

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA (Northern Division)

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STUDENTS FOR SENSIBLE DRUG	)	
POLICY FOUNDATION, et al.,	)	
	)	Civil Action No.
	)	1:06-cv-1010-CBK
Plaintiffs	)	
	)	
v.	)	
	)	
MARGARET SPELLINGS, Secretary	)	
of the United States Department of	)	
Education, in her official capacity	)	
	)	
Defendant.	)	
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**DEFENDANT’S MOTION TO DISMISS**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendant Margaret Spellings, Secretary of the United States Department of Education, in her official capacity, respectfully moves the Court to dismiss the complaint in its entirety for failure to state a claim upon which relief can be granted. The accompanying Memorandum of Law more fully sets forth the reasons that support Defendant’s Motion to Dismiss.

Respectfully Submitted,

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**MEMORANDUM OF LAW IN SUPPORT OF**  
**DEFENDANT'S MOTION TO DISMISS**

## **INTRODUCTION**

Plaintiffs challenge the constitutionality of a provision of the Higher Education Act of 1965, as amended, which suspends eligibility for federal student financial aid for students who have been convicted of drug-related offenses. 20 U.S.C. § 1091(r) (“§1091(r”). Plaintiffs contend that this provision violates the Equal Protection component of the Due Process Clause of the Fifth Amendment and the Double Jeopardy Clause of the Fifth Amendment.

The challenged statute is constitutional. Congress enacted it for the purposes of deterring the possession and sale of illegal drugs on college campuses and preventing taxpayer subsidization of this activity through the provision of federal student financial aid. There is a rational basis for the statute and, therefore, it does not violate the equal protection guarantee.

The statute does not violate the Double Jeopardy Clause because the suspension of federal financial aid simply is not a criminal punishment. Congress did not intend it to be a criminal punishment, nor is it so punitive in purpose or effect that it is converted into one. The statute merely suspends a governmental benefit, for a limited duration of time, which can be made even shorter if the student completes a drug rehabilitation program. The Court should dismiss both of plaintiffs’ claims.

## **STATUTORY AND REGULATORY BACKGROUND**

### I. Federal Student Aid.

Title IV of the Higher Education Act of 1965, as amended (“HEA”), authorizes the federal student financial assistance programs for higher education, which include the Federal Pell Grant, 20 U.S.C. § 1070a et seq., the Federal Supplemental Educational Opportunity Grant (“FSEOG”), id. § 1070b et seq., the Federal Family Education Loan (“FFEL”) Program, id. § 1071 et seq., the William D. Ford Federal Direct Loan (“Direct Loan”) Program, id. § 1087a et

seq., the Federal Perkins Loan Program, id. § 1087aa et seq., and the Federal Work-Study Program. 42 U.S.C. § 2751 et seq. Title IV, HEA programs provide financial aid to assist students and their parents in meeting the costs of post-secondary education.

Congress has established a web of rules governing eligibility for federal student aid for higher education. For instance, in addition to being “enrolled or accepted for enrollment in a degree, certificate, or other program ... leading to a recognized educational credential” at an eligible institution, 20 U.S.C. § 1091(a)(1); 34 C.F.R. § 668.32(a), students must be making “satisfactory progress” in their course of study. 20 U.S.C. § 1091(a)(2); 34 C.F.R. § 668.34. Students cannot owe a refund on previously received Federal Pell Grants, or be in default on any Title IV, HEA student loan, subject to certain exceptions. 20 U.S.C. § 1091(a)(3); 34 C.F.R. § 668.32(g). Effective July 1, 2006, eligibility for aid will be restricted for students who have been convicted of, or pled nolo contendere or guilty to, a crime involving fraud in obtaining Title IV, HEA funds. Higher Education Reconciliation Act of 2005, § 8021(a) (Title VIII-A of P.L. 109-171, the Deficit Reduction Act of 2005, 120 STAT. 4, 178) (“HERA”). Federal student aid is available only to students who are citizens or nationals of the United States, permanent residents of the United States, or in the United States for other than a temporary purpose. 20 U.S.C. § 1091(a)(5); 34 C.F.R. § 668.33. Other than for certain unsubsidized loans, federal student aid is awarded to students based on financial need. 20 U.S.C. § 1087kk et seq. Students must be high school graduates, unless they satisfy “ability to benefit” requirements. 20 U.S.C. § 1091(d); 34 C.F.R. Part 668, Subpart J. Students must satisfy the requirements of Selective Service Registration. 20 U.S.C. § 1091(n); 34 C.F.R. § 668.37. Finally, incarcerated students are ineligible for federal student aid. 20 U.S.C. § 1070a(b)(8), 34 C.F.R. § 668.32(c)(2)(ii) (Federal

Pell Grants); § 1091(b)(5), 34 C.F.R. § 668.32(c)(3) (Federal Perkins, FFEL, and Direct Loans).

## II. Suspension of Eligibility for Drug-Related Offenses.

In 1998, Congress enacted the Higher Education Amendments of 1998 (the “1998 Amendments”), which amended the HEA. The 1998 Amendments contained a subsection providing for “suspension of eligibility for drug-related offenses,” codified at 20 U.S.C. § 1091(r) and implemented in the Department’s regulations at 34 C.F.R. § 668.40. Under this provision, a student who has been convicted under federal or state law of possession or sale of a controlled substance is ineligible, for a period of time, for student financial aid under the programs authorized by Title IV of the HEA. The ineligibility is for a specified period of time, from the date of the conviction. A student convicted of an offense involving the possession of a controlled substance is ineligible for aid for one year for a first offense; two years for a second offense; and indefinitely for a third offense. A student convicted of an offense involving the sale of a controlled substance is ineligible for aid for two years for a first offense and indefinitely for a second offense. § 1091(r)(1); 34 C.F.R. § 668.40(a), (b).

The statute further provides that a student can regain eligibility for federal student aid, before the end of the ineligibility period and regardless of the number or type of convictions on the student’s record, by successfully completing a drug rehabilitation program. § 1091(r)(2)(A); 34 C.F.R. § 668.40(c). The drug treatment program must comply with criteria established by the Secretary, and must include two unannounced drug tests. § 1091(r)(2)(A)(i), (ii); 34 C.F.R. § 668.40(d). Eligibility is also restored if the conviction is reversed or set aside. § 1091(r)(B); 34 C.F.R. § 668.40(a)(2).

An acceptable drug treatment program is one which (1) includes at least two

unannounced drug tests; and (2)(i) has received or is qualified to receive funds directly or indirectly under a federal, state or local government program; (ii) is administered or recognized by a federal, state or local government agency or court; (iii) has received or is qualified to receive payment directly or indirectly from a federally- or state-licensed insurance company; or (iv) is administered or recognized by a federally- or state-licensed hospital, health clinic or medical doctor. 34 C.F.R. 668.40(d). The Secretary intended to allow a wide range of treatment programs to qualify as drug treatment programs for purposes of § 1091(r). 64 FR 57356, 57357 (Oct. 22, 1999).

Congress recently amended § 1091(r), effective July 1, 2006, to clarify that it intended that the suspension of eligibility provision apply only to convictions for conduct occurring while the student was receiving federal student aid. HERA § 8021(c).

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiffs are three individual students (one of whom allegedly resides in South Dakota) who claim to be affected by the challenged provision, and Students for Sensible Drug Policy Foundation, a student-led organization allegedly devoted to reducing harms to students caused by the government's drug policies. (Complaint at ¶¶ 9-12). The individual plaintiffs allege that they were convicted of, or pled guilty to, criminal charges for possessing illegal drugs while enrolled in college and receiving federal student aid. (*Id.* at ¶¶ 10-12). They allege that they therefore will be ineligible for student aid for one school year pursuant to 20 U.S.C. § 1091(r). (*Id.*). Plaintiffs have filed this action as a class action.

The Complaint acknowledges that § 1091(r) is enforced by the Department of Education ("DOE"). (*See id.* at ¶¶ 1, 18, 19). DOE uses the Free Application for Federal Student Aid

(“FAFSA”) to determine eligibility for federal student aid. The FAFSA asks the student if he or she has been convicted of possessing or selling illegal drugs. (See id. at ¶ 21). If an applicant answers this question in the affirmative, the applicant is directed to complete a worksheet designed to determine whether, and for how long, the applicant is ineligible for student aid pursuant to § 1091(r). (Id. at ¶ 22).

Although plaintiffs refer to the challenged statute as an aid “elimination” provision, they concede that § 1091(r) merely suspends a student’s financial aid eligibility for a period of time and that § 1091(r) specifically allows students to resume eligibility before the end of the ineligibility period by completing a drug treatment program. (See id. at ¶¶ 6, 23). Plaintiffs acknowledge that § 1091(r) “allows students to regain eligibility before the prescribed time periods have concluded through enrollment in specified drug-treatment programs.” (Id. at ¶ 23). They complain, however, that many of these programs are inaccessible to students, for a variety of reasons. (Id.). Plaintiffs further claim that § 1091(r) “targets those convicted of a drug offense, but not of any other class of criminal behavior.” (Id. at ¶ 27).

Somewhat tautologically, plaintiffs allege that § 1091(r) affects only those students who require financial aid to attend college. (Id. at ¶ 25). They also allege that the statute “discriminates against racial minority groups” because “African Americans comprise 12% of the United States population and 13% of drug users, but they account for more than 62% of those convicted of drug offenses.” (Id. at ¶ 26).

Plaintiffs assert two causes of action. The first is that § 1091(r) violates the Equal Protection component of the Due Process Clause of the Fifth Amendment to the Constitution by “singling out, for denial of financial aid, the category of individuals with a controlled substances

conviction. While any non-drug offender, from a murderer to a shoplifter, can receive financial aid, an individual who is caught with any amount of a controlled substance, including a small amount of marijuana, is automatically denied aid by the federal government.” (Id. at ¶ 30).

Plaintiffs’ second cause of action is that § 1091(r) violates the Double Jeopardy Clause of the Fifth Amendment to the Constitution because students convicted of a drug offense are allegedly being punished a second time by the denial of financial aid. (Id. at ¶ 34). Plaintiffs seek a declaration that § 1091(r) violates the Constitution and an injunction preventing the Secretary of Education from enforcing it. (Id. at ¶¶ 36-41).

### **STANDARD OF REVIEW**

For purposes of a motion to dismiss, the Court takes all facts alleged in the complaint as true. Knapp v. Hanson, 183 F.3d 786, 788 (8<sup>th</sup> Cir. 1999). The Court must construe the allegations in the complaint and reasonable inferences arising from the complaint favorably to plaintiffs. Id. (citing Morton v. Becker, 793 F.2d 185, 187 (8<sup>th</sup> Cir. 1986)). A motion to dismiss should be granted if “it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.” Knapp, 183 F.3d at 788 (quoting Morton, 793 F.2d at 187). See also Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

### **ARGUMENT**

#### **I. SECTION 1091(r) DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION.**

Section 1091(r) does not violate the Equal Protection component of the Due Process Clause of the Fifth Amendment, as a matter of law. Plaintiffs’ equal protection claim is reviewed under the extremely deferential standard of rational basis review. There are two

rational bases for Congress' action of suspending student aid eligibility for those students convicted of drug-related offenses: deterring the possession and sale of illegal drugs on college campuses, and preventing the subsidization of this conduct by taxpayers. Section 1091(r) easily survives rational basis review.

A. Section 1091(r) Need Only Have a Rational Basis to Survive Equal Protection Scrutiny.

In order to survive equal protection scrutiny, § 1091(r) need only have a conceivable rational basis. “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). See also Heller v. Doe, 509 U.S. 312, 319-20 (1993); Carter v. Arkansas, 392 F.3d 965, 968 (8<sup>th</sup> Cir. 2004); Minnesota Senior Federation v. United States, 273 F.3d 805, 808 (8<sup>th</sup> Cir. 2001), cert. denied, 536 U.S. 939 (2002); Knapp, 183 F.3d at 789. Section 1091(r) clearly does not involve any suspect classification or implicate any fundamental right. There is no federal constitutional fundamental right to financial aid for higher education. See Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 458-61 (1988) (no fundamental right to education); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29-39 (1973) (same); Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 18.45, at 817 (3d ed. 1999) (“The Supreme Court has not held that publicly financed primary or secondary education is a fundamental right.”). The statute does not categorize on the basis of an inherently suspect classification, such as race, alienage, gender or national origin. See Knapp, 183 F.3d at 789. Persons convicted of drug-related offenses are not a suspect class. Rem v. U.S. Bureau of

Prisons, 320 F.3d 791, 795 (8<sup>th</sup> Cir. 2003) (“Convicted drug traffickers are not a suspect class”); Discovery House, Inc. v. City of Indianapolis, 319 F.3d 277, 282 (7<sup>th</sup> Cir.), cert. denied, 540 U.S. 879 (2003) (applying rational basis review to claim that drug treatment facility was discriminated against because its clients were drug addicts). Nor have plaintiffs pled that their claim involves a fundamental right or suspect classification.<sup>1</sup>

On rational basis review, § 1091(r) enjoys “a strong presumption of validity.” Beach Comm., 508 U.S. at 314. See also Knapp, 183 F.3d at 789. The Supreme Court has described rational basis review as “a paradigm of judicial restraint.” Beach Comm., 508 U.S. at 314. See also Minnesota Senior Federation, 273 F.3d at 808. So long as there is any plausible reason for Congress’ action, the statute must be upheld on rational basis review. The equal protection component of the Fifth Amendment “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” Beach Comm., 508 U.S. at 313. See also Richenberg v. Perry, 97 F.3d 256, 261(8<sup>th</sup> Cir. 1996), cert. denied, 522 U.S. 807 (1997). Plaintiffs’ burden in attacking the rationality of § 1091(r) is “to negative every conceivable basis which might support [§ 1091(r)].” Beach Comm., 508 U.S. at 315 (internal quotations and citations omitted). See also Gilmore v. County of Douglas, State of Neb., 406 F.3d 935, 939 (8<sup>th</sup> Cir. 2005); Chance Management, Inc. v. South Dakota, 97 F.3d 1107, 1114-15 (8<sup>th</sup> Cir. 1996), cert. denied, 519 U.S.

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<sup>1</sup> Plaintiffs allege that § 1091(r) “discriminates against racial minority groups” because “African Americans comprise 12% of the United States population and 13% of drug users, but they account for more than 62% of those convicted of drug offenses.” (Complaint at ¶ 26). However, plaintiffs do not allege that § 1091(r) is a racial classification subject to strict scrutiny. Section 1091(r) is, of course, not such a classification. Nor is a disparate impact theory, even involving members of a racial minority, cognizable under the Equal Protection Clause. “[A] law, neutral on its face and serving ends otherwise within the power of government to pursue,” is not invalid under the Equal Protection Clause simply because it may disproportionately affect a suspect class. Washington v. Davis, 426 U.S. 229, 242 (1976).

1149 (1997).

A court must, in conducting rational basis review, accept a legislature's classification "even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality." Heller, 509 U.S. at 321 (internal quotations and citations omitted). See also Minnesota Senior Federation, 273 F.3d at 808. Precision between the classification and its purpose is not required. Instead, a plaintiff's burden is to show that the classification is "so attenuated to its asserted purpose that the distinction it draws is wholly arbitrary and irrational." Chance Management, Inc., 97 F.3d at 1114 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985)). See also Nordlinger v. Hahn, 505 U.S. 1, 11 (1992). Concepts such as "underinclusive," "overinclusive" and "least restrictive means" have no relevance to rational basis review. See Heller, 509 U.S. at 330; United States v. Thornton, 901 F.2d 738, 740 (9<sup>th</sup> Cir. 1990).

Legislatures are permitted to approach problems incrementally, which naturally results in distinctions among classes and inequality. This is particularly true when a legislature acts in an area that necessarily requires it to draw lines, such as providing social welfare benefits. See Beach Comm., 508 U.S. at 315-16 ("Defining the class of persons subject to a regulatory requirement – much like classifying governmental beneficiaries – 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'") (quoting U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980)); Minnesota Senior Federation, 273 F.3d at 808

(“Distributing Social Security and Medicare benefits is a massive undertaking which ‘requires Congress to make many distinctions among classes of beneficiaries while making allocations from a finite fund.’”) (quoting Bowen v. Owens, 476 U.S. 340, 345 (1986)).

Moreover, there is no requirement that the reasons advanced in support of a statute were what actually motivated the legislature, or were even considered by the legislature, in enacting the statute. Heller, 509 U.S. 312 (a legislature need not “‘actually articulate at any time the purpose or rationale supporting its classification’”) (quoting Nordlinger, 505 U.S. at 11); Beach Comm., 508 U.S. at 315 (“[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”). Legislative choices are not subject to courtroom fact-finding and may be based on “rational speculation unsupported by evidence or empirical data.” Beach Comm., 508 U.S. at 315. For this reason, rational basis review requires no factual development beyond the complaint, and a district court may conduct a rational basis review on a motion to dismiss. Gilmore, 406 F.3d at 937, 939-40; Carter, 392 F.3d at 968; Knapp, 183 F.3d at 789.

B. Section 1091(r) Easily Survives Rational Basis Review.

There are two powerful, related justifications for the suspension of federal financial aid to students convicted of drug offenses: deterring the possession and sale of illegal drugs on college campuses and preventing the subsidization of this conduct by taxpayers. These purposes are legitimate goals of Congress, and § 1091(r) is rationally related to achieving them. In addition, while not necessary under rational basis review, Congress in fact enacted § 1091(r) with these goals in mind, as shown by the legislative history.

- (1) Section 1091(r) is justified by the related goals of deterring drug-related offenses on college campuses and preventing taxpayer subsidization of this conduct.

By requiring the suspension of federal financial aid for students convicted of drug-related offenses, § 1091(r) provides a strong incentive for college-aged students not to use or sell illegal drugs while they are in school. As the Complaint recognizes, many students are dependent on federal financial aid. (See Complaint at ¶ 17). Students are logically deterred from using or selling drugs by the potential serious consequence of having their financial aid suspended if they are convicted of possessing or selling illegal drugs. The Secretary “strongly encourages” higher education institutions to notify their students of the existence of § 1091(r) and “to help students understand how their actions might affect their future eligibility.” 64 FR 38504, 38506 (July 16, 1999). Whether or not the threat of having their financial aid suspended in fact deters students from engaging in the possession or sale of illegal drugs is, of course, immaterial to whether deterrence is a rational basis for the statute. See Beach Comm., 508 U.S. at 320. Congress’ recent clarification that the suspension applies only to convictions for conduct occurring while a student was receiving federal student aid, see HERA § 8021(c), reinforces the deterrent nature of the provision. The prevention of drug-related offenses in higher education institutions, and the prevention of the consequences of students using and selling drugs on campus, are obviously legitimate goals worthy of congressional action.

In a similar case, the Seventh Circuit held that deterring drug use was a rational justification for a statute making individuals convicted of drug-related offenses ineligible for federal food stamps and Temporary Assistance for Needy Families (“TANF”) welfare benefits. Turner v. Glickman, 207 F.3d 419, 425 (7<sup>th</sup> Cir. 2000). The plaintiff, on behalf of a class of

similarly situated persons, challenged the statute as a violation of the equal protection component of the Fifth Amendment and the Double Jeopardy Clause of the Fifth Amendment. Addressing the government's argument that deterring drug use was a rational basis for the statute, the court held as follows:

[T]here is a rational connection between the disqualification of drug felons from eligibility for food stamps and TANF and the government's desire to deter drug use. Rendering those convicted of drug-related felony crimes ineligible to receive food stamps or aid under TANF is a potentially serious sanction, and individuals who are currently eligible for such assistance would undoubtedly consider potential disqualification from federal benefits before engaging in crimes involving illegal drugs. It was not irrational for Congress to conclude that the disqualification of drug felons from receiving certain kinds of federal aid under [the challenged statute] would deter drug use among the population eligible to receive that aid. This is all that is required to sustain a classification in the face of an equal protection challenge when the challenged classification is subject to rational basis review.

207 F.3d at 425. See also Thornton, 901 F.2d at 740 (finding that congressional goal of reducing drug use by school children is rationally achieved by increasing penalties for those who sell drugs near schools). The potential consequence imposed on students by § 1091(r), suspension of federal financial aid – although not as serious a sanction as being permanently disqualified from receiving food stamps and cash welfare benefits – rationally provides a significant deterrent to the possession or sale of illegal drugs while in college.

A second, related purpose of § 1091(r) is to prevent taxpayer subsidization through federal financial aid of the possession and sale of illegal drugs by students. Congress may allocate “scarce federal resources by limiting [T]itle IV [HEA] aid to those who are willing to meet their responsibilities to the United States” by not violating laws prohibiting possession and sale of illegal drugs. Selective Service System v. Minnesota Public Interest Research Group,

468 U.S. 841, 854 (1984). Congress has a rational, legitimate interest in not having taxpayers support the possession and sale of illegal drugs by providing financial assistance to students convicted of drug-related offenses who could be using those funds to buy drugs. See Turner, 207 F.3d at 425. Section 1091(r) suspends financial aid eligibility to students convicted of drug-related offenses and thereby achieves this legitimate purpose.<sup>2</sup>

- (2) The legislative history of § 1091(r) confirms that it has a rational basis.

The legislative history of § 1091(r) confirms that Congress enacted the provision as a

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<sup>2</sup> The identification of legitimate governmental interests that are rationally related to § 1091(r) distinguishes this case from Romer v. Evans, 517 U.S. 620 (1996), and from Paine v. Board of Regents of the University of Texas System, 355 F. Supp. 199 (W.D. Tex. 1972), aff'd, 474 F.2d 1397 (5<sup>th</sup> Cir. 1973) (per curiam). In Romer, the Supreme Court held that an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination violated the Equal Protection Clause. Section 1091(r) is not like the Colorado Amendment, which was “inexplicable by anything but animus toward the class that it affects.” Romer, 517 U.S. at 632. See also Milner v. Apfel, 148 F.3d 812, 817 (7<sup>th</sup> Cir.), cert. denied, 525 U.S. 1024 (1998) (discussing Romer); Gavin, 122 F.3d at 1090 (same); South Dakota Farm Bureau v. Hazeltine, 202 F. Supp. 2d 1020, 1048-49 (D.S.D. 2002) (Kornmann, J.), aff'd in part, 340 F.3d 583 (8<sup>th</sup> Cir. 2003), cert. denied, 541 U.S. 1037 (2004) (same). In addition, § 1091(r) does not have the same sweeping effect that was fatal to the Colorado amendment in Romer. See Imprisoned Citizens Union v. Shapp, 11 F. Supp. 2d 586, 603 (E.D. Pa. 1998), aff'd, 169 F.3d 178 (3d Cir. 1999). Section 1091(r) provides only for the suspension (not elimination) of financial aid eligibility (not eligibility to attend college). For the most part, the suspension is temporary, and in all cases students can regain their eligibility by completing a drug treatment program.

In Paine, 355 F. Supp. at 205-06, the court held that a University of Texas rule requiring the automatic suspension of students convicted of drug-related offenses violated the Equal Protection Clause (but not the Double Jeopardy Clause). All other students received a full range of procedural rights before being suspended. The court was not able to discern any reason for denying procedural rights to students with drug convictions and providing them to all others. It therefore held that the rule violated the Equal Protection Clause. The rational bases supporting § 1091(r) discussed above distinguish it from Paine.

Both of these cases are also distinguishable in that they did not involve decisions made by the government in providing governmental benefits, an area in which the government always has great discretion. See Beach Comm., 508 U.S. at 315-16; Minnesota Senior Federation, 273 F.3d at 808.

deterrent to the possession and sale of illegal drugs on college campuses and to prevent taxpayer subsidization of this activity through student financial aid. During the House debate on the bill that became § 1091(r), Congressman Souder introduced an amendment adding the requirement that acceptable drug rehabilitations programs include two unannounced drug tests. Congressman Souder discussed the alarming increase in drug arrests on college campuses, in contrast to decreasing rates for other crimes:

The Chronicle of Higher Education, March 21, 1997, states that crime data from 489 of the largest colleges and universities in this country indicate that drug arrests on college campuses jumped by close to 18 percent in 1995 . . . . By comparison, all other crimes, including murder, robbery, aggravated assault, burglary, vehicle theft and violations of weapons laws declined. So it is clear in our universities we have had drug use as an increasing problem. This 18 percent jump is even more troubling when you consider that those are the kids that get caught.

144 Cong. Rec. H2510-08, H2580 (April 29, 1998). Congressman Souder also referenced the increasing trends in drug use among high school seniors and college students. *Id.* Congressman Souder elaborated about the purpose of the underlying bill and his amendment providing for drug testing:

The point here is not to get people out of college. That is why we have the treatment program and then they come back in. We want to get people rehabbed so they can learn. But the problem here is we need to make sure not just that they are going through treatment programs and insurance companies can make a lot of money and treatment programs can make a lot of money, but that, in fact, people are cured. This can be done, quite frankly, faster than the suspension period. If they successfully complete a rehab program and they get through a drug test that is clean, they are back in school. I have no desire to eliminate anybody's opportunity to climb out of the situation they are in to advance their career, but the best way to do that is to make sure one is clean of drugs.

Id.

Congressman Solomon, the sponsor of the underlying bill, supported Congressman Souder's amendment as a measure that would help put students with drug problems "on the road to recovery." 144 Cong. Rec. H2860-03, H2869 (May 6, 1998). Congressman Solomon emphasized his intent that the potential suspension of financial aid for students with drug-related convictions would serve as a deterrent to drug use and drug-related crime by analogizing his legislation to a law that suspends the drivers' licenses of people with drug-related felony convictions:

Mr. Chairman, as my colleagues know, a number of years ago we passed the Solomon amendment which suspended the drivers' licenses of all people who were convicted of drug felonies, either selling or using drugs. As my colleagues know, that legislation now has swept the Nation. In New Jersey alone, they have revoked 10,000 drivers' licenses, which means we removed 10,000 drug users from the highways. Many of those people have been rehabilitated now because that license meant so much to them, and now they are obeying the law, they are drug-free, and they have their licenses back. This is the kind of legislation that we need to focus these young men and women on to make sure we are going to have a drug-free society.

Id.

Congressman Goodling noted that "H.R. 6 [the Higher Education Amendments of 1998] . . . provides strong incentives for students to stay off drugs. An amendment . . . will eliminate student aid eligibility for students convicted of drug offenses. . . . If we want to ensure safety on our Nation's campuses, it is vital to keep them drug-free." 144 Cong. Rec. H2510-08, H2516 (April 29, 1998).

Debate on the legislation in the Senate similarly focused on the suspension of financial aid eligibility as providing an incentive for students to stay off drugs and as sending a message

that the taxpayers would not foot the bill for students to use illegal drugs. Senator Gregg stated that the bill reflects the “No. 1 concern” of parents that their children will become involved with drugs. 144 Cong. Rec. S7784-02, S7787. He continued as follows:

[The bill] says that taxpayers should not be carrying the burden of supporting a student who has taken the irresponsible activity of using and being found to be guilty of using an illegal drug. . . . You can avoid this if you, as a student, go through a properly approved, satisfactory drug rehabilitation program. . . . [The bill] sends a very clear message to students that if they are going to obtain the benefit – having the taxpayers of this country support them when they are in college through giving them basically a subsidized loan – then they are going to have to be responsible in the manner in which they pursue their academic careers and not use illegal drugs. This is, I think, a major step forward in delivering the correct philosophical position on the question of using drugs.

Id. See also 144 Cong. Rec. S7962-01, S7962 (July 10, 1998) (“I also support another provision of S. 1882 that would prevent students convicted of drug use or possession from being eligible for federal aid unless they complete a rehabilitation program. Taxpayers shouldn't support the tuition of students who recklessly use illegal drugs.”) (remarks of Senator Faircloth).

In addition, in considering an earlier version of the recent amendment clarifying Congress' intent that § 1091(r) applies only to drug-related convictions for conduct occurring while the student was receiving federal student aid, Congress explained that the clarification was needed to insure that § 1091(r) “serves the purpose for which it was intended: to serve as a deterrent to prevent drug offenses while students are enrolled in higher education at taxpayer expense, and not to reach back and limit financial aid for past offenses.” H.R. Report No. 109-231, Report of the House Committee on Education and the Workforce on H.R. 609, College Access and Opportunity Act of 2005, at 206-07.

- (3) The fact that § 1091(r) applies only to drug offenders does not violate the equal protection guarantee.

Plaintiffs' allegation that § 1091(r) violates the equal protection guarantee because it applies only to drug offenders and does not apply to non-drug offenders, "from a murderer to a shoplifter," is meritless. (Complaint at ¶ 30). It is well-settled that the equal protection requirement does not prevent Congress from acting incrementally and addressing problems one classification at a time. See, e.g., Beach Comm., 508 U.S. at 316; Minnesota Senior Federation, 273 F.3d at 808; Turner, 207 F.3d at 426; Milner, 148 F.3d at 814; Thornton, 901 F.2d at 740.

"The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Beach Comm., 508 U.S. at 316 (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)) (citations omitted). Legislatures are permitted to correct problems incrementally because "[t]he conditions under which legislators operate, conditions that include interest-group pressures and budgetary limitations, often make it impossible for a legislature to solve problems at wholesale rather than retail." Milner, 148 F.3d at 814. Plaintiffs' argument that § 1091(r) is "underinclusive" simply has no place in rational basis review.

In any event, § 1091(r) is not underinclusive. Section 1091(r) reflects Congress' concern about the particular problem of increased drug use and increased arrests for drug-related offenses on college campuses. The rate of drug-related offenses on campuses was increasing while other crime rates on campuses were decreasing. Congress chose to address this specific problem by

suspending taxpayer-supported financial aid to students convicted of drug-related offenses – an eminently reasonable approach. Suspending financial aid to non-drug offenders as well, as plaintiffs suggest Congress was required to do, would not have served Congress’ specific purpose of protecting college campuses from increased exposure to illegal drugs. Congress did not violate the equal protection component by legislating a targeted solution to this problem.

## II. SECTION 1091(r) DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

The Double Jeopardy Clause of the Fifth Amendment provides that no “person [shall] be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. It has long been “recognized that the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, ‘in common parlance’ be described as punishment.” Hudson v. United States, 522 U.S. 93, 98-99 (1997) (citing United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 (1943) (quoting Moore v. Illinois, 14 How. 13, 19, 14 L.Ed. 306 (1852))). “The Clause protects only against the imposition of multiple criminal punishments for the same offense.” Hudson, 522 U.S. at 99 (emphasis in original). See also Morse v. Commr. of Internal Revenue Service, 419 F.3d 829, 834-35 (8<sup>th</sup> Cir. 2005); United States v. Lippert, 148 F.3d 974, 976 (8<sup>th</sup> Cir. 1998).

Determining whether § 1091(r) is a criminal or civil sanction is a question of statutory construction. Hudson, 522 U.S. at 99; Morse, 419 F.3d at 835; Lippert, 148 F.3d at 976. The inquiry involves two steps: (1) a determination of whether Congress “indicated either expressly or impliedly” that § 1091(r) was a criminal or civil sanction, and (2) if Congress intended § 1091(r) to be civil in nature, a determination of whether it is nonetheless so punitive “in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty.”

Hudson, 522 U.S. at 99 (internal quotations and citations omitted). See also Lippert, 148 F.3d at 976. Section 1091(r) is to be evaluated on its face, and ““only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”” Hudson, 522 U.S. at 99 (quoting United States v. Ward, 448 U.S. 242, 249 (1980)). See also Lippert, 148 F.3d at 976.

As an initial matter, § 1091(r) is not a sanction at all, let alone a criminal sanction. It is a congressional determination that scarce federal resources should not be used to benefit those who have violated the nation’s drug laws. Even if § 1091(r) were viewed as a sanction, it is plainly civil in nature, as a matter of law. There is not a shred of evidence to suggest that Congress, either expressly or impliedly, enacted § 1091(r) for the purpose of imposing a second criminal punishment on students who had been convicted of drug-related offenses. Both the statute and its legislative history compel the conclusion that Congress intended the suspension of federal financial aid to students convicted of drug-related offenses to be civil in nature. And there is no proof that section § 1091(r) is so punitive in purpose and effect to override Congress’ intent.

A. Congress Intended § 1091(r) to Be Civil in Nature.

Clearly, Congress did not expressly indicate that § 1091(r) was to be a criminal penalty. Everything about § 1091(r) – its limited, moderate terms, its enforcement mechanism, and its legislative history – reveals an intention that § 1091(r) be civil in nature.

Section 1091(r) provides a measured, reasonable scheme for suspending, not eliminating, financial aid eligibility for students convicted of drug-related offenses. Importantly, it does not impose an absolute ban on eligibility for financial aid for these students. Eligibility is merely suspended for time periods of limited duration. For a first offense for the possession of illegal

drugs, eligibility is suspended for one year. For a second possession offense, the ineligibility period is for two years. It is only upon a student's third conviction for the possession of illegal drugs that the student permanently loses his or her financial aid eligibility. A student convicted of the more serious offense of selling illegal drugs has his or her student aid eligibility suspended for two years, and indefinitely for a second such offense. § 1091(r)(1).<sup>3</sup>

Congress further tempered § 1091(r) by providing for the reinstatement of financial aid eligibility upon the completion of a drug rehabilitation program. A student whose ineligibility has been suspended for any amount of time, including permanently, has the ability to end the suspension and have his or her eligibility reinstated by completing a drug rehabilitation program. § 1091(r)(2). The Secretary has promulgated broad criteria for determining acceptable drug treatment programs under § 1091(r)(2). See 34 C.F.R. 668.40(d); 64 FR at 57357. The fact that the statute provides a way for affected students to mitigate the sanction is evidence that it is not punitive. Students are not being punished for their drug-related convictions, because they can mitigate the suspension by completing a drug rehabilitation program. Selective Service System, 468 U.S. at 853 (holding that statute denying federal financial assistance under Title IV of the HEA to male students who failed to register for the draft did not impose punishment because, inter alia, it allowed affected students to regain eligibility by registering for the draft late).

The limited, qualified nature of § 1091(r) demonstrates that it is civil in nature, not criminal. In Turner, 207 F.3d at 427-31, the court rejected the plaintiff's Double Jeopardy

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<sup>3</sup> The fact that the statute applies to drug-related convictions and refers to the prohibited activity in criminal terms "is only evidence of the criminal nature of the underlying conduct triggering the sanction of [§ 1091(r)]. These aspects of the statute do not speak to the nature of the sanction itself . . ." Turner, 207 F.3d at 428.

challenge to the statute that made individuals convicted of drug-related felonies permanently ineligible for food stamps and TANF welfare benefits, finding that Congress intended the statute to be civil in nature and finding no clear proof that the statute serves as a criminal punishment. If a permanent ban on receiving essential, subsistence benefits is not found to be criminal, then a statute that merely provides for temporary suspension of the far-less-essential benefit of higher education financial assistance is surely not criminal. See LaCrosse v. Commodity Futures Trading Com'n, 137 F.3d 925, 931 (7<sup>th</sup> Cir. 1998) (finding that if a lifelong ban on a broker engaging in trading is not found to be criminal, then a five-year trading ban is certainly not criminal).

The fact that § 1091(r) is enforced by an administrative agency, DOE, not through any criminal process, is highly probative of its civil nature. Plaintiffs acknowledge that § 1091(r) is enforced by DOE. (See Complaint at ¶¶ 1, 18, 19). Compare 21 U.S.C. § 862 (authorizing courts, at their discretion, to deny federal benefits to persons convicted of drug-related offenses) (cited in Complaint at ¶ 4). When enforcement authority is conferred on an administrative agency, it “is prima facie evidence that Congress intended to provide for a civil sanction.” Hudson, 522 U.S. at 103. See also Morse, 419 F.3d at 835; Turner, 207 F.3d at 429 (“The most significant indication we can find of congressional intent is the enforcement provisions provided by Congress. Significantly, the ineligibility provisions . . . are not enforced through any criminal process. Rather, the permanent disqualification from the receipt of food stamps and TANF benefits of individuals convicted of drug-related felonies is enforced by the state agencies responsible for administering the food stamp program.”); LaCrosse, 137 F.3d at 930-31. The presumption that a statute administered by an agency is civil arises because agency enforcement

mechanisms lack the procedural safeguards attendant to criminal proceedings, not because of any discretion that the agency exercises in administering the statute. Turner, 207 F.3d at 429 (citing Helvering v. Mitchell, 303 U.S. 391, 402 (1938)).

Lastly, § 1091(r)'s legislative history gives no indication of any intent on the part of Congress to inflict a second criminal punishment on students convicted of drug-related offenses. As demonstrated above, Congress enacted § 1091(r) to serve as a deterrent to the possession and sale of illegal drugs on college campuses and to prevent taxpayer subsidization of this conduct through student financial aid. Congress was concerned about increasing drug-related crime rates on college campuses and increasing drug use among high school seniors and college students. The legislative history belies the conclusion that Congress' intent was to punish students who had been convicted of drug-related offenses by suspending their student aid eligibility. See, e.g., 144 Cong. Rec. H2510-08, H2580 (April 29, 1998) ("The point here is not to get people out of college. That is why we have the treatment program and then they come back in. . . . I have no desire to eliminate anybody's opportunity to climb out of the situation they are in to advance their career, but the best way to do that is to make sure one is clean of drugs.") (remarks of Congressman Souder).<sup>4</sup>

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<sup>4</sup> In remarks on a previous, unenacted version of § 1091(r), Congressman Solomon explained that his legislation presented "an effective way to dramatically reduce the demand for illegal drugs in this country" by providing an incentive for casual drug users to stop using drugs. 136 Cong. Rec. H5131-04, H5174 (July 20, 1990). In the context of these remarks, Congressman Solomon stated as follows:

Due to the backlog of drug related cases in our courts, casual drug users face minimal sentencing, if any. My amendment would suspend Federal higher education benefits to individuals who are convicted of drug use or possession. The penalties would vary depending on the type of offense and would be nullified, if the

B. Section 1091(r) Does Not Actually Function as a Criminal Penalty.

The determination of whether § 1091(r) is so punitive in either purpose or effect as to transform what Congress intended to be a civil sanction into a criminal one is made according to the following guidelines: “(1) ‘[w]hether the sanction involves an affirmative disability or restraint’; (2) ‘whether it has historically been regarded as a punishment’; (3) ‘whether it comes into play only on a finding of scienter’; (4) ‘whether its operation will promote the traditional aims of punishment-retribution and deterrence’; (5) ‘whether the behavior to which it applies is already a crime’; (6) ‘whether an alternative purpose to which it may rationally be connected is assignable for it’; and (7) ‘whether it appears excessive in relation to the alternative purpose assigned.’” Hudson, 522 U.S. at 99-100 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). Application of these guidelines “involves a certain degree of judicial discretion: Some of the considerations identified in [Mendoza-Martinez] may be more or less dispositive than others.” Burr v. Snider, 234 F.3d 1052, 1054 (8<sup>th</sup> Cir. 2000), cert. denied, 534 U.S. 844 (2001).

An application of the Mendoza-Martinez guidelines to § 1091(r) shows an absence of

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individual successfully completed a rehabilitation program. Let me again emphasize the fact that this amendment is targeted at the casual drug users. They finance the bulk of the illegal drug trade in our country. They are a large percentage of the drug epidemic. They are one of the biggest reasons why we continue to see drug trafficking in this country and they should be held accountable.

Id. While these remarks might, if taken out of context, support an inference of an intent to punish drug users, when viewed in context they show that the Congressman’s intent was to provide a serious consequence for illegal drug use – that of suspension of student financial aid – to serve as a deterrent to engaging in such conduct. Congressman Solomon also stated in the context of these remarks that “[s]uspending federal education benefits is a way for [Congress] to show we are not going to tolerate casual drug use.” Id.

“clear[] proof” that the statute has a criminal purpose or effect. Hudson, 522 U.S. at 99. The Supreme Court has recognized that “[n]o affirmative disability or restraint is imposed” by “the mere denial of a noncontractual government benefit.” Flemming v. Nestor, 363 U.S. 603, 617 (1960) (holding termination of Social Security benefits to individuals deported for certain reasons not to be punishment). In Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984), the Supreme Court held that a statute denying federal financial assistance under Title IV of the HEA to male students who failed to register for the draft did not impose a punishment. Citing Flemming, the Court held that “the sanction is the mere denial of a noncontractual governmental benefit.” 468 U.S. at 853. Following this authority, lower courts have held that the denial of a variety of governmental benefits does not constitute punishment. See, e.g., Turner, 207 F.3d at 430-31 (denial of food stamps and TANF welfare benefits to individuals convicted of drug-related offenses); Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Dempsey, 167 F.3d 458, 465 (8<sup>th</sup> Cir. 1999) (denial of state family-planning funds to abortion service provider); Jones v. Heckler, 774 F.2d 997, 998-99 (10<sup>th</sup> Cir. 1985) (suspension of Social Security disability benefits to prisoners); Jensen v. Heckler, 766 F.2d 383, 386 (8<sup>th</sup> Cir.) (per curiam), cert. denied, 474 U.S. 945 (1985) (suspension of Social Security benefits to incarcerated felons not involved in approved rehabilitation program); Greenwell v. Walters, 596 F. Supp. 693, 696-97 (M.D. Tenn. 1984) (denial of full veterans’ educational benefits to incarcerated veterans). The weight of this authority also forecloses any attempt by plaintiffs to rely on the second Mendoza-Martinez factor, because the denial of a noncontractual governmental benefit such as Title IV HEA aid has historically not been regarded as a punishment. See Turner, 207 F.3d at 430-31.

While § 1091(r) comes into play only on a finding of scienter, promotes the goal of deterrence, and applies to behavior that is already a crime (the third, fourth and fifth Mendoza-Martinez guidelines), the existence of these factors, standing alone, is insufficient to render a sanction criminal. See Hudson, 522 U.S. at 105; Turner, 207 F.3d at 430; Lippert, 148 F.3d at 977; LaCrosse, 137 F.3d at 931-32. The remaining two factors – factors six and seven – weigh in favor of the constitutionality of the statute. Section 1091(r) rationally promotes alternative purposes to punishment, including deterring drug use and drug-related crime on college campuses and allocating scarce federal funds so as not to subsidize this conduct. Moreover, there is no indication that the moderate suspension periods imposed by § 1091(r), which the student can shorten even further by completing a drug rehabilitation program, are excessive in relation to these purposes. See Rem, 320 F.3d at 794; Turner, 207 F.3d at 431; LaCrosse, 137 F.3d at 932.

This analysis reveals that the clear proof required to “override legislative intent and transform what has been denominated a civil remedy into a criminal penalty” is lacking here. Hudson, 522 U.S. at 99. Accordingly, § 1091(r) does not impose a criminal punishment and does not violate the Double Jeopardy Clause.

### CONCLUSION

For all the foregoing reasons, defendant Margaret Spellings, Secretary of the United States Department of Education, in her official capacity, respectfully requests that the Court dismiss the Complaint for failure to state a cause of action.

Respectfully Submitted,

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