted that the “D/E rates measure is *scientifically*  
6 *invalid* because it fails to control or account for the confounding variables that could  
7 influence the relationship between the independent (program quality) and  
8 dependent variable (D/E rates) or render the relationship between the independent  
9 and dependent variables as merely correlative, not causal.” 84 Fed. Reg. at 31,427  
10 (emphasis added).

11 220. In this same vein, the Department also asserted that it “has not been  
12 able to develop a methodology to accurately control for or repress confounding  
13 variables, such as student demographic characteristics, to isolate the impact of  
14 institutional quality on student outcomes, [or to] more accurately attribute student  
15 outcomes to a single variable, such as institutional quality.” 84 Fed. Reg. at 31,435.  
16 The Department further asserted that, “[i]n the past, the Department has  
17 performed single variant analysis to identify non-traditional student characteristics  
18 that increase the risk of non-completion or student loan defaults. However, the  
19 Department has not performed multi-variant analysis to develop an algorithm that  
20 would allow it to isolate independent variables and examine causal relationships  
21 between those variables and student outcomes.” 84 Fed. Reg. at 31,435.

22 221. Although the Department is correct that the Gainful Employment Rule  
23 does not “control” for “confounding variables” such as student demographics *within*  
24 the D/E rates measure, the Department did—in 2014—conduct extensive  
25 multivariate regression analysis to consider whether the demographic composition  
26 of a program influenced the ultimate outcomes under the D/E rates measure and  
27 Eligibility Metrics. *See, e.g.*, 79 Fed. Reg. at 65,042 (showing, in Table 2.2, the  
28 results of “[t]he second regression [that] used percent zero EFC, female, and above

1 age 24 as independent variables in addition to percent Pell and percent minority”);  
2 79 Fed. Reg. at 65,052–54 (showing, in Tables 2.12 & 2.13, a “regression model with  
3 annual earnings rate as the dependent variable and *multiple* independent variables  
4 that are indicators of student, program, and institutional characteristics”)  
5 (emphasis added).

6 222. After considering the results of the demographic analysis in 2014, the  
7 Department determined that “student characteristics of programs do not overly  
8 influence the performance of programs on the D/E rates measure.” *See, e.g.*, 79 Fed.  
9 Reg. at 64,910; *see also, e.g.*, 79 Fed. Reg. at 64,923 (“[T]he Department has  
10 examined the effects of student demographic characteristics on results under the  
11 annual earnings rate measure and does not find evidence to indicate that the  
12 composition of a GE program’s students is determinative of outcomes.”); 79 Fed.  
13 Reg. at 64,908 (“[W]e do not expect student demographics to overly influence the  
14 performance of programs on the D/E rates measure.”). As the Department stated in  
15 summary:

16 [T]he Department cannot conclude . . . that demographic  
17 characteristics are largely determinative of results. . . . Instead, we  
18 find a negative association between the proportion of low-income  
19 students and the annual earnings rate when controlling for other  
20 demographic and non-demographic factors, similar passing rates  
across all quartiles of low-income variables, and similar demographic  
profiles in passing, zone, and failing programs for almost all of the  
variables examined. These and other results of our analyses suggest  
that the regulation is not primarily measuring student demographics.

21 79 Fed. Reg. at 65,057.

22 223. As the District Court held in *APSCU III*, “[t]he Department therefore  
23 made extensive efforts [in 2014] to get to the bottom of this criticism [regarding the  
24 impact of demographics], and this Court cannot fairly say that the agency acted  
25 arbitrarily in the face of it.” *APSCU III*, 110 F. Supp. 3d at 192.

26 224. Although the Department, in the Repeal, “acknowledge[d]” this prior  
27 analysis, it also claimed that it was an “incomplete analysis of the data available to  
28 the Department.” 84 Fed. Reg. at 31,414. However, the Department pointed to only

1 a single example of “data available to the Department” that was not fully analyzed  
2 in 2014, *i.e.*, a 1994 analysis by the National Center for Education Statistics  
3 (“NCES Analysis”), which the Department asserted “confirm[s] the impact of  
4 student characteristics on student outcomes,” 84 Fed. Reg. at 31,414, and which the  
5 Department erred by not considering in 2014.

6       225. The 1994 NCES Analysis is based on data from 1989–1990. Although  
7 the 1994 NCES Analysis discusses factors that influence the likelihood of  
8 graduation, it does not specifically address student loan borrowers who graduated,  
9 nor is it specific to gainful employment programs. As a result of these limitations,  
10 the 1994 NCES Analysis is not a reliable source for the Department to use in order  
11 to contradict its 2014 conclusion, *see, e.g., supra* ¶ 222, that student demographics  
12 and characteristics would not overly influence the performance of gainful  
13 employment programs on the D/E rates measure.

14       226. The Gainful Employment Rule, in contrast, only considers the  
15 outcomes of student loan borrowers who graduated from a GE program. Moreover,  
16 the Department’s multivariate regression analysis in 2014 was based on data it  
17 gathered in connection with institutional compliance with the 2011 GE Rule.

18       227. In promulgating the Repeal, the Department “[did] not analyze[] the  
19 racial or ethnic demographics of students served by programs that failed the 2015  
20 D/E calculations.” 84 Fed. Reg. at 31,414. With respect to gender disparities, the  
21 Department asserts—without citing to any non-anecdotal evidence—that “it seems  
22 clear” that women and low-income students will be impacted more significantly  
23 than other students by program closures due to the Gainful Employment Rule. 84  
24 Fed. Reg. at 31,414–15.

25       228. The Department asserted as a basis for the Repeal that the  
26 performance of programs on the D/E rates measure can, but should not, be impacted  
27 by factors other than “program quality.” *See* 84 Fed. Reg. at 31,427 (“The  
28 Department has used well-respected, peer-reviewed references to substantiate its

1 reasons throughout these final regulations for believing that D/E rates could be  
2 influenced by a number of factors other than ‘program quality.’”); 84 Fed. Reg. at  
3 31,396 (agreeing that the “D/E rates measure is a fundamentally flawed and  
4 unreliable *quality indicator*”) (emphasis added). According to the Department,  
5 because the D/E rates measure fails to take into account factors other than program  
6 quality, the D/E rates measure is an invalid indicator. 84 Fed. Reg. at 31,396.

7 229. With respect to all purported justifications for the Repeal, the  
8 Department failed to provide relevant evidence a reasonable mind might accept as  
9 adequate to support the conclusions drawn. The Department’s decision to Repeal  
10 the Gainful Employment Rule was therefore arbitrary and capricious under the  
11 APA.

#### 12 **7.1.5 The Department Continued to Renege on its Prior Justifications for the** 13 **Accountability Framework**

14 230. In the Repeal, the Department reversed course on both the thresholds  
15 for the Eligibility Metrics and the D/E rates measures (*i.e.*, the discretionary income  
16 rate and the annual earnings rate). *See, e.g.*, 84 Fed. Reg. at 31,427 (referring to the  
17 D/E rates measure as “scientifically invalid”).

18 231. With respect to the thresholds, the Department claimed that there is  
19 “no empirical basis for the 8 percent” D/E rates measure threshold for the annual  
20 earnings rate. 84 Fed. Reg. at 31,407. The Department also asserted that, in 2014,  
21 it “failed to provide a sufficient, objective, and reliable basis for the 20 percent  
22 [discretionary income] threshold.” 84 Fed. Reg. at 31,407. The Department also  
23 stated that rulemaking subsequent to the Gainful Employment Rule rendered the  
24 twenty percent standard “obsolete” because “no borrower would ever be required to  
25 pay more than 10 percent of their discretionary income.” 84 Fed. Reg. at 31,407.

26 232. With respect to the D/E rates measure calculations, the Department  
27 expressed its concern with the use of an amortization rate that differs from the  
28 amortization terms “made available” to borrowers under the law and the

1 Department’s REPAYE regulations. 84 Fed. Reg. at 31,409. Yet there was an  
2 obvious alternative amortization rate to address this concern, *see supra* ¶ 131,  
3 which the Department presented to the Committee but subsequently failed to  
4 address in the Repeal.

5 233. The Department also expressed concerns with the fact that the use of  
6 SSA earnings data to calculate D/E rates was inaccurate because that data excluded  
7 “unreported tip income and some self-employment earnings” and would “[p]enaliz[e]  
8 programs,” even where asserted data-related problems were “not the fault of  
9 institutions of higher education.” 84 Fed. Reg. at 31,409–10.

10 234. The Department also disagreed with its prior conclusion that the D/E  
11 rates measure “sufficiently control[] for the impact of recessions.” 84 Fed. Reg. at  
12 31,411. Yet as the Department suggested in a footnote, albeit with selective  
13 quotations, 84 Fed. Reg. at 31,411 n.99 (asserting that *APC v. Duncan* stated that  
14 Plaintiff’s argument that the Gainful Employment Rule “failed to adjust for  
15 economic cycles was ‘just a red herring’”), *APC v. Duncan* examined this exact issue  
16 and concluded that the argument that the Gainful Employment Rule failed to  
17 sufficiently adjust for economic cycles was “*not just* a red herring,” (emphasis  
18 added) but “also untrue.” 107 F. Supp. 3d at 368.

19 235. The Department’s rejection of its prior position regarding economic  
20 cycles appears to be grounded in the fact that the “Great Recession lasted eighteen  
21 months,” 84 Fed. Reg. at 31,411 n.99, while the Department repeatedly asserted in  
22 2014 that “recessions have, on average, lasted, 11.1 months,” 79 Fed. Reg. at 64,920.  
23 But in the 2018 NPRM, the Department asserted something different, namely that  
24 “the Great Recession lasted for well over two years.” 83 Fed. Reg. at 40,172.

25 236. Regardless of the length of the Great Recession, the Department  
26 acknowledged in the Gainful Employment Rule that the Great Recession was an  
27 “outlier event[].” 84 Fed. Reg. at 31,411.

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1           237. In addition, the Department stated in the Repeal that unemployment  
2 data regarding the aftermath of the Great Recession established that the “three-  
3 year window afforded to institutions in the 2014 Rule would come up desperately  
4 short of a jobless recovery that lasted eight years.” 84 Fed. Reg. at 31,411 n.99.

5           238. In the Repeal, the Department did not consider whether the four-year  
6 “zone” window would ameliorate its concerns about the Gainful Employment Rule  
7 not controlling for the impact of recessions. Under the Gainful Employment Rule, a  
8 program becomes ineligible if it *either* fails the D/E rates measure for two out of  
9 three consecutive years *or* has a combination of zone and failing D/E rates for four  
10 consecutive years. *See* 34 C.F.R. § 668.403(c)(4).

11           239. In the Repeal, the Department failed to consider the extent to which,  
12 as it stated in 2014:

13                   Sensitivity to temporary economic fluctuations outside of an  
14 institution’s control is also reduced by calculating the D/E rates based  
15 on two-year and four-year cohorts of students, rather than a single-  
16 year cohort, and calculating a program’s annual earnings as means  
17 and medians. Calculating D/E rates based on students who completed  
18 over multiple years reduces the impact of short term fluctuations in  
the economy that may affect a particular cohort of graduates but not  
others. Similarly, means and medians mitigate the effects of economic  
cycles by measuring central tendency and reducing the influence of  
students who may have been most impacted by a downturn.

19 79 Fed. Reg. at 64,926. Nor did the Department explain why this position is no  
20 longer accurate or justified.

21           240. The Department failed, in the Repeal to consider the extent to which,  
22 as it stated in 2014, “[t]he zone protects passing programs from losing their  
23 eligibility for [T]itle IV, HEA program funds where their increase in D/E rates was  
24 attributable to temporary fluctuations in local labor market conditions.” 79 Fed.  
25 Reg. at 64,926. Nor did the Department explain why this position is no longer  
26 accurate or justified.

27           241. In the Repeal, the Department did not consider available debt-to-  
28 earnings data for multiple cohorts of students across numerous years, even though,

1 as one commentator explained, “the Department has in its possession debt-to-  
2 earnings data for multiple cohorts of students across several years” and “student  
3 roster information from 2008–09 through 2013–14 that have not been sent to the  
4 Social Security Administration to generate earnings data.”<sup>25</sup> The commenter also  
5 noted that, in order to determine the potential effects of broader national  
6 conditions, the Department could “cross the data by program with information on  
7 national, regional, and local economic conditions to see if in fact there is a  
8 connection.”<sup>26</sup> The Department failed to do this or respond to this comment.

9       242. With respect to all of its justifications, the Department failed to  
10 provide relevant evidence that a reasonable mind might accept as adequate to  
11 support the conclusions drawn.

## 12 **7.2 The Department Failed to Consider Alternatives to the Repeal of the** 13 **Accountability Framework**

14       243. An agency not only has a duty to consider reasonable alternatives to its  
15 chosen policy, but also must provide a reasoned explanation for its rejection of those  
16 alternatives.

17       244. The Department was aware of myriad alternatives to the Gainful  
18 Employment Rule, as a whole and with respect to its component pieces.

19       245. Although the Department stated in the Repeal that it “reviewed and  
20 considered various changes to the final regulations,” and that “changes made in  
21 response to comments [were] described in the *Analysis of Comments and Changes*  
22 section of [the] preamble,” 84 Fed. Reg. at 31,448, no changes were actually made.  
23  
24

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25       <sup>25</sup> See Comment from Ben Miller *et al.*, to U.S. Dep’t of Educ., Docket No. ED-  
26 2018-OPE-0042 1, 11–12 (Sept. 13, 2018) (“Miller Comment”), *available at*:  
27 [https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-  
13794&attachmentNumber=1&contentType=pdf](https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13794&attachmentNumber=1&contentType=pdf).

28       <sup>26</sup> *Id.*

### 7.2.1 Failure to Consider Alternatives to the Certification Requirement

246. The Department did not consider any reasonable alternatives to the Certification Requirement that determines initial eligibility. *See* 34 C.F.R. § 668.414. To the extent the Department did consider such alternatives, the Department failed to identify those alternatives in either the 2018 NPRM or the Repeal and failed to give a reasoned explanation for its rejection of those alternatives.

247. With respect to the elimination of the Certification Requirement, the Department stated only that it “considered disclosures related to licensure and certification, as well as accreditation, as part of its Accreditation and Innovation negotiated rulemaking package and, therefore, will not include regulations related to disclosures of this information in this rulemaking.” 84 Fed. Reg. at 31,424.

248. The Department did not consider *any* alternative to the Certification Requirement, despite the fact that there were obvious alternatives that were known and common. For example, in developing the Gainful Employment Rule, the Department heard from commenters that “the certification requirements should be expanded.” 79 Fed. Reg. at 64,990. At the time, the Department dismissed this consideration because it was “unnecessary in light of the requirements already provided by the regulation.” 79 Fed. Reg. at 64,990.

249. Moreover, members of the Negotiated Rulemaking Committee received and presented alternative certification requirements. For example, one committee member submitted a memorandum to the Department containing proposed amendments to 34 C.F.R. § 668.414 that would have strengthened the certification requirements.<sup>27</sup>

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<sup>27</sup> *See* Memorandum from Laura Metune, Vice Chancellor of External Affairs, California Cmty. Colls. Chancellor’s Office, to U.S. Dep’t of Educ., *Gainful Employment Negotiated Rulemaking Committee* (Jan. 30, 2018), available at: <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/gememoissue8metune.pdf>.



1           250. Prior to the second and third negotiated rulemaking sessions, the  
2 Department also released issue papers that proposed revisions to 34 C.F.R.  
3 § 668.414. The Department did not consider these alternatives when publishing the  
4 Repeal. If they were considered, the Department did not give a reasoned  
5 explanation for its rejection of these alternatives.

6           251. With respect to initial certification requirements generally, the  
7 Department's issue papers also show that it was aware of a potential alternative  
8 rule requiring "any Title IV eligible education program that prepares students for  
9 employment in an occupation for which the State or Federal government has  
10 requirements for certification/licensure" to "certify in its [Program Participation  
11 Agreement with the Department] that the program is approved by a recognized  
12 accrediting agency and meets the State or Federal requirements," which would  
13 include the requirements regarding gainful employment.<sup>28</sup>

#### 14 **7.2.2 Failure to Consider Alternative Eligibility Metrics**

15           252. The Department did not consider any reasonable alternative to the  
16 Eligibility Metrics. To the extent the Department did consider such alternatives, the  
17 Department failed to identify those alternatives in either the 2018 NPRM or the  
18 Repeal and failed to give a reasoned explanation for its rejection of those  
19 alternatives.

20           253. The Department was aware of numerous alternative metrics. For  
21 example, during Day 2 of Session 1 of negotiated rulemaking, Greg Martin, the  
22

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23           <sup>28</sup> See U.S. Dep't of Educ., *Certification Requirements*, First Amended Issue  
24 Paper No. 8, 2017–2018 Negotiated Rulemaking (Session No. 2, Feb. 5–8, 2018),  
25 available at: [https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issue  
26 paper8certificationrequirements.pdf](https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper8certificationrequirements.pdf) **Error! Hyperlink reference not valid.** see also  
27 U.S. Dep't of Educ., *Certification Requirements*, Second Amended Issue Paper No.  
28 8, 2017–2018 Negotiating Rulemaking (Session No. 3, Mar. 12–15, 2018), available  
at: [https://www2.ed.gov/  
policy/highered/reg/hearulemaking/2017/session3issuepaper8certificationrequireme  
nts.pdf](https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/session3issuepaper8certificationrequirements.pdf) **Error! Hyperlink reference not valid.**

1 Department’s representative, acknowledged that “there have been other metrics  
2 considered in previous negotiations.”<sup>29</sup> In the Repeal, however, the Department did  
3 not consider any of those metrics.

4 254. In 2014, for example, the Department considered and proposed using  
5 pCDR (*i.e.*, the program-level cohort default rate, “which examines the rate at  
6 which borrowers who previously enrolled in the program default,” *see supra* ¶ 125,  
7 as part of the Eligibility Metrics. Using the pCDR metric would have been an  
8 obvious alternative to Repeal because the Department proposed using the pCDR  
9 metric in its 2014 NPRM. But the Department did not consider using pCDR in the  
10 Repeal.

11 255. In the preamble to the Repeal, the Department stated that during the  
12 negotiated rulemaking session, there was a “proposal from one negotiator to use a  
13 one-to-one ratio to report debt-to-earnings,” but there was “no consensus” around  
14 that proposal. 84 Fed. Reg. at 31,408. The Department did not consider that “one-to-  
15 one ratio” proposal in developing the Repeal and, to the extent it did, it failed to give  
16 a reasoned explanation for the rejection of that alternative.

17 256. In the preamble to the Repeal, the Department also stated that one  
18 commenter “offered alternative D/E rates and thresholds for consideration,  
19 including using a 10% debt-to-income threshold with a 10-year repayment term or a  
20 15% or 20% debt-to-income thresholds [sic].” 84 Fed. Reg. at 31,407. Although it  
21 noted that comment in the discussion, the Department does not appear to have  
22 considered that proposal in developing the Repeal and, to the extent it did, it failed  
23 to give a reasoned explanation for the rejection of that alternative.

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26 <sup>29</sup> U.S. Dep’t of Educ., *Transcript of Gainful Employment Negotiated*  
27 *Rulemaking Committee 2017–2018* 1, 12 (Session No. 1, Dec. 5, 2017), available at:  
28 [https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/tuesdaydecemeber5tr  
anscript.docx](https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/tuesdaydecemeber5transcript.docx).

1           257. The Department also evinced its knowledge of obvious alternatives  
2 through the proposals the agency itself made during negotiated rulemaking. For  
3 example, prior to Negotiated Rulemaking Session 2, the Department released a  
4 version of Issue Paper #3, that suggested numerous alternatives to the formula for  
5 calculating the D/E rates measure.<sup>30</sup>

6           258. Issue Paper #3 (Session 2) proposed numerous additional alternatives,  
7 including amending the “Annual Loan Payment” component of both the annual  
8 earnings and discretionary income threshold formula to use: (i) an amortization  
9 period of fifteen years, regardless of program length; (ii) the statutory interest rate  
10 on federal Direct unsubsidized loans during the last award year of the cohort period,  
11 rather than the average rate over the last three years; and (iii) a “loan debt” that no  
12 longer included private educational loans or institutional loans.

13           259. Issue Paper #3 (Session 2) also proposed to “no longer exclude from the  
14 numerator and the denominator of the D/E rates calculation students who have one  
15 or more [T]itle IV loans in a military related deferment status” and to “require that  
16 a student be enrolled for at least 60 days for that individual to be counted as an  
17 exclusion to the D/E rate calculations.” The Department likewise noted in Issue  
18 Paper #3 (Session 2) that it “propose[d] to use a single two-year cohort period in  
19 calculating D/E rates and remove the four-year cohort rate.”

20           260. Prior to Negotiated Rulemaking Session 3, the Department released  
21 another new version of Issue Paper #3, which suggested additional alternatives to  
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25           <sup>30</sup> See U.S. Dep’t of Educ., *Debt Calculations*, First Amended Issue Paper No. 3,  
26 2017–2018 Negotiated Rulemaking (Session No. 2, Feb. 5–7, 2018), *available at*:  
27 [https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper3debt  
28 calculations.pdf](https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper3debt_calculations.pdf).

1 the formula for calculating the Eligibility Metrics.<sup>31</sup> This paper summarized the  
2 proposed alternatives to the Eligibility Metrics “[s]ince Session 2” as follows:

3 [W]e propose to amortize debt over a ten-year period for undergraduate  
4 certificates, post-baccalaureate certificates, and associate’s [sic]  
5 degrees. We also propose to amortize debt over a fifteen-year period for  
6 bachelor’s degrees. In conforming with our previous proposal to limit  
7 these regulations to undergraduate programs, we removed the  
8 amortization of debt for Master’s [sic] level programs or higher. We  
9 also propose moving the calculation of a loan repayment rate to  
10 § 668.406.

11 261. In issuing the 2018 NPRM and the Repeal, the Department did not  
12 consider any of these, or other, reasonable alternatives to the Eligibility Metrics. To  
13 the extent the Department did consider such alternatives, the Department failed to  
14 identify those alternatives in either the 2018 NPRM or the Repeal and failed to give  
15 a reasoned explanation for its rejection of any considered alternatives.

### 16 **7.2.3 Failure to Consider Alternative Thresholds and Sanctions for Failing D/E** 17 **Rates Measures**

18 262. The Department did not consider alternative sanctions for GE  
19 programs that fail to meet certain minimum threshold D/E rates measures that  
20 were less drastic than the chosen policy of complete repeal. Nor did the Department  
21 consider alternative thresholds. To the extent the Department did consider such  
22 alternatives, including during negotiated rulemaking, the Department failed to  
23 identify those alternatives or give a reasoned explanation for the rejection of those  
24 alternatives.

25 263. The Department was aware of numerous alternative thresholds and  
26 sanctions, insofar as it had considered various alternatives in 2011. For example, in  
27 2011, the Department set a discretionary income rate threshold of thirty percent  
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31 *See* U.S. Dep’t of Educ., *Debt Calculations*, Second Amended Issue Paper No. 3, 2017–2018 Negotiated Rulemaking (Session No. 3, Mar. 12–15, 2018), available at: <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/session3issuepaper3ratecalculations.pdf>.

1 and an annual earnings threshold of twelve percent. In the Gainful Employment  
2 Rule, the Department set a passing discretionary income rate threshold at twenty  
3 percent, with a “zone” between twenty percent and thirty percent, and a failing rate  
4 at thirty percent. Similarly, with respect to annual earnings, the Gainful  
5 Employment Rule established a passing rate of eight percent, a failing rate of  
6 twelve percent, and a “zone” between those two marks.

7         264. The Department also demonstrated its knowledge of obvious  
8 alternative thresholds and sanctions through proposals it made during the  
9 negotiated rulemaking process. For example, in Issue Paper #2 (Session 2), the  
10 Department proposed to amend the framework so that programs were no longer  
11 considered “passing” or “failing” based on D/E rates.<sup>32</sup> Instead, the Department  
12 proposed to refer to GE programs as “acceptable” if they met established standards  
13 and “low-performing” if they did not meet the established standards. The  
14 Department also proposed to “remove the concept of a ‘zone’ from regulations.”

15         265. The Department further evinced its knowledge of obvious alternative  
16 thresholds in Issue Paper #2 (Session 3) when it proposed “to add a loan repayment  
17 rate into the framework for undergraduate educational programs” and to “refer to a  
18 program as one that ‘meets benchmarks’ if it meets the established standards and a  
19 program as one that ‘does not meet benchmarks’ if it does not meet established  
20 standards.”<sup>33</sup>

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23         <sup>32</sup> See U.S. Dep’t of Educ., *D/E Rates*, Amended Issue Paper No. 2, 2017–2018  
24 Negotiated Rulemaking (Session No. 2, Feb. 5–8, 2018), *available at*:  
25 <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper2debttoearningsrates.pdf>.

26         <sup>33</sup> See U.S. Dep’t of Educ., *D/E Rates*, Second Amended Issue Paper No. 2,  
27 2017–2018 Negotiated Rulemaking (Session No. 3, Mar. 12–15, 2018), *available at*:  
28 <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/session3issuepaper2derates.pdf>.

1           266. With respect to sanctions, prior to Session 2, the Department proposed  
2 in Issue Paper #4 to eliminate the loss of eligibility as a sanction for failing to meet  
3 the D/E rates measure thresholds.<sup>34</sup> But in that same Issue Paper, the Department  
4 did *not* propose to eliminate entirely the warnings and notifications that would be  
5 provided for programs that were deemed “low-performing” due to their D/E rates  
6 measures.

7           267. The Department further demonstrated its knowledge of obvious  
8 alternative sanctions in Issue Paper #4 (Session 3), in which it proposed to “tie  
9 sanctions for poor performance under the D/E rates and loan repayment rate  
10 measures to standards of administrative capability.”<sup>35</sup> The Department further  
11 proposed “potential sanctions” that included “limitations on an institution’s ability  
12 to expand programs by more than 10 percent for programs that do not meet  
13 benchmarks, or to start new programs in similar occupations to the programs that  
14 do not meet benchmarks without prior approval of the Department or a program  
15 review conducted by the Department.”

16           268. In Issue Paper #4 (Session 3), the Department further illustrated its  
17 knowledge of obvious sanctions, in which it proposed “some clarifications on when  
18 notifications” should be made to students in languages other than English as a  
19 result of a GE program’s failure to meet D/E rates measure thresholds.  
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22           <sup>34</sup> See U.S. Dep’t of Educ., *Sanctions for Programs Based on D/E Rates*,  
23 Amended Issue Paper No. 4, 2017–2018 Negotiated Rulemaking (Session No. 2,  
24 Feb. 5–8, 2018), *available at*:  
<https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper4sanctions.pdf>.

25           <sup>35</sup> See U.S. Dep’t of Educ., *Sanctions for Programs Based on D/E Rates*, Second  
26 Amended Issue Paper No. 4, 2017–2018 Negotiated Rulemaking (Session No. 3,  
27 Mar. 12–15, 2018), *available at*:  
<https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/session3issuepaper4sanctions.pdf>.

1           269. To the extent the Department had concerns with the specific Eligibility  
2 Metrics established in the Gainful Employment Rule, the Department failed to  
3 consider other obvious alternatives. For example, in light of the fact that the 2018  
4 NPRM expressed no concern with the substantive basis for the twenty percent  
5 discretionary income rate threshold, the Department could have considered the  
6 obvious alternative of removing only the eight percent annual earnings rate, as  
7 commenters suggested.

8           270. In issuing the Repeal, the Department did not consider any of these, or  
9 other, reasonable alternatives to the thresholds or sanctions for failing to meet the  
10 Eligibility Metrics. To the extent the Department did consider such alternatives, the  
11 Department failed to identify those alternatives in either the 2018 NPRM or the  
12 Repeal and failed to give a reasoned explanation for its rejection of those  
13 alternatives. The Department's actions in this regard were arbitrary, capricious,  
14 and not in accordance with law.

#### 15 **7.2.4 Failure to Consider Alternatives to Issues with Tip-Based Occupations**

16           271. In 2014, the Department received comments contending that the  
17 Department's earnings assessment process for the D/E rates measure was flawed  
18 with regard to information on self-employed individuals because the ultimate source  
19 of data on their earnings is the individual, who may fail to report or significantly  
20 underreport earnings or who may have relatively significant business expenses that  
21 offset even substantial income. *See* 79 Fed. Reg. at 64,955. Commenters also noted  
22 that many individuals in careers with substantial tip-income components tend to  
23 underreport tips.

24           272. In response to this and other concerns, the Department included in the  
25 Gainful Employment Rule the Alternate Earnings Appeals process, *see supra* ¶ 133,  
26 whereby institutions could submit an alternative means of calculating the D/E rates  
27 measure.

28 ///

1           273. In the Repeal, the Department made two general assertions regarding  
2 the alternate earnings appeal process that are relevant here. First, the Department  
3 claimed that—in light of the *AACS* decision, *see supra* ¶¶ 161–163—the “standard  
4 for such appeals was inappropriately high.” 84 Fed. Reg. at 31,410. Second, the  
5 Department claimed that “[t]he administrative burden and complexity of accounting  
6 for underreported income for the purpose of the D/E rates measure is another factor  
7 that supports the [Repeal].” 84 Fed. Reg. at 31,410.

8           274. Although the Department repeatedly referred to the ruling in the  
9 *AACS* case as a decision of the United States Court of Appeals for the D.C. Circuit,  
10 *see* 84 Fed. Reg. at 31,410, the *AACS* decision is a decision of the United States  
11 District Court for the District of Columbia.

12           275. In the *AACS* litigation, plaintiffs challenged the Gainful Employment  
13 Rule on a number of grounds related to the underreporting of income derived from  
14 tips by graduates of cosmetology programs and the resulting impact on the D/E  
15 rates measure calculation.

16           276. As an initial matter, *AACS* noted that the Department “had discretion  
17 to use SSA [earnings] data as the presumptive measure of average income for GE  
18 programs.” 258 F. Supp. 3d at 73. The District Court stated that it “had no reason to  
19 believe that SSA [earnings] data is anything but precise with respect to *reported*  
20 income,” and that although “incomplete” because it measures reported income  
21 rather than total income, the Department “has discretion to sacrifice some measure  
22 of fit for the sake of administrability.” *Id.* (emphasis in original)..

23           277. Ultimately, however, the District Court concluded that the alternate  
24 earnings appeals process was insufficient for the *AACS* member schools and ordered  
25 the Department not to require these schools to adhere to certain restrictions  
26 regarding the sample size used for alternate earnings appeals. *Id.* at 76–77.

27           278. In all other regards, *AACS* upheld the Gainful Employment Rule.

28 ///



1           279. In response to the *AACS* ruling, the Department established a new  
2 date for institutions to file both a notice of intent to file an alternate earnings  
3 appeal and the appeal itself. *See* 82 Fed. Reg. at 39,363; *supra* ¶ 165. In addition,  
4 the Department modified the alternate earnings appeals process for all institutions  
5 (*i.e.*, *AACS* and non-*AACS* institutions). The Department stated that, in response to  
6 the *AACS* litigation, it would not enforce certain aspects of the regulations related  
7 to the alternate earnings appeals. Instead, the Department asserted that, with  
8 respect to appeals relying on survey information, it would “consider the response  
9 rate, the nonresponse bias analysis, and any other information requested by the  
10 Secretary that indicates that the responses are a reliable measure of the program  
11 graduates’ true earnings.” 82 Fed. Reg. at 39,363. With respect to appeals “based on  
12 data from State-sponsored data systems,” the Department stated that it would  
13 “consider the[ir] validity . . . on a case-by-case basis, taking into account the  
14 response rate and other information requested by the Secretary.” 82 Fed. Reg. at  
15 39,363.

16           280. This alternative to the alternate earnings appeal process was made “to  
17 reduce the burden on institutions in conducting these appeals while still ensuring  
18 that institutions provide enough information for the Department to determine  
19 whether the program graduates for whom alternate earnings data [we]re provided  
20 are a valid representation of the overall cohort.” 82 Fed. Reg. at 39,363.

21           281. In the *Federal Register* notice, the Department also invited public  
22 comment and stated that it would “consider these comments in determining  
23 whether to take any future action in connection with the upcoming negotiated  
24 rulemaking.” 82 Fed. Reg. at 39,363.

25           282. Although the Department concluded that this alternative to the  
26 alternate earnings appeals process satisfied the *AACS* ruling, the Department  
27 failed to consider this alternative when issuing the Repeal.

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1           283. In the Repeal, the Department also failed to consider the extent to  
2 which issues surrounding reporting of tip income are a real problem. The  
3 Department put forth no data on the extent to which tip income is underreported  
4 and failed to consider a comment describing how the IRS “works with employers  
5 who may have a lot of tipped employees to create Tip Reporting Alternative  
6 Commitments (TRACs),” which include “promises from businesses to distribute  
7 materials and educate employees about the importance of reporting tips.” Miller  
8 Comment at 23. Nor did the Department consider the impact of “Tip Rate  
9 Determination Agreements,” *i.e.*, a voluntary compliance agreement that the IRS  
10 describes as “designed to enhance tax compliance among tipped employees,”<sup>36</sup> or the  
11 increasing extent to which tips are paid by credit card, which are more likely to be  
12 reported. Miller Comment at 23. The Department also did not consider the “role of  
13 institutions in encouraging proper tip reporting” and whether “cosmetology  
14 programs include in their delivered curriculum ethics lectures on the importance of  
15 reporting.” *Id.* The Department failed to respond to comments on these topics.

16           284. The Department asserted in the 2018 NPRM that the “process for  
17 developing . . . an [alternate earnings] appeal has proven to be more difficult to  
18 navigate than the Department had originally planned.” 83 Fed. Reg. at 40,174. The  
19 Department further asserted in the 2018 NPRM that it “reviewed earnings appeal  
20 submissions for completeness and considered response rates on a case-by-case basis  
21 . . . . Through this process, the Department has corroborated claims from  
22 institutions that the survey response requirements of the earnings appeals  
23 methodology are burdensome given that program graduates are not required to  
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26           <sup>36</sup> See generally U.S. Internal Revenue Serv., *Voluntary Compliance*  
27 *Agreements – Restaurant Tax Tips*, [https://www.irs.gov/businesses/small-](https://www.irs.gov/businesses/small-businesses-self-employed/voluntary-compliance-agreements-restaurant-tax-tips)  
28 [businesses-self-employed/voluntary-compliance-agreements-restaurant-tax-tips](https://www.irs.gov/businesses/small-businesses-self-employed/voluntary-compliance-agreements-restaurant-tax-tips)  
(last updated Nov. 9, 2018).

1 report their earnings to their institution or to the Department . . . .” 83 Fed. Reg. at  
2 40,174.

3 285. In the Repeal, the Department reiterated this conclusion, asserting  
4 that “[a]dministering the GE regulations, particularly alternate earnings appeals,  
5 has also turned out to be much more burdensome to the Department than was  
6 originally anticipated.” 84 Fed. Reg. at 31,419.

7 286. The Department did not make relevant information available to the  
8 public to adequately comment on this justification.

9 287. On March 5, 2018, the National Student Legal Defense Network  
10 (“Student Defense”), counsel to Plaintiffs in this litigation, requested documents  
11 related to alternate earnings appeals under the Freedom of Information Act  
12 (“FOIA”).

13 288. Student Defense requested: (i) all documents constituting notices of  
14 intent to file alternate earnings appeals by institutions of higher education; (ii) all  
15 documents constituting those alternate earnings appeals; and (iii) all documents  
16 constituting or reflecting communications with any institutions about their  
17 alternate earnings appeals.

18 289. The Department failed to produce the documents under the timeline  
19 required by the FOIA.

20 290. By the time the comment period closed, Student Defense had not  
21 received the relevant information requested.

22 291. It is Student Defense’s general practice to publish documents received  
23 from the government under the FOIA on its website, so that members of the public  
24 can review them.

25 292. In its comment submitted in response to the 2018 NPRM, Student  
26 Defense highlighted that it could not effectively comment on the Department’s  
27 assertions about the alternative earnings appeals process because the requested  
28 information was not provided.

1 **7.3 The Department Provided No Reasonable Justification for the Repeal of the**  
2 **Transparency Framework**

3 293. In the Repeal, the Department openly admitted that repealing the  
4 Transparency Framework would harm students. The Department asserted “that[,]  
5 by rescinding the 2014 Rule[,] some students would be more likely to make poor  
6 educational investments.” 84 Fed. Reg. at 31,394. The Department further stated  
7 that “[w]ith the elimination of the disclosures and the ineligibility sanction that  
8 would have removed students’ program choices, students, their parents, and other  
9 interested members of the public will have to seek out the information that  
10 interests them about programs they are considering.” 84 Fed. Reg. at 31,444–45.

11 294. In repealing the Reporting Requirements, the Department’s sole  
12 justification was that it would reduce cost and burden on institutions that offer  
13 gainful employment programs. *See, e.g.*, 84 Fed. Reg. at 31,418.

14 295. In repealing the Disclosure Requirements, the Department asserted in  
15 the 2018 NPRM that it “underestimated” the “burden” that the regulations would  
16 have on institutions. *See, e.g.*, 83 Fed. Reg. at 40,173 (“The Department also  
17 believes that it underestimated the burden associated with distributing the  
18 disclosures directly to prospective students.”); 83 Fed. Reg. at 40,177 (“Furthermore,  
19 when developing the GE regulations, the Department, as noted in feedback received  
20 from multiple institutions, underestimated the burden on institutions associated  
21 with the use of a standardized disclosure template in publishing program outcomes  
22 and distributing notifications directly to prospective and current students.”).

23 296. The Department produced no data demonstrating the extent to which  
24 the administrative burden associated with the Gainful Employment Rule differed  
25 from its expectations when it passed the rule.

26 297. The only “evidence” the Department offered to support its view were  
27 anecdotal comments of one individual who was a member of the 2017–2018  
28 Negotiated Rulemaking Committee.

1           298. During negotiated rulemaking, a Department representative, when  
2 asked for estimates of the Gainful Employment Rule’s administrative burden,  
3 stated “we don’t currently have anything right now.”<sup>37</sup>

4           299. In the Gainful Employment Rule, the Department estimated the total  
5 “burden hours”—*i.e.*, the number of hours of “burden” created by the rule to  
6 students and institutions—to be 6,925,627. *See* 79 Fed. Reg. at 65,005.

7           300. Given what the Department stated about how it had underestimated  
8 the burden attributable to the Gainful Employment Rule in 2014, it would logically  
9 follow that repealing the Rule would result in an estimated burden decrease that  
10 was *larger* than the 2014 estimated increase. In the 2018 NPRM and Repeal,  
11 however, the Department states that the total “burden hours” reduced by the  
12 proposed repeal would be 6,925,628, a one hour difference (or one ten-millionth of a  
13 percent difference) from the estimated burden of the Gainful Employment Rule. *See*  
14 83 Fed. Reg. at 40,182; 84 Fed. Reg. at 31,452. Functionally, this is the exact same  
15 burden that the Department estimated in 2014.

16           301. In repealing the Disclosure Requirements, the Department also  
17 asserted that “disclosures required by the GE regulations include some data, such  
18 as job placement rates, that are highly unreliable and may not provide the  
19 information that students and families need to make informed decisions about  
20 higher education options.” 84 Fed. Reg. at 31,392. But to “address” this concern, the  
21 Department “describe[d] in [the Repeal] our preliminary plans for the expansion of  
22 the College Scorecard.” 84 Fed. Reg. at 31,394.

23           302. The College Scorecard is a Departmental website, launched in 2013  
24 and available at <http://collegescorecard.ed.gov>, that provides information to the  
25 public regarding institutions of higher education.

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27           <sup>37</sup> U.S. Dep’t of Educ., *Transcript of Gainful Employment Negotiated*  
28 *Rulemaking Committee 2017–2018* 1, 23 (Session No. 2, Feb. 8, 2018), *available at*:  
<https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/day4getranscript.pdf>.

1           303. Appendix A to the Repeal includes a comparison of information that  
2 was “made available to students and parents through the 2017 GE disclosure  
3 template with the information” that the Department claims “will be provided  
4 through the expanded College Scorecard or other consumer information tools, such  
5 as College Navigator.” 84 Fed. Reg. at 31,395; *see also* 84 Fed. Reg. at 31,435–37  
6 (Appendix A).

7           304. The Department did not explain why job placement rates are “highly  
8 unreliable” or why the Department was wrong to include these rates as part of the  
9 Reporting and Disclosure Requirements in 2014. Nor did the Department explain  
10 why, in the Repeal, it stated that job placement rates are “highly unreliable and  
11 may not provide the information that students and families need to make informed  
12 decisions about higher education options,” 84 Fed. Reg. at 31,392, but also stated, as  
13 recently as July 2018, that it could propose to “develop[] a single definition for  
14 purposes of measuring and reporting job placement rates” as part of a different  
15 rulemaking proceeding. *See* Negotiated Rulemaking Committee; Public Hearings,  
16 83 Fed. Reg. 36,814, 35,815 (July 31, 2018).

17           305. The Department did not explain why it no longer believes, as it  
18 asserted in 2014, that the “direct delivery” of information to students makes it more  
19 likely that students will receive and review disclosed information. 79 Fed. Reg. at  
20 64,969. Nor did the Department explain why it no longer considers direct  
21 distribution of information to prospective and enrolled students to be preferable to  
22 making information available via College Scorecard or elsewhere on the  
23 Department’s website. *See* 79 Fed. Reg. at 64,978.

24           306. Non-binding plans to expand the Department’s College Scorecard do  
25 not mitigate the fact that students will be “more likely to make poor educational  
26 investments” as a result of the Repeal.

27           307. The Department failed to consider that, as a commenter pointed out,  
28 during August 2018, the College Scorecard received approximately 63,000 visitors,

1 which is a small fraction of both the number of students enrolled in GE programs  
2 and the number of students enrolled in failing programs.

3 308. The Repeal does not maintain or add any regulations that require  
4 disclosure of *any* information to enrolled or prospective students. Rather, the  
5 Department stated that it “encourages all institutions to post links to the Scorecard  
6 on their institutional websites.” 84 Fed. Reg. at 31,423. In contrast, the Gainful  
7 Employment Rule required institutions to post the required disclosures on  
8 programmatic websites with a link that is “prominent, readily accessible, clear,  
9 conspicuous, and direct.” 34 C.F.R. § 668.412(c). In addition, the Gainful  
10 Employment Rule required institutions to include, in a “prominent manner,” the  
11 disclosures in all promotional materials (including catalogs, invitations, flyers,  
12 billboards and advertising on or through radio, television, print media, the Internet,  
13 and social media), or, if “space or airtime constraints . . . preclude[d]” this, the  
14 institution was required to include a link that was “prominent, readily accessible,  
15 clear, conspicuous, and direct” and identified as “Important Information about the  
16 educational debt, earnings, and completion rates of students who attended this  
17 program.” 34 C.F.R. § 668.412(d).

18 309. The Repeal also does not maintain or add any regulations that require  
19 disclosure of information to students, in the form of warnings, when a program is at  
20 risk of being determined *not* to prepare students for gainful employment in a  
21 recognized occupation.

22 310. The lack of any requirement that schools warn students about a  
23 potential loss of Title IV eligibility suggests either that the Department does not  
24 intend for a GE program to ever lose Title IV eligibility because it fails to prepare  
25 students for gainful employment in a recognized occupation or that warning of such  
26 a determination is no longer “essential” or “necessary” for students.

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#### 7.4 The Department Failed to Consider Alternatives to Repealing the Disclosure Requirements

311. The Department stated in the Repeal that it “considered multiple options regarding which metrics to disclose, which entity bears the burden of computing them, and how to disseminate them to students and the public.” 84 Fed. Reg. at 31,449.

312. With respect to disclosures, the Department stated that it was “not convinced that the GE disclosures are useful to students.” 84 Fed. Reg. at 31,419. At the same time, it acknowledged that information regarding “[a]ffordability and earnings associated with institutions and programs continues to be an area of interest” for students and their families. 84 Fed. Reg. at 31,445. And, as noted *supra* ¶ 168, the Department declared in May 2019 that the 2019 disclosure template would provide information that was “especially meaningful to students.”

313. The Department suggested numerous alternatives during negotiated rulemaking. For example, in Issue Paper #6 provided before the second session, the Department proposed requiring certain programs to disclose, on specific programmatic websites, information about the primary occupation that the program prepares students to enter, programmatic completion rates, program length, enrollment numbers, the loan repayment rate, cost information, the job placement rate, the percentage of Title IV recipients, median loan debt, completion rates, earnings information, professional licensure information, accreditation status, and a link to the College Navigator and College Scorecard websites.<sup>38</sup>

314. By the third negotiated rulemaking session, the Department proposed to narrow the information required to be disclosed, but nevertheless continued to

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<sup>38</sup> U.S. Dep’t of Educ., *Program Disclosures*, First Amended Issue Paper No. 6, 2017–2018 Negotiated Rulemaking (Session No. 2, Feb. 5–8, 2018), *available at* <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper6programinformationdisclosures.pdf>.



1 propose many of the same disclosure requirements included in the Gainful  
2 Employment Rule.<sup>39</sup>

3 315. In issuing the Repeal, the Department failed to provide any non-  
4 conclusory explanations for rejecting an obvious alternative to complete repeal of  
5 the Disclosure Requirements.

6 316. The Department's failures are particularly troubling in light of its  
7 reliance on a focus group report to support complete repeal of the Disclosure  
8 Requirements, despite that report identifying an approach for disclosures that was  
9 found to be both "helpful and important." Holly Bozeman *et al.*, *Summary Report*  
10 *for the 2017 Gainful Employment Focus Groups*, Westat 1-1, 5-2 (Mar. 2017)  
11 ("Focus Group Report").<sup>40</sup> Indeed, with respect to the "warning language that would  
12 be added to a webpage if a program fails to meet U.S. Department of Education  
13 standards," participants in the focus group found the "visual display" to be "very  
14 effective." *Id.* at 5-6.

15 317. The Department claimed in the Repeal that the Focus Group Report  
16 showed that "students mostly want to know how students like them have done in  
17 the program," 84 Fed. Reg. at 31,419, when in reality the report states:

18 **Prospective and current students looked for and valued a variety of**  
19 **types of information in their search for a college or program of study.**  
20 Prospective students were asked what type of information has been  
21 most important for them in their search process; students were evenly  
22 split between tuition costs, accreditation, and length of program.  
23 Current students were asked what type of information they had looked  
24 for when considering a program, and similarly, tuition costs were most  
25 important, followed by schedule. In contrast to the prevailing opinion  
26 that cost was a determining factor, one current student countered that  
27 it was "[n]ot about the money [spent], it's about the job that will last

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25 <sup>39</sup> See, e.g., U.S. Dep't of Educ., *Program Disclosures*, Second Amended Issue  
26 Paper No. 6, 2017–2018 Negotiated Rulemaking (Session No. 3, Mar. 12–15, 2018),  
27 available at: [https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/  
session3issuepapers6disclosures.pdf](https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/session3issuepapers6disclosures.pdf).

28 <sup>40</sup> The Focus Group Report is available online at:  
<https://www2.ed.gov/about/offices/list/ope/summaryrpt2017gefoc317.pdf>.

1 the longest . . . [I] don't want to waste time on something [if] I'm not  
2 going to get anything out of it."

3 Focus Group Report at 2-1 (emphasis in original).

4 318. Insofar as the Department asserted that the Gainful Employment Rule  
5 had a disparate impact on proprietary institutions and that, "[w]ithout a statutory  
6 change, there was no way to expand the GE regulations to apply to all institutions,"  
7 84 Fed. Reg. at 31,394, the Department failed to consider that, even though it did  
8 not have the authority to expand the Accountability Framework beyond those  
9 programs that prepare students for gainful employment in a recognized occupation,  
10 it did have the authority to expand the Transparency Framework to cover  
11 additional institutions. *See, e.g.*, 79 Fed. Reg. at 64,890 (discussing how the  
12 Department's authorities under 20 U.S.C. § 1221e-3 and 20 U.S.C. § 3474 "include  
13 promulgating regulations that . . . require institutions to report information about  
14 the program to the Secretary" and "require . . . institution[s] to disclose information  
15 about the[ir] program[s] to students, prospective students, and their families, the  
16 public, taxpayers, and the Government, and institutions"); 79 Fed. Reg. at 64,891  
17 (describing how section 431 of the Department of Education Organization Act, 20  
18 U.S.C. § 1231a, provides authority for the Transparency Framework insofar as that  
19 provision permits the Secretary to "inform the public regarding federally supported  
20 education programs; and collect data and information on applicable programs for  
21 the purpose of obtaining objective measurements of the effectiveness of such  
22 programs in achieving the intended purposes of such programs").

23 319. Although the Department has purportedly tried to cure the harms  
24 created by repealing the Disclosure Requirements through non-binding assertions  
25 about its plans to update the College Scorecard (which, at the time of the  
26 publication of the Repeal, it was "still developing," 84 Fed. Reg. at 31,424), the  
27 Department never considered whether providing debt and earnings metrics on a  
28 Departmental website is an adequate substitute for the Disclosure Requirements,

1 which are provided on institutional and programmatic websites, in marketing  
2 materials, and via direct distribution to prospective and enrolled students.

3 320. To the extent the Department had concerns with job placement rate  
4 disclosures, the Department failed to consider the obvious alternative of adding an  
5 explanation about how the rates are calculated to make clear to prospective  
6 students whether they can make an apples-to-apples comparison across programs.  
7 Nor did the Department consider the obvious alternative of developing a single  
8 methodology for measuring and reporting job placement rates, despite the fact that  
9 this was a known alternative to repeal. *See* 83 Fed. Reg. at 35,815 (convening, in a  
10 different rulemaking proceeding, a negotiated rulemaking committee to consider,  
11 *inter alia*, “[d]eveloping a single definition for purposes of measuring and reporting  
12 job placement rates”).

### 13 **8. Post-Repeal Developments**

14 321. On June 28, 2019, the Department issued Electronic Announcement  
15 #122 (“EA122”) regarding the “Early Implementation of the Rescission of the  
16 Gainful Employment Rule.”

17 322. In EA122, the Department recognized that the Master Calendar Rule  
18 requires that regulations affecting Title IV programs be published in final form by  
19 November 1, prior to the start of the July 1 award year in which they become  
20 effective. At the same time, the Department noted that the HEA permits the  
21 Secretary to designate a regulation for early implementation, which allows those  
22 subject to its terms to comply sooner if they wish to do so. *See* HEA § 482(c)(2), 20  
23 U.S.C. § 1089(c)(2).

24 323. In EA122, the Department stated that “[i]nstitutions that early  
25 implement the rescission of the GE rule will not be required to report GE data . . .  
26 for the 2018–2019 award year,” which would otherwise be due on October 1, 2019.  
27 In addition, “those institutions that early implement will not be required to comply  
28 with the current requirements in 34 C.F.R. § 668.412(d) and (e) that require

1 institutions to include the disclosure template, or a link thereto, in their GE  
2 program promotional materials and directly distribute the disclosure template to  
3 prospective students, which will be required starting on July 1, 2019.”

4 324. In EA122, the Department also stated that “[i]nstitutions that early  
5 implement will no longer be required to post the GE Disclosure Template and may  
6 remove the template and any other GE disclosures that are required under 34  
7 C.F.R. [§] 668.412 from their web pages. Finally, an institution that early  
8 implements will not be required to comply with the certification requirements for  
9 GE programs under 34 C.F.R. [§] 668.414.”

10 325. On or about September 13, 2019, the Department issued Electronic  
11 Announcement #123 (“EA123”), which, like EA122, provides that institutions that  
12 “choose to early implement” will not be required to report GE data for the 2018–19  
13 award year. The Department made clear in EA123 that institutions “that do not  
14 early implement the rule are still expected to comply with the 2014 rule until the  
15 rescission becomes effective on July 1, 2020.”

16 326. By choosing to early implement the Repeal, the Department relieved  
17 institutions of their regulatory obligations to comply with the Certification,  
18 Reporting, and Disclosure Requirements. The Department does not track which  
19 institutions have chosen to early implement.

20 327. Since publication of the Repeal, the Department also released a  
21 “redesign” of the College Scorecard website, which it asserts provides “customized,  
22 accessible, and relevant data on potential debt and earnings based on field of study  
23 (including for 2-year programs, 4-year degrees, certificate programs, and some  
24 graduate programs), graduation rates, and even apprenticeships.”<sup>41</sup>

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27 <sup>41</sup> Press Release, U.S. Dep’t of Educ., *Secretary DeVos Delivers on Promise to*  
28 *Provide Students Relevant, Actionable Information Needed to Make Personalized*  
*Education Decisions* (Nov. 20, 2019), available at: <https://www.ed.gov/news/press->

1           328. The information provided by the updated College Scorecard is not a  
2 substitute for the information required to be reported and disclosed under the  
3 Gainful Employment Rule.

4           329. For example, the Gainful Employment Rule required that institutions  
5 provide the required disclosures on: (i) “any Web page containing academic cost,  
6 financial aid, or admissions information;” (ii) in “all promotional materials made  
7 available by or on behalf of an institution;” and (iii) by “direct distribution” to  
8 prospective students, either by email or hand-delivery. *See* 34 C.F.R. § 668.412(c)–  
9 (e). By contrast, interested parties must visit the College Scorecard website to  
10 review information about an institution’s offerings. Further, while the Gainful  
11 Employment Rule required an “institution that offers a GE program in more than  
12 one program length” to publish a “separate disclosure template for each length of  
13 the program,” 34 C.F.R. § 668.412(f), the College Scorecard does not separate GE  
14 programs by length.

15           330. Still further, although the Gainful Employment Rule defined covered  
16 programs in terms of a six-digit CIP code, the “[College] Scorecard uses the first  
17 four digits of the CIP code in its calculations.”<sup>42</sup> As a result, the updated College  
18 Scorecard aggregates information from disparate programs. For example, the  
19 Scorecard would include together the following types of programs:

20  
21  
22 [releases/secretary-devos-delivers-promise-provide-students-relevant-actionable-information-needed-make-personalized-education-decisions.](#)

23           <sup>42</sup> *See* U.S. Dep’t of Education, *Technical Documentation: College Scorecard*  
24 *Data by Field of Study* 1, 13 (Nov. 20, 2019), *available at*  
25 <https://collegescorecard.ed.gov/assets/FieldOfStudyDataDocumentation.pdf>.  
26 Notably, although the Department sought to justify its use of four-digit CIP  
27 information in the Scorecard by claiming that it can provide “more information that  
28 is not privacy-suppressed,” it recognized that the “trade-off” of using four-digit CIP,  
instead of six-digit CIP, was the “loss of granularity in describing individual  
program offerings by institutions.” *Id.*

1 A program that focuses on the principles and practice of  
 2 administration in four-year colleges, universities and higher education  
 3 systems, the study of higher education as an object of applied research,  
 4 and which may prepare individuals to function as administrators in  
 5 such settings. Includes instruction in higher education economics and  
 6 finance; policy and planning studies; curriculum; faculty and labor  
 7 relations; higher education law; college student services; research on  
 8 higher education; institutional research; marketing and promotion;  
 9 and issues of evaluation, accountability and philosophy.<sup>43</sup>

10 with the following:

11 A program that focuses on early childhood educational program  
 12 administration and prepares individuals to serve as a principal or  
 13 director of an early childhood educational program. Includes  
 14 instruction in early childhood education, program and facilities  
 15 planning, budgeting and administration, public relations, human  
 16 resources management, early childhood growth and development,  
 17 counseling skills, applicable law and regulations, school safety, policy  
 18 studies, and professional standards and ethics.<sup>44</sup>

19 331. There is a meaningful difference in information and data regarding  
 20 programs if the information is provided at a four-digit CIP code level as opposed to a  
 21 six-digit CIP code level. *See supra* ¶¶ 91–95.

22 332. As an example, according to the 2015 D/E rates measure data the  
 23 Department released in 2017, a master’s degree program at Capella University—a  
 24 proprietary institution—corresponding to the six-digit CIP code for “Educational  
 25 Leadership and Administration, General” (CIP Code 13.0401) had a median  
 26 earnings value of \$57,339, whereas a master’s degree program at Capella  
 27 University corresponding to the six-digit CIP code for “Higher Education/Higher  
 28 Education Administration” (CIP Code 13.0406) had a median earnings value of  
 \$43,156. Because these programs share a four-digit CIP code, but not a six-digit CIP  
 code, the College Scorecard does not differentiate between them. Therefore, a  
 prospective student looking at the College Scorecard will not be able to differentiate

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26 <sup>43</sup> Nat’l Ctr. for Educ. Statistics, *IPEDS Detail for CIP Code 13.0406*,  
 27 <https://nces.ed.gov/ipeds/cipcode/cipdetail.aspx?y=56&cipid=90420>.

28 <sup>44</sup> Nat’l Ctr. for Educ. Statistics, *IPEDS Detail for CIP Code 13.0414*,  
<https://nces.ed.gov/ipeds/cipcode/cipdetail.aspx?y=56&cipid=93060>.

1 the programs or determine which program tends to lead to higher post-graduation  
2 earnings.

3 333. Similarly, according to that same data, a master's degree program at  
4 Capella University corresponding to the six-digit CIP code for "Adult and  
5 Continuing Education and Teaching" (CIP Code 13.1201) had a median earnings  
6 value of \$56,675, whereas a master's degree program at Capella University  
7 corresponding to the six-digit CIP code for "Early Childhood Education and  
8 Teaching" (CIP Code 13.1210) had a median earnings value of \$40,022. Because  
9 these programs share a four-digit CIP code, but not a six-digit CIP code, the College  
10 Scorecard does not differentiate between them. Therefore, a prospective student  
11 looking at the College Scorecard will not be able to differentiate the programs or  
12 determine which program tends to lead to higher post-graduation earnings.

13 334. Likewise, according to that same data, a master's degree program at  
14 Grand Canyon University corresponding to the six-digit CIP Code for "Educational  
15 Leadership and Administration, General" (CIP Code 1304.01) had a median  
16 earnings value of \$57,252, whereas a master's degree program at Grand Canyon  
17 University corresponding to the six-digit CIP Code for "Educational, Instructional,  
18 and Curriculum Supervision" (CIP Code 1304.04) had a median earnings value of  
19 \$45,838. Because these programs share a four-digit CIP code, but not a six-digit CIP  
20 code, the College Scorecard does not differentiate between them. Therefore, a  
21 prospective student looking at the College Scorecard will not be able to differentiate  
22 the programs or determine which program tends to lead to higher post-graduation  
23 earnings.

24 335. Without information at the six-digit CIP code level, prospective and  
25 enrolled students will not be able to make an accurate assessment of whether the  
26 earnings they are likely to make post-graduation are worth the cost of tuition for a  
27 given program.

28 ///

1           336. In addition, although the College Scorecard provides both earnings and  
2 debt information for some programs, albeit identified by four-digit CIP code, in no  
3 case does the Department provide the type of information necessary to compare  
4 earnings to debt, including no way for a student to determine whether median post-  
5 graduation debt is too high, given median post-graduation earnings. Moreover, even  
6 if the College Scorecard did compare earnings to debt, the earnings data comes from  
7 students graduating in 2015 and 2016. Debt data, on the other hand, was collected  
8 from students who graduated in 2016 and 2017.

9           337. The College Scorecard does not inform students whether any program  
10 prepares students for gainful employment in a recognized occupation. Nor does the  
11 College Scorecard provide a warning to prospective and enrolled students that a  
12 program is at risk of losing Title IV eligibility due to a failure to prepare students  
13 for gainful employment in a recognized occupation.

14 **9. The Department Continues to Rely on 2014 GE Data and the Eligibility Metrics**  
15 **for Other Purposes**

16           338. Throughout the Repeal, the Department reiterated its apparent  
17 position that the Eligibility Metrics were “arbitrary,” “lack[ed] an empirical basis,”  
18 and were published without a “sufficient, objective, and reliable basis.”

19           339. Nevertheless, before, during, and even after publication of the Repeal,  
20 the Department incorporated the Eligibility Metrics and D/E rates measure into its  
21 administration of the “Borrower Defense” Rule and relied upon these very  
22 calculations to justify its actions as non-arbitrary.

23           340. As relevant here, the 1995 Borrower Defense Rule is a regulation  
24 under which students can seek and obtain discharges of their federal student loan  
25 debt based on an act or omission of an institution of higher education that would  
26 give rise to a cause of action against the school under applicable state law. *See*

27 ///

28 ///



1 *generally* 34 C.F.R. § 685.206(c)(1) (applicable to loans issued between July 1, 1995  
2 and July 1, 2017).<sup>45</sup>

3 341. The regulation provides that “[i]f the borrower’s defense against  
4 repayment is successful, the Secretary notifies the borrower that the borrower is  
5 relieved of the obligation to repay all or part of the loan and associated costs and  
6 fees that the borrower would otherwise be obligated to pay.” 34 C.F.R.  
7 § 685.206(c)(2).

8 342. Between 2015 and 2017, the Department fully discharged the loans of  
9 students who attended particular programs at institutions owned by Corinthian  
10 Colleges, Inc. (“CCI”) pursuant to the 1995 Borrower Defense Rule. In 2017,  
11 however, the Department changed its approach under the 1995 Borrower Defense  
12 Rule and decided that, when a valid Borrower Defense claim had been brought by or  
13 on behalf of a former CCI student, the amount of relief granted would be  
14 determined by comparing the average 2014 earnings of a subset of CCI students  
15 with the average 2014 earnings of students from “peer” institutions that offered  
16 comparable programs and were considered to be passing the D/E rates measure  
17 using information released in January 2017, *supra* ¶¶ 150–151 (the “Average  
18 Earnings Rule”).

19 343. On December 20, 2017, a class of students filed suit to challenge the  
20 Department’s new approach. *See generally* Compl., *Calvillo Manriquez v. DeVos*,  
21 345 F. Supp. 3d 1077 (N.D. Cal. 2018) (No. 3:17-cv-07210-SK).

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23  
24 <sup>45</sup> The 1995 Borrower Defense Rule was modified by the Department in 2016  
25 (effective July 1, 2017) and again in 2019 (effective July 1, 2020). *See* Student  
26 Assistance General Provisions, Federal Perkins Loan Program, Federal Family  
27 Education Loan Program, William D. Ford Federal Direct Loan Program, and  
28 Teacher Education Assistance for College and Higher Education Grant Program, 81  
Fed. Reg. 75,926 (Nov. 1, 2016); Student Assistance General Provisions, Federal  
Family Education Loan Program, and William D. Ford Federal Direct Loan  
Program, 84 Fed. Reg. 49,788 (Sept. 23, 2019).

1           344. On May 25, 2018, the District Court enjoined the Department from  
2 using the “Average Earnings Rule” because the plaintiffs had shown a likelihood of  
3 success on the merits that the Department had violated the Privacy Act. *Calvillo*  
4 *Manriquez*, 345 F. Supp. 3d at 1099.

5           345. The Department appealed. Following the submission of written briefs  
6 and oral argument, the United States Court of Appeals for the Ninth Circuit  
7 ordered the parties to submit supplemental briefing on whether the “Average  
8 Earnings Rule” was arbitrary and capricious.

9           346. In its supplemental brief, the Department repeatedly relied upon the  
10 Gainful Employment Rule to argue that the “Average Earnings Rule” was not  
11 arbitrary and capricious because, in part, a comparison between *passing* GE  
12 programs and CCI programs is a non-arbitrary component to calculating the  
13 amount of loan discharge afforded to former CCI students. *See generally*  
14 Supplemental Br. of Defs.-Appellees, *Calvillo Manriquez v. DeVos*, No. 18-16375  
15 (9th Cir. Mar. 5, 2019). For example, the Department noted how “limiting the  
16 comparator programs to those with passing Gainful Employment scores *helped*  
17 Corinthian borrowers.” *Id.* at 13 (emphasis in original). The Department also  
18 asserted that “[a]verage earnings for the subset of programs with passing Gainful  
19 Employment scores are, as might be expected, ‘higher’ than the average earnings  
20 for schools generally.” *Id.* Finally, the Department argued that “limiting the  
21 comparison to schools with passing Gainful Employment scores made the earnings  
22 of Corinthian borrowers seem comparatively lower and had the effect of increasing  
23 the amount of loan forgiveness Corinthian borrowers received.” *Id.*

24           347. On December 10, 2019, the Department announced a new methodology  
25 for determining the amount of relief it would provide borrowers who stated a valid  
26 Borrower Defense claim under the 1995 Borrower Defense Rule. For students who  
27 stated valid claims with respect to schools that were both “non-operational” and “for  
28 which there is 2014 GE earnings data,” the Department’s stated policy is to use the

1 2014 data “to establish the borrower defense applicant’s program earnings, and the  
 2 earnings for the comparison group.” *See* U.S. Dep’t of Educ., *Policy Statement Re:  
 3 Tired Relief Methodology to Adjudicate Certain Borrower Defense Claims* 1, 7 (Dec.  
 4 10, 2019) (“2019 Borrower Defense Policy Statement”).<sup>46</sup>

5 348. In the 2019 Borrower Defense Policy Statement, the Department  
 6 stated that “the use of GE earnings data for determining [a borrower’s] harm is  
 7 appropriate.” *Id.* at 8. But, the Department did not mention or distinguish how it  
 8 had repeatedly criticized the very same earnings data in the Repeal. *See, e.g.*, 84  
 9 Fed. Reg. at 31,410 (describing how the “SSA data may be inaccurate”); 84 Fed. Reg.  
 10 at 31,409 (noting that the “earnings portion of the D/E calculation [is] subject to  
 11 significant errors”).

12 349. Despite representing in the Repeal that using the SSA earnings data  
 13 could lead to “significant errors,” 84 Fed. Reg. at 31,409, the Department has used  
 14 that very same data to deny full debt relief to defrauded students. The fact that the  
 15 Department relies on the SSA earnings data to serve one policy goal (effectuating  
 16 incomplete loan relief), while claiming that using the same data could lead to  
 17 “significant errors” to serve another policy goal (repealing the Gainful Employment  
 18 Rule) demonstrates that the Repeal was not based on any legitimate position that  
 19 such data was unreliable.

## 20 CAUSES OF ACTION

### 21 COUNT 1

#### 22 Agency Action that is Arbitrary, Capricious, and 23 Not in Accordance with Law Due to Failures to Properly Interpret the Statutory Mandate

24 350. Plaintiffs repeat and incorporate by reference each of the foregoing  
 25 allegations as if fully set forth herein.

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27 <sup>46</sup> The 2019 Borrower Defense Policy Statement is available online at:  
 28 <https://www.ed.gov/sites/default/files/documents/borrower-defense-relief.pdf>.

1           351. The APA requires courts to “set aside agency action, findings, and  
2 conclusions found to be[] arbitrary, capricious, an abuse of discretion, or otherwise  
3 not in accordance with law.” 5 U.S.C. § 706(2)(A).

4           352. The Repeal is a “final agency action for which there is no other  
5 adequate remedy in a court” and is “subject to judicial review.” 5 U.S.C. § 704; *see*  
6 *id.* § 702.

7           353. During the course of multiple lawsuits, courts have uniformly  
8 concluded that the gainful employment provision of the HEA is ambiguous, leaving  
9 a regulatory gap for the Department to fill. *APSCU I*, 870 F. Supp. 2d at 145–46;  
10 *APC v. Duncan*, 107 F. Supp. 3d at 358–60; *APSCU III*, 110 F. Supp. 3d at 184–89,  
11 *aff’d*, *APSCU Appeal*, 640 F. App’x at 7. *See supra* ¶¶ 77–80, 142–149.

12           354. Despite these holdings, in issuing the Repeal, the Department asserted  
13 that the statute is *unambiguous* and that, by repealing the Gainful Employment  
14 Rule in its entirety, “it, in fact, *is* enforcing the law as written and as intended.” 84  
15 Fed. Reg. at 31,401 (emphasis in original). The Department also stated, without  
16 acknowledging these holdings, that “[t]he Department does not agree that it needs  
17 to define the term ‘gainful employment’ beyond what appears in statute. Since it  
18 was added to the HEA in 1968, the term ‘gainful employment’ has been widely  
19 understood to be a descriptive term that differentiates between programs that  
20 prepare students for named occupations and those that educate students more  
21 generally in the liberal arts and humanities.” 84 Fed. Reg. at 31,401. *See supra*  
22 ¶ 189.

23           355. By contradicting numerous federal courts that have held otherwise,  
24 without acknowledging or explaining its divergence from these judgments, the  
25 Department has acted in a manner that is arbitrary, capricious, and otherwise not  
26 in accordance with law.

27           356. Because the Department had previously, and repeatedly, asserted that  
28 the relevant statutory language was ambiguous, the Department also acted

1 arbitrarily, capriciously, and not in accordance with law by failing to provide a  
2 sufficient justification for its changed interpretation of the statute. *Supra* ¶¶ 190–  
3 193.

4 357. Insofar as the Department asserts that leaving an ambiguous term  
5 undefined is simply “enforcing the law as written,” *supra* ¶ 189, and by failing to  
6 elucidate that provision by regulation, the Department has acted in a manner that  
7 is arbitrary, capricious, and otherwise not in accordance with law within the  
8 meaning of the APA, 5 U.S.C. § 706.

9 358. In addition, by taking this position, the Department specifically limited  
10 its interpretation to “two words in the HEA,” “gainful employment,” 84 Fed. Reg. at  
11 31,411, but did not consider the entire statutory command. For example, in a  
12 section entitled “Is there a need to define gainful employment?” the Department  
13 notes that a commenter “stated that the Department must establish a definition for  
14 the term ‘gainful employment in a recognized occupation.’” 84 Fed. Reg. at 31,401.  
15 But in responding to that comment, the Department’s entire discussion focuses on  
16 the need to “define the term ‘gainful employment,’” stating that “[t]he Department  
17 does not agree that it needs to define the term ‘gainful employment’ beyond what  
18 appears in statute.” 84 Fed. Reg. at 31,401.

19 359. By limiting its statutory interpretation to the narrow phrase “gainful  
20 employment,” instead of the more complete phrase “prepare students for gainful  
21 employment in a recognized occupation,” the Department interpreted the statutory  
22 language in a manner that is contrary to the holdings of numerous federal courts  
23 recognizing that the “relevant statutory command” for the purposes of determining  
24 eligibility for certain institutions and programs under Title IV is that programs  
25 “prepare students for gainful employment in a recognized occupation.” *See, e.g.*,  
26 *APSCUI*, 870 F. Supp. 2d at 146 (noting that, “importantly[,] . . . the relevant  
27 statutory command is that a given program ‘prepare students for gainful  
28 employment in a recognized occupation,’” and contrasting that language with the

1 more narrow phrase, “gainful employment”); *APC v. Duncan*, 107 F. Supp. 3d at 359  
 2 (agreeing with and incorporating the holding of *APSCU I*); *APSCU III*, 110 F. Supp.  
 3 3d at 185 (analyzing the complete version of the statutory language, including the  
 4 meaning of the word “prepare”), *aff’d*, *APSCU Appeal*, 640 F. App’x 5 (D.C. Cir.  
 5 2016). *See supra* ¶¶ 82, 150–51.

6 360. By failing to consider the complete portion of the statutory language,  
 7 and limiting its interpretation to an incomplete portion, the Department has acted  
 8 in a manner that is arbitrary, capricious, and otherwise not in accordance with law  
 9 within the meaning of the APA, 5 U.S.C. § 706.

## 10 COUNT 2

### 11 Agency Action that is Arbitrary, Capricious, and Not in 12 Accordance with Law Due to its Disregard for, and Refusal to Interpret and Apply, a Statutory Mandate

13 361. Plaintiffs repeat and incorporate by reference each of the foregoing  
 14 allegations as if fully set forth herein.

15 362. In order for certain institutions to participate in Title IV, HEA  
 16 programs with respect to certain postsecondary programs, those programs must  
 17 prepare students for gainful employment in a recognized occupation. *Supra* ¶¶ 69–  
 18 70.

19 363. In the Repeal, the Department acknowledged and admitted that it has  
 20 a stated policy of ignoring this Congressional mandate. For example, the  
 21 Department stated that “programs with non-passing results will benefit from  
 22 avoiding ineligibility.” 84 Fed. Reg. at 31,446. The Department also highlighted the  
 23 extent to which “non-passing programs remain accessible with the rescission of the  
 24 2014 Rule.” 84 Fed. Reg. at 31,445.

25 364. Insofar as the Department has adopted a regulation that completely  
 26 disregards and refuses to interpret and apply a statutory mandate, the Department  
 27 has acted in a manner that is arbitrary, capricious, and otherwise not in accordance  
 28 with law within the meaning of the APA, 5 U.S.C. § 706.

## COUNT 3

**Agency Action that is Arbitrary, Capricious, and  
Not in Accordance with Law Due to its Reliance on  
Impermissible Factors**

365. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

366. An agency decision will normally be deemed arbitrary and capricious if the agency has “relied on factors which Congress has not intended it to consider[.]” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

367. In the HEA, Congress created a statutory distinction between degree programs offered by public and non-profit institutions, on the one hand, and programs offered by proprietary and postsecondary vocational institutions (and non-degree programs at public and non-profit institutions), on the other, whereby public and non-profit institution degree programs that are not required to prepare students for gainful employment can be Title IV eligible, whereas proprietary and postsecondary vocational institutions are only Title IV eligible with respect to programs that prepare students for gainful employment in a recognized occupation. *See supra* ¶¶ 69–70.

368. In the Repeal, the Department relied on factors that Congress, as demonstrated by this statutory scheme, did not intend for it to consider.

369. The Department based the Repeal on its view that the Gainful Employment Rule disproportionately impacted proprietary institutions. *See, e.g.*, 84 Fed. Reg. at 31,392 (“[T]he GE regulations have a disparate impact on proprietary institutions and the students these institutions serve.”); *id.* at 31,394 (justifying the Repeal on the basis that “there was no way to expand the GE regulations to apply to all institutions”); 84 Fed. Reg. at 31,396 (asserting that the “limited applicability of the 2014 Rule to some, but not all, higher education programs makes it an inadequate solution for informing consumer choice and addressing loan default issues”). *See supra* ¶ 194.

1           370. The Department also asserted that the Gainful Employment Rule  
2 created an “uneven playing field” between public institutions and for-profit  
3 institutions, given that public institutions “benefit from direct appropriations” from  
4 states in the form of “taxpayer subsidies.” 84 Fed. Reg. at 34,397. *See supra* ¶ 195.

5           371. The Department further asserted that there is a “need for an  
6 accountability and transparency framework that applies to all [T]itle IV programs  
7 and institutions,” 84 Fed. Reg. at 31,394, and that the Gainful Employment Rule  
8 did not adequately solve the problems that extended beyond proprietary  
9 institutions. *See supra* ¶¶ 196–197.

10           372. The Department’s reliance on its view that: (i) the Gainful  
11 Employment Rule disproportionately affects proprietary institutions; (ii) the Gainful  
12 Employment Rule created an “uneven playing field” between proprietary and public  
13 institutions; and (iii) there is a need for accountability for *all* institutions and  
14 programs, not merely gainful employment programs, constitutes a policy  
15 disagreement with Congress over the distinction Congress created between  
16 programs that must “prepare students for gainful employment in a recognized  
17 occupation” in order to be eligible to receive Title IV funds and those that do not  
18 need to meet that standard to be eligible. *See supra* ¶¶ 198–199.

19           373. To the extent the Gainful Employment Rule had a larger effect on  
20 proprietary institutions than other types of institutions, such an effect was  
21 consistent with the clear intent of Congress that the Department consider one type  
22 of program and institution differently than other programs and institutions. *See*  
23 *supra* ¶¶ 194–202. Rather than acknowledge and accept that statutory scheme, the  
24 Department relied on an effect of that statutory distinction as a basis for the  
25 Repeal. In this regard, the Department has relied on factors that Congress has not  
26 intended for it to consider and has therefore acted in a manner that is arbitrary,  
27 capricious, and otherwise not in accordance with law within the meaning of the  
28 APA, 5 U.S.C. § 706.



## COUNT 4

**Agency Action that is Arbitrary, Capricious, and  
Not in Accordance with Law Due to its Elimination of the  
Disclosure Requirements**

374. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

375. In the Gainful Employment Rule, as part of the Transparency Framework, the Department established a series of disclosure requirements wherein an institution “must use” a Secretary-developed “disclosure template . . . to disclose information about each of its GE programs to enrolled and prospective students.” 34 C.F.R. § 668.412(a). *See supra* ¶¶ 134, 137–138.

376. In enacting the Disclosure Requirements in 2014, the Department stated that “[t]he disclosure requirements will help ensure students, prospective, students, and their families, the public, taxpayers, and the Government, and institutions have access to meaningful and comparable information about student outcomes and the overall performance of GE programs.” 79 Fed. Reg. at 64,891. The “helpful[ness] and importan[ce]” of the Disclosure Requirements were confirmed in the Focus Group Report. *See supra* ¶¶ 316–317.

377. By repealing the Disclosure Requirements without a reasonable explanation, the Department is depriving both prospective and enrolled students, including Individual Plaintiffs, of critical information about the programs they are attending or considering attending, which is required to be disclosed under the Gainful Employment Rule. Individual Plaintiffs are deprived of information necessary to make an informed decision regarding enrollment, and, as a result, may choose programs that will lead them to incur debt that they will be unable to afford to repay. *See supra* ¶¶ 44–52.

378. The repeal of the Disclosure Requirements is arbitrary and capricious in at least five ways.

///

1           379. First, the Department eliminated the Disclosure Requirements in their  
2 entirety, without actual consideration of regulatory alternatives. *See supra* ¶¶ 311–  
3 320. For example, the Department stated in the Repeal—but not in the 2018  
4 NPRM—that a justification for rescinding the Disclosure Requirements is that  
5 “[c]onsumer testing has revealed that students mostly want to know how students  
6 like them have done in the program.” 84 Fed. Reg. at 31,419. But the Department  
7 failed to consider that the Disclosure Requirements require institutions to disclose  
8 those kinds of facts and, to the extent the Department disagrees that the existing  
9 disclosure requirements accomplish this goal, the Department also failed to  
10 consider that the Gainful Employment Rule affords the Department the ability to  
11 modify the precise topics as part of the disclosure template.

12           380. The Department’s proposals during the negotiated rulemaking process,  
13 the Department’s consideration of regulatory alternatives in prior rulemakings, and  
14 comments submitted in response to the 2018 NPRM all demonstrate that the  
15 Department was aware of regulatory alternatives. *See, e.g., supra* ¶ 313.  
16 Nevertheless, the Department did not seek comment on those alternatives during  
17 the comment period, nor did it provide a sufficient explanation for its rejection of  
18 those alternatives in the Repeal. *See supra* ¶ 315.

19           381. Second, throughout the preamble to the Repeal, the Department  
20 indicates that it intends to “address concerns” with the repeal of the Disclosure  
21 Requirements by expanding the College Scorecard. *See, e.g.,* 84 Fed. Reg. at 31,394  
22 (“However, to address concerns that by rescinding the 2014 Rule some students  
23 would be more likely to make poor educational investments, the Department  
24 describes in this document our preliminary plans for the expansion of the College  
25 Scorecard.”). *See supra* ¶¶ 301–302. Later, the Department refers to information  
26 that “will be provided through the expanded College Scorecard or other consumer  
27 information tools, such as College Navigator.” 84 Fed. Reg. at 31,395; *see also* 84  
28 Fed. Reg. at 31,406 (“This is another reason why we are rescinding the GE

1 regulations and proposing to expand the College Scorecard.”); *id.* at 31,408  
2 (referring to the “expanded College Scorecard”); 84 Fed. Reg. at 31,411 (“We think  
3 consumers should make those decisions for themselves, aided by information the  
4 Department plans to make available through the College Scorecard.”); 84 Fed. Reg.  
5 at 31,419 (“The Department will now provide outcomes data to all students using  
6 the College Scorecard, or its successor, which has the advantage of reducing the  
7 burden on institutions and allowing students to more easily compare outcomes  
8 among the institutions and programs available to them.”).

9       382. In relying on the College Scorecard as a substitute for the Disclosure  
10 Requirements, the Department also states that, “[s]ince we are still developing the  
11 tool and are not required to publish regulations in order to produce the College  
12 Scorecard, we will not commit to all of the particulars of its content in this final  
13 regulation.” 84 Fed. Reg. at 31,424.

14       383. The plans the Department does reveal in Appendix A, *see supra* ¶ 303,  
15 demonstrate that even an “Expanded [S]corecard” is not an adequate substitute for  
16 the Disclosure Requirements. For example, under the 2017 disclosure template,  
17 institutions were required to disclose the “[p]ercent of students graduating on time  
18 for each program.” 84 Fed. Reg. at 31,435. The Department’s plans for expanding  
19 the scorecard with respect to completion rates asserts that an expanded College  
20 Scorecard “*could include*” program-level information, not that it would. 84 Fed. Reg.  
21 at 31,435 (emphasis added). Similarly, the 2017 disclosure requirement included  
22 information about costs of the program, but under the current and expanded  
23 Scorecard, cost information would be at the “institution level.” 84 Fed. Reg. at  
24 31,435. Institution-level information (rather than program-level information) does  
25 not provide sufficiently detailed information for prospective and enrolled students to  
26 make informed decisions.

27       384. The Department’s replacement of existing disclosure requirements  
28 with vague, undeveloped, and “preliminary plans for the expansion of the College

1 Scorecard”—that it is under no compulsion to implement or maintain—is arbitrary  
2 and capricious, insofar as preliminary, non-binding plans to take future action do  
3 not mitigate the harm that students will be “more likely to make poor educational  
4 investments” as a result of the Repeal. 84 Fed. Reg. at 31,394. Moreover, the  
5 Department has failed to adequately justify the departure from its 2014 conclusion  
6 that direct distribution of disclosures to students was “more effective in ensuring  
7 that students obtain critical information about program-level student outcomes”  
8 than making information available on the Department’s website. 79 Fed. Reg. at  
9 64,978. *See supra* ¶¶ 305–307.

10 385. The Department’s non-binding update to the College Scorecard in  
11 November 2019 is not a substitute for the Gainful Employment Rule, nor does it  
12 ameliorate the Department’s failures to comply with the APA in the Repeal. For  
13 example, not only is the College Scorecard not provided directly to prospective and  
14 enrolled students by direct distribution, but also it provides data at the four-digit  
15 CIP code level, rather than the six-digit level and, thus, is not as specific and  
16 precise as the information provided under the Gainful Employment Rule. *See supra*  
17 ¶¶ 91–95, 138, 329–337. Nor does the College Scorecard provide a warning to  
18 prospective and enrolled students that a program is at risk of losing Title IV  
19 eligibility due to a failure to prepare students for gainful employment in a  
20 recognized occupation. *See supra* ¶¶ 113–114, 309, 337.

21 386. Third, as part of its justification for the Repeal, the Department  
22 asserted in the 2018 NPRM that it “underestimated” the “burden” that the  
23 disclosure aspects of the regulations would have on institutions. *See, e.g.*, 83 Fed.  
24 Reg. at 40,173 (“The Department also believes that it underestimated the burden  
25 associated with distributing the disclosures directly to prospective students.”); 83  
26 Fed. Reg. at 40,177 (“Furthermore, when developing the GE regulations, the  
27 Department, as noted in feedback received from multiple institutions,  
28 underestimated the burden on institutions associated with the use of a

1 standardized disclosure template in publishing program outcomes and distributing  
2 notifications directly to prospective and current students.”). *See supra* ¶ 294. But  
3 these and other statements regarding administrative burden lacked evidence, *see*  
4 *supra* ¶¶ 295–298, and were inconsistent with its prior statements regarding the  
5 extent of that burden, *id.* ¶¶ 299–300.

6 387. Fourth, the Department’s elimination of the Disclosure Requirements  
7 based on concerns regarding the precise disclosures to be required is also arbitrary  
8 and capricious insofar as the Gainful Employment Rule already afforded the  
9 Secretary discretion to identify, with greater specificity, the information that must  
10 be included in the template and to design an appropriate template for the  
11 disclosures. 34 C.F.R. § 668.412.

12 388. Fifth, to the extent the Department’s elimination of the Disclosure  
13 Requirements was premised on the fact that it was too narrowly targeted towards  
14 gainful employment programs (*i.e.*, that it “fails to provide transparency regarding  
15 program-level debt and earnings outcomes for all academic programs,” 84 Fed. Reg.  
16 at 31,392), the Department acted arbitrarily and capriciously by failing to consider  
17 how its broad statutory authority to impose disclosure requirements could be used  
18 with respect to programs other than those that purport to prepare students for  
19 gainful employment in a recognized occupation. *See* 81 Fed. Reg. at 76,017 (“The  
20 HEA authorizes the Department to adopt disclosure regulations as does the general  
21 authority of the Secretary in 20 U.S.C. § 1221e–3 and 20 U.S.C. § 3474.”).

22 389. Given that the Department has: (i) failed to consider or justify its  
23 rejection of known alternatives to a repeal of the Disclosure Requirements;  
24 (ii) based the Repeal on a non-binding policy that the agency will disclose additional  
25 information in the future; (iii) asserted that it underestimated the burden created  
26 by the Gainful Employment Rule without evidence or data to substantiate that  
27 claim, while simultaneously estimating that the reduction in burden via repeal is  
28 equivalent to the burden created; (iv) failed to recognize that the Gainful

1 Employment Rule already afforded the Department the discretion to identify  
2 appropriate disclosures; and (v) failed to consider how its statutory authorities could  
3 be used to remedy problems the Department identified with the Gainful  
4 Employment Rule, the Department has acted in a manner that is arbitrary,  
5 capricious, and otherwise not in accordance with law within the meaning of the  
6 APA, 5 U.S.C. § 706.

## 7 COUNT 5

### 8 Agency Action that is Arbitrary, Capricious, and 9 Not in Accordance with Law Due to its Failure to 10 Consider Alternative Continuing Eligibility Metrics & 11 Thresholds

11 390. Plaintiffs repeat and incorporate by reference each of the foregoing  
12 allegations as if fully set forth herein.

13 391. In promulgating and repealing regulations, federal agencies are  
14 required to consider reasonably obvious alternatives to the chosen policy that could  
15 serve the agency's identified goals. In its consideration of those alternatives, the  
16 agency must give a reasoned explanation for its rejection of those alternatives. The  
17 agency's failure to do so constitutes arbitrary and capricious decision-making.

18 392. To the extent the Department eliminated the D/E rates measure (and  
19 thus the thresholds) because it believed those metrics "lack[] sufficient accuracy and  
20 validity" or were published without a "sufficient, objective, and reliable basis," 84  
21 Fed. Reg. at 31,407, the Department was obligated to consider known, common, and  
22 reasonable alternatives to those metrics and provide a reasoned explanation for its  
23 rejection of the same.

24 393. The Department was aware of numerous obvious alternatives to the  
25 D/E rates measure formula and thresholds. *See supra* ¶¶ 253–261 (alternative  
26 metrics); *id.* ¶¶ 262–270 (alternative thresholds).

27 394. For example, the Department was aware of, but failed to consider,  
28 numerous obvious alternatives to the formula for calculating the D/E rates

1 measure, including, but not limited to, alternative formulas or mechanisms to  
2 calculate the discretionary income rate and the annual earnings rate, such as  
3 changes to the formula for calculating the annual loan payment and/or the  
4 amortization period. The Department previously considered such alternatives in the  
5 2011 GE Rule, proposed them itself in the 2014 NPRM, discussed them during the  
6 2017–2018 negotiated rulemaking, and received public comments raising those  
7 alternatives in response to the 2018 NPRM. *See supra* ¶¶ 252–261.

8         395. The Department was also aware of numerous obvious alternatives to  
9 the threshold for considering a program passing, failing, or in the “zone” with  
10 respect to the D/E rates measure, insofar as the Department used such alternatives  
11 in the 2011 GE Rule, proposed such alternatives in the 2014 NPRM, discussed such  
12 alternatives during the 2017–2018 negotiated rulemaking, and received such  
13 alternatives via public comments in response to the 2018 NPRM. *See supra* ¶¶ 263–  
14 269.

15         396. Yet the Repeal failed to consider reasonable alternatives to the D/E  
16 rates measure or thresholds that were less drastic than the chosen policy of  
17 complete repeal and that were neither unknown nor uncommon. To the extent the  
18 Department did consider such alternatives, the Department failed to identify those  
19 alternatives or give a reasoned explanation for the rejection of the alternatives.

20         397. By failing to consider reasonable alternatives and failing to give a  
21 reasoned explanation justifying the rejection of those alternatives, but nevertheless  
22 publishing the Repeal, the Department has acted in a manner that is arbitrary,  
23 capricious, and contrary to law within the meaning of the APA, 5 U.S.C. § 706.

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## COUNT 6

**Agency Action that is Arbitrary, Capricious, and  
Not in Accordance with Law Due to its Failure to Explain  
a Change in Position on Continuing Eligibility Metrics  
and Thresholds**

398. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

399. Agencies may change their existing policies if they provide a reasoned explanation for the change. When an agency changes its existing position, policy, or factual findings, it must display both an awareness that it is changing its position and that there are good reasons for the new policy. An unexplained inconsistency in an agency policy is a proper basis for holding an interpretation to be arbitrary and capricious.

400. In promulgating the Gainful Employment Rule in 2014, the Department established the D/E rates measure as a means of determining whether a given program is preparing students for gainful employment in a recognized occupation. In the Repeal, however, the Department has departed from its prior statements and policies regarding the continuing eligibility metrics and thresholds without adequate explanation or justification.

401. First, the Department has failed to provide a reasoned explanation for its change in position regarding the use of SSA earnings data. Although the Department has previously asserted that it “found no sources superior to the SSA [earnings data],” *see supra* ¶ 141, and although numerous courts (*e.g.*, *APSCU III* and *AACS*) have held that the use of SSA earnings data was rational, *id.* ¶¶ 148, 276, the Department now claims that SSA earnings data “may be inaccurate” in light of the issues with underreported tip income. *Id.* ¶ 348.

402. Moreover, without justification or explanation, the Department continues to rely on the use of SSA earnings data for purposes of Borrower Defense relief determinations. *See supra* ¶ 347.



1           403. Second, the Repeal failed to provide a reasoned explanation for why  
2 the alternate earnings appeals process was insufficient to overcome any limitations  
3 created by the SSA earnings data. *See supra* ¶¶ 133, 165, 279–292.

4           404. Third, the Department failed to establish good reasons for deviating  
5 from the eight percent annual earnings threshold. For example, although the  
6 Department states in the Repeal that there was “no empirical basis for the 8  
7 percent threshold and [the Department] will, therefore, no longer use it to  
8 determine [T]itle IV program eligibility,” 84 Fed. Reg. at 31,407, the Department  
9 entirely failed to acknowledge the following sources, *see supra* ¶ 115, or provide a  
10 reasoned explanation for why its prior consideration of, and reliance on, these  
11 sources was no longer correct:

- 12           • Keith Greiner, *How Much Student Loan Debt Is Too Much?*, 26 J. of  
13           Student Fin. Aid 1, 7–19 (1996) (cited at 79 Fed. Reg. at 64,919 n.100);
- 14           • Patricia M. Scherschel, *Student Indebtedness: Are Borrowers Pushing*  
15           *the Limits?* USA Group Found. (Nov. 1998) (cited at 79 Fed. Reg. at  
16           64,919 n.101);
- 17           • Steven A. Harrast, *Undergraduate Borrowing: A Study of Debtor*  
18           *Students and their Ability to Retire Undergraduate Loans*, 34 J. of  
19           Student Fin. Aid 1, 21–37 (2004) (cited at 79 Fed. Reg. at 64,919  
20           n.102); *and*
- 21           • Tracey King & Ivan Frishberg, *Big Loans, Bigger Problems: A Report*  
22           *on the Sticker Shock of Student Loans*, The State PIRG’s Higher  
23           Education Project (Mar. 2001), *available at:*  
24           [www.pirg.org/highered/highered.asp?id2=7973](http://www.pirg.org/highered/highered.asp?id2=7973) (cited at 79 Fed. Reg. at  
25           64,919 n.103).

26           405. Fourth, the Department failed to provide a reasoned explanation for  
27 why its prior consideration of the Federal Housing Administration’s underwriting  
28 standards regarding total debt levels, which the Consumer Financial Protection

1 Bureau also adopted, was no longer correct, nor did it display awareness that it had  
2 previously relied on this source. *See supra* ¶ 119.

3 406. Nor did the Department provide a reasoned explanation why its prior  
4 consideration of the 1986 study by the National Association of Student Financial  
5 Aid Administrators, *see supra* ¶ 116, or the study by Sandy Baum and Marie  
6 O'Malley, *id.* ¶ 117, were no longer correct, nor did it display awareness that it had  
7 previously relied on these sources.

8 407. Fifth, the Department asserted that because it “used a different set of  
9 thresholds that included 12 percent as the passing rate [in 2011],” rather than the  
10 eight percent used in 2014, there was an “absence of a reasoned methodology for  
11 distinguishing between passing and failing programs.” 84 Fed. Reg. at 31,407. But  
12 the Department failed to provide a reasoned explanation for why the Department’s  
13 2014 justification for this difference was inadequate or insufficient and failed to  
14 even display awareness that the Department had previously explained this  
15 distinction. *See* 79 Fed. Reg at 64,920.

16 408. Sixth, the Department failed to provide a reasoned explanation for why  
17 its prior conclusion that the twenty percent discretionary earnings threshold was a  
18 reasonable way of ascertaining whether a program prepares students for gainful  
19 employment in a recognized occupation was no longer correct. *See supra* ¶¶ 121–  
20 122. The Department failed to provide a reasoned explanation and good reason why  
21 it now believes that, “[i]n the 2014 Rule, the Department failed to provide a  
22 sufficient, objective, and reliable basis for the 20 percent threshold for the debt-to-  
23 discretionary income standard.” 84 Fed. Reg. at 31,407.

24 409. The sole justification that the Department provided for why the twenty  
25 percent discretionary earnings threshold lacked a reasonable basis in 2014 and  
26 lacks that same basis today is that a new income-driven repayment plan (REPAYE)  
27 was introduced in 2015. According to the Department, REPAYE “renders the 20  
28 percent debt-to-discretionary income threshold in the 2014 Rule obsolete since no

1 borrower would ever be required to pay more than 10 percent of their discretionary  
2 income.” 84 Fed. Reg. at 31,408. *See supra* ¶ 231.

3 410. The Department’s reliance on the REPAYE monthly payment amount  
4 to counter the D/E rates measure does not constitute a reasoned explanation  
5 because, *inter alia*: (i) the “discretionary income” used for purposes of REPAYE is  
6 not the same as the “discretionary income rate” for purposes of the D/E rates  
7 measure, *compare* 34 C.F.R. § 685.209(b)(1)(iii)(A) *with* 34 C.F.R. § 668.404(a)(1);  
8 (ii) the Department’s failed to distinguish between the debt-to-earnings rates,  
9 which measure the average total debt compared to earnings of an identified group of  
10 program completers, with the option of individual students to make lower monthly  
11 payments on their student loans; and (iii) the Department failed to recognize that  
12 the lower monthly payment option available to an individual student is not an  
13 indication of, or replacement for, whether the program prepared that student for  
14 gainful employment in a recognized occupation.

15 411. Seventh, in issuing the Repeal, the Department failed to provide a  
16 reasoned explanation for why its prior conclusion, that the four-year “zone” makes it  
17 unlikely that fluctuations in labor market conditions could cause a passing program  
18 to become ineligible, was incorrect. *See supra* ¶¶ 233–240.

19 412. By failing to provide a good reason for its changes and ignoring or  
20 countermanding its prior factual findings without reasoned explanation, but  
21 nevertheless publishing the Repeal, the Department has acted in a manner that is  
22 arbitrary, capricious, and contrary to law within the meaning of the APA, 5 U.S.C  
23 § 706.

## 24 COUNT 7

### 25 Agency Action that is Arbitrary, Capricious, and Not in 26 Accordance with Law Due to its Failure to Consider Alternative Certification Requirements

27 413. Plaintiffs repeat and incorporate by reference each of the foregoing  
28 allegations as if fully set forth herein.

1           414. In the Gainful Employment Rule, the Department included the  
2 Certification Requirement, whereby an institution would establish a GE program’s  
3 initial eligibility to participate in Title IV, HEA programs, as well as a process by  
4 which the Department determines whether a program remains eligible. *See supra*  
5 ¶¶ 98–100.

6           415. The Certification Requirement, set forth in 34 C.F.R. § 668.414,  
7 ensured “that a program eligible for [T]itle IV, HEA program funds meets certain  
8 basic minimum requirements necessary for students to obtain gainful employment  
9 in the occupation for which the program provides training.” 79 Fed. Reg. at 64,911.

10           416. The Repeal eliminates, in its entirety, the Certification Requirement  
11 and *any process* by which the Department establishes a GE program’s eligibility.

12           417. The Department did not consider any alternative certification  
13 requirement, despite obvious alternatives that were known and common. *See supra*  
14 ¶¶ 246–251. For example, in developing the Gainful Employment Rule in 2014, the  
15 Department heard from a commenter that it should require more expansive  
16 certification requirements. 79 Fed. Reg. at 64,990. *See supra* ¶ 248. At the time, the  
17 Department dismissed this consideration because it was “unnecessary in light of the  
18 requirements already provided by the regulation.” 79 Fed. Reg. at 64,990. Given  
19 that the Repeal removed these requirements, the Department should have  
20 considered these known alternatives.

21           418. Alternative certification requirements were also presented during the  
22 2017–2018 negotiated rulemaking. *See supra* ¶ 249 & n.27.

23           419. For example, prior to the second and third negotiated rulemaking  
24 sessions, the Department released issue papers that proposed revisions to 34 C.F.R.  
25 § 668.414. *See supra* ¶¶ 250–251. The Department did not consider these  
26 alternatives publishing the Repeal, and if they were considered, the Department did  
27 not give a reasoned explanation for their rejection.

28 ///

1 420. By failing to consider reasonable alternatives, but nevertheless  
2 repealing the Certification Requirement, the Department has acted in a manner  
3 that is arbitrary, capricious, and contrary to law within the meaning of the APA, 5  
4 U.S.C. § 706.

### 5 COUNT 8

#### 6 Agency Action that is Arbitrary, Capricious, and Not in 7 Accordance with Law Due to its Failure to Adequately 8 Explain its Change in Position Regarding Certification Requirements

9 421. Plaintiffs repeat and incorporate by reference each of the foregoing  
10 allegations as if fully set forth herein.

11 422. In 2014, the Department recognized that the Certification  
12 Requirement, in addition to requiring institutions to provide certain information to  
13 the Department, “creat[ed] an enforcement mechanism for the Department to take  
14 action if a required approval has been lost, or if a certification that was provided  
15 was false.” 79 Fed. Reg. at 64,989. The Department also noted that the Certification  
16 Requirement had “minimal” burden on institutions and that “any burden [would be]  
17 outweighed by the benefits of the requirements[,] which . . . will help ensure that  
18 programs meet minimum standards for students to obtain employment in the  
19 occupations for which they receive training.” 79 Fed. Reg. at 64,989. *See supra* ¶ 99.

20 423. The Department also referred to the Certification Requirement as an  
21 “independent pillar of the accountability framework . . . that complement[s] the  
22 metrics-based standards.” 79 Fed. Reg. at 64,990. *See supra* ¶ 100.

23 424. The Repeal eliminates, in its entirety, the Certification Requirement  
24 and any process by which the Department establishes a GE program’s eligibility to  
25 participate in Title IV.

26 425. In the Repeal, the Department did not provide a reasoned explanation  
27 for why the Certification Requirement was no longer sound policy or any good  
28 reason to support having no certification requirement. *See supra* ¶¶ 246–251.

1 426. The only arguable justification it provided came in response to a  
2 comment that “institutions of higher education should be required to certify [that]  
3 programs that lead to careers with State licensure requirements actually meet  
4 those State licensure standards.” 84 Fed. Reg. at 31,424. In response to that  
5 comment, the Department asserted that it “considered disclosures related to  
6 licensure and certification” as part of a separate rulemaking process. 84 Fed. Reg.  
7 at 31,424. *See supra* ¶ 247.

8 427. The Certification Requirement is different than the Disclosure  
9 Requirements, insofar as certifications are made to the Department and used by the  
10 Department for determinations of programmatic eligibility for Title IV  
11 participation. In contrast, disclosures are public-facing materials that both  
12 prospective and enrolled students, including Individual Plaintiffs, can readily  
13 access.

14 428. Insofar as the Department has eliminated the Certification  
15 Requirement without sufficient acknowledgment, justification, explanation, or good  
16 reason, the Department has acted in a manner that is arbitrary, capricious, and  
17 otherwise not in accordance with law within the meaning of the APA, 5 U.S.C.  
18 § 706.

19 **COUNT 9**

20 **Agency Action that is Arbitrary, Capricious, and**  
21 **Not in Accordance with Law Insofar as**  
22 **it is Unsupported by Substantial Evidence**

23 429. Plaintiffs repeat and incorporate by reference each of the foregoing  
24 allegations as if fully set forth herein.

25 430. In issuing and repealing regulations, federal agencies are required to  
26 base their decisions on adequate factual support, meaning that agencies must have  
27 and rely upon enough relevant evidence that a reasonable mind might accept as  
28 adequate to support a conclusion. *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1072  
(9th Cir. 2015) (recognizing that the “arbitrary and capricious standard

1 incorporates the substantial evidence test” in the case of informal agency  
2 proceedings).

3 431. In issuing the Repeal, the Department failed to base its decision on  
4 adequate factual support because the evidence before the agency established that  
5 institutions of higher education are offering programs that do not prepare students  
6 for gainful employment in a recognized occupation. Despite these facts, the  
7 Department eliminated regulations designed to ensure implementation of the  
8 HEA’s statutory guardrails.

9 432. In the Repeal, the Department has not considered substantial evidence  
10 to justify its findings or changes in position. For example, in asserting that the D/E  
11 rates measure is “scientifically invalid” because it fails to control for demographic  
12 factors as part of the calculation, the Department failed to sufficiently consider or  
13 explain the overwhelming evidence from its 2014 analysis that “student  
14 characteristics of programs do not overly influence the performance of programs on  
15 the D/E rates measure.” 79 Fed. Reg. at 64,910; *see also, e.g.*, 79 Fed. Reg. at 64,923  
16 (“[T]he Department has examined the effects of student demographic characteristics  
17 on results under the annual earnings rate measure and does not find evidence to  
18 indicate that the composition of a GE program’s students is determinative of  
19 outcomes.”); 79 Fed. Reg. at 64,908 (“[W]e do not expect student demographics to  
20 overly influence the performance of programs on the D/E rates measure. “). *See*  
21 *supra* ¶¶ 132, 220–226.

22 433. Even further, in changing its position about the effects of macro-  
23 economic and labor market conditions on a program’s likelihood of passing the D/E  
24 rates measures, the Department has failed to analyze data within its possession, as  
25 one commenter suggested. *See supra* ¶¶ 233–241.

26 434. Compounding the Department’s errors, the Repeal is also premised on  
27 numerous misstatements regarding the limited research it does cite. For example:  
28 ///

- 1 a. The Department asserted in the Executive Summary that “research  
2 published in 2014—and discussed throughout [the Repeal]”—shows  
3 how the Gainful Employment Rule was insufficiently justified. 84 Fed.  
4 Reg. at 31,393. But the Department’s only citation is to a working  
5 paper, the Lochner Paper, that was not peer-reviewed or published in  
6 final form, used a decades-old and small sample of bachelor’s degree  
7 recipients, and admitted to shortcomings that render it unable to  
8 “statistically distinguish” between graduates of proprietary  
9 institutions and non-profit institutions. Yet the Department cited this  
10 paper for numerous propositions. *See* 84 Fed. Reg. at 31,393 nn. 5–6,  
11 31,415 n.125, 31,423 n.164. *See also supra* ¶¶ 208–211.
- 12 b. The Department stated in the 2018 NPRM that “[r]esearch published  
13 subsequent to the promulgation of the GE regulations adds to the  
14 Department’s concern about the validity of using D/E rates as to [sic]  
15 determine whether or not a program should be allowed to continue to  
16 participate in [T]itle IV programs.” 83 Fed. Reg. at 40,171. But the  
17 Department did not indicate to what sources it was referring. When  
18 challenged on this statement under the Information Quality Act, the  
19 Department’s response was, without citation or reference, that it “used  
20 well-respected, peer-reviewed references to substantiate its reasons  
21 throughout these final regulations for believing that D/E rates could be  
22 influenced by a number of factors other than program quality.” 84 Fed.  
23 Reg. at 31,427. *See supra* ¶ 216.
- 24 c. The Department repeatedly cited its own “analysis” without  
25 description, discussion, or indication of that analysis’s methodology or  
26 specific findings. *See, e.g.*, 84 Fed. Reg. at 31,398 n.27 & accompanying  
27 text (asserting that the Department’s analysis of enrollment data  
28 suggests that students who enroll in proprietary institutions “are well



1 aware that other, lower cost options exist”); 84 Fed. Reg. at 31,405  
2 (asserting, without a description of data or methodology, that the  
3 Department’s “analysis of the outstanding student loan portfolio  
4 demonstrates that poor outcomes are not limited to [proprietary]  
5 institutions or the small number, relative to total postsecondary  
6 enrollment, of students who attend them”); 84 Fed. Reg. at 31,425  
7 (asserting, in response to comments about the lack of analysis, that  
8 “[t]he Department has provided a more than rigorous review of data  
9 that was not considered in connection with the 2014 Rule,” without  
10 describing that review or its underlying data). *See supra* ¶¶ 216–217.

11 d. The Department asserts that the Cellini & Darolia Paper shows that  
12 “differences in characteristics” (*e.g.*, financial independence, minority  
13 group status, single-parent status) “may explain disparities in student  
14 outcomes, including higher borrowing levels and student loan defaults  
15 among students who enroll at proprietary institutions.” 84 Fed. Reg. at  
16 31,393. In reality, the Cellini & Darolia Paper does the *opposite*,  
17 stating that “the relatively high for-profit cost (mostly tuition) is by far  
18 the largest predictor of this explained variation” in borrowing rates  
19 between for-profit and public two-year college students. *See supra*  
20 ¶¶ 205–206.

21 e. The Department makes numerous statements regarding the Cellini &  
22 Turner Paper that misconstrue its findings and methodology, including  
23 that it: (i) was not peer-reviewed, when it was; (ii) compared what  
24 employees earn in different fields, when the study compared earnings  
25 in the same fields; and (iii) failed to consider demographically-matched  
26 comparison groups beyond zip codes and birthdates, when it considered  
27 a wide array of demographic indicators. *See supra* ¶¶ 210–215.

28 ///

1 435. By failing to base its decision on the facts and evidence before it and  
 2 nevertheless publishing the Repeal without adequate factual support or substantial  
 3 evidence, the Department has acted in a manner that is arbitrary, capricious, and  
 4 contrary to law within the meaning of APA, 5 U.S.C. § 706.

5 **COUNT 10**

6 **Agency Action that is Arbitrary, Capricious, and Not in**  
 7 **Accordance with Law Due to Defendants' Continued**  
 8 **Reliance on the Gainful Employment Rule to Defend its**  
 9 **Other Decisions**

10 436. Plaintiffs repeat and incorporate by reference each of the foregoing  
 11 allegations as if fully set forth herein.

12 437. Throughout the Repeal, the Department asserted that the D/E rates  
 13 measure “lack[ed] sufficient accuracy and validity” or was published without a  
 14 “sufficient, objective, and reliable basis.” *See supra* ¶ 231. The Department also  
 15 asserted that the D/E rates measure was “scientifically invalid.” *See supra* ¶¶ 219,  
 16 230. Yet the Department failed to provide a reasonable explanation for its use of,  
 17 and continued reliance on, the D/E rate measure as part of its “Average Earnings  
 18 Rule” to calculate the amount of Borrower Defense debt relief that should be  
 19 provided to former CCI students. *See supra* ¶¶ 338–346.

20 438. Both before and after the comment period, the Department argued in  
 21 court that a comparison between passing GE programs and CCI programs was a  
 22 non-arbitrary component of its calculations of the amount of loan discharges  
 23 afforded to former CCI students. *See supra* at ¶ 346. For example, the Department  
 24 noted how “limiting the comparator programs to those with passing Gainful  
 25 Employment scores *helped* Corinthian borrowers” because “limiting the comparison  
 26 to schools with passing Gainful Employment scores made the earnings of  
 27 Corinthian borrowers seem comparatively lower and had the effect of increasing the  
 28 amount of loan forgiveness Corinthian borrowers received.” *See supra* at ¶ 346.

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1           439. In publishing the Repeal, the Department has not explained the  
2 inconsistencies between its positions that: (i) limiting the Borrower Defense  
3 comparison to CCI programs, on the one hand, and comparable, passing GE  
4 programs on the other, supported the Department's position that the "Average  
5 Earnings Rule" was non-arbitrary; with its position that: (ii) the metrics used to  
6 determine whether a program was passing "had no empirical basis" (for the eight  
7 percent annual earnings threshold) and were without a "sufficient, objective, and  
8 reliable basis" (for the twenty percent discretionary income threshold).

9           440. In publishing the Repeal, the Department has not explained why the  
10 SSA earnings data used in the Gainful Employment Rule is "subject to significant  
11 errors" and "inaccurate" when used to "penaliz[e] programs" under the Gainful  
12 Employment, but is nevertheless sufficient to serve as the basis for determining the  
13 amount of debt relief provided to student loan borrowers who have stated a valid  
14 Borrower Defense claim. *See supra* ¶¶ 347–349.

15           441. Insofar as the Department, in publishing the Repeal, acted on concerns  
16 that it wholly ignored when justifying its schemes for determining Borrower  
17 Defense relief, the Department has acted in a manner that is arbitrary, capricious,  
18 and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C.  
19 § 706.

## 20    COUNT 11

### 21    Agency Action that is Arbitrary, Capricious, and Not in 22    Accordance with Law Due to the Use of an Inadequate   Comment Period

23           442. Plaintiffs repeat and incorporate by reference each of the foregoing  
24 allegations as if fully set forth herein.

25           443. The APA requires an agency to publish "notice" of "either the terms or  
26 substance of the proposed rule or a description of the subjects and issues involved"  
27 in order to "give interested persons an opportunity to participate in the rule making  
28 through submission of written data, views, or arguments" and then, "[a]fter

1 consideration of the relevant matter presented, the agency shall incorporate in the  
2 rules adopted a concise general statement of their basis and purpose.” 5 U.S.C.  
3 § 553(b)–(c).

4 444. Under the APA’s notice and comment requirements, among the  
5 information that must be revealed for public evaluation are the technical studies  
6 and data upon which the agency relies. *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d  
7 1072, 1076 (9th Cir. 2006). Although an agency is permitted to add supporting  
8 documentation in response to comments submitted during a comment period, such  
9 documentation is limited to materials that supplement or confirm existing data. An  
10 agency is not permitted to introduce in a final rule the *only* evidence that it claims  
11 supports a proposition.

12 445. The Department has deprived the public of an adequate opportunity to  
13 comment by repeatedly citing to unnamed sources and vague, undisclosed  
14 references to its own “analysis,” including, for example and without limitation, by:

- 15 a. Basing its concern regarding the “validity” of the D/E rates measure in  
16 part on the Department’s “analysis” of the D/E rates issued in 2017  
17 without disclosing that analysis or providing the opportunity to  
18 comment on that analysis. *See supra* ¶¶ 216–217.
- 19 b. Basing its concern regarding the “validity” of the D/E rates measure in  
20 part on “[r]esearch published subsequent to the promulgation of the  
21 GE regulations,” without identifying that research in the 2018 NPRM  
22 or providing the opportunity to comment. *See supra* ¶ 216.
- 23 c. Basing its concern about prior findings on outcomes on its “analysis of  
24 the outstanding student loan portfolio,” 84 Fed. Reg. at 31,405, without  
25 identifying that analysis in the 2018 NPRM or providing the  
26 opportunity to comment. *See supra* ¶ 217.
- 27 d. Stating in the 2018 NPRM that “[o]ther research findings suggest that  
28 D/E rates-based eligibility creates unnecessary barriers for certain

1 demographic groups,” 79 Fed. Reg. at 40,171, while failing to identify  
2 such findings. Although the Department included a reference to a 2016  
3 study from the College Board in the 2018 NPRM, the Department  
4 conceded in the Repeal that the cited research “did not address GE  
5 programs specifically” and therefore could not have been about “D/E  
6 rates-based eligibility.” 84 Fed. Reg. at 31,427. *See supra* ¶ 218.

7 e. Asserting in the 2018 NPRM and Repeal that administering the  
8 alternate earnings appeals process has been more burdensome to the  
9 Department than was originally anticipated, without providing  
10 commenters with an opportunity to review the underlying information  
11 regarding alternate earnings appeals, despite requests for that  
12 information. *See supra* ¶¶ 284–292.

13 446. By failing to provide adequate notice and comment, the Department  
14 has violated the APA’s procedural requirements, 5 U.S.C. § 553, and, as a result,  
15 has acted in a manner that is arbitrary, capricious, and contrary to law within the  
16 meaning of APA, 5 U.S.C. § 706.

17 **REQUEST FOR RELIEF**

18 WHEREFORE, Plaintiffs respectfully request that this Court:

19 A. Declare that Defendants have violated the APA by issuing the Repeal  
20 in a manner that is arbitrary, capricious, and otherwise contrary to law;

21 B. Hold unlawful, vacate, and set aside the Repeal;

22 C. Enjoin the Defendants from implementing the Repeal;

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- 1 D. Award Plaintiffs their costs and reasonable attorneys' fees; *and*  
2 E. Grant such other relief as the Court deems just and proper.  
3

4 Dated: January 22, 2020

Respectfully submitted,

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6 ROTHNER SEGALL & GREENSTONE

7 Daniel A. Zibel (*pro hac vice forthcoming*)  
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