

No. 21-50352

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IN THE  
**United States Court of Appeals**  
**for the Fifth Circuit**

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ALLISON KING,  
*Plaintiff-Appellant,*

v.

BAYLOR UNIVERSITY,  
*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Western District of Texas, No. 6:20-cv-504  
Before the Honorable Alan D. Albright

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**BRIEF FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION  
AND 18 OTHER HIGHER EDUCATION ASSOCIATIONS IN SUPPORT  
OF DEFENDANT-APPELLEE**

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JESSICA L. ELLSWORTH  
STEPHANIE J. GOLD  
NATHANIEL A.G. ZELINSKY  
HOGAN LOVELLS US LLP  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5600  
jessica.ellsworth@hoganlovells.com

*Counsel for Amici Curiae American  
Council on Education and 18 Other  
Higher Education Associations*

September 17, 2021

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## **CERTIFICATE OF INTERESTED PERSONS**

1. Number and style of case: *King v. Baylor*, 21-50352.

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

### **Plaintiff-Appellant**

Allison King

### **Current and Former Attorneys for Plaintiff-Appellant**

Hassan Zavareei

Tycko & Zavareei LLP

Jeff Edwards

Edwards Law

Eric Poulin

Roy Willey

Anastopoulo Law Firm

### **Defendant-Appellee**

Baylor University

### **Current and Former Attorneys for Defendant-Appellee**

Kyle D. Hawkins

Russell H. Falconer

Robert C. Walters

Andrew LeGrand

Philip Axt

Emily A. Jorgens

Thomas M. Molloy, Jr.

Gibson, Dunn & Crutcher LLP

### **Amici Curiae**

American Council on Education

Accreditation Council for Pharmacy Education

American Association of Community Colleges

APPA

Association of Catholic Colleges and Universities

Association of Governing Boards of Universities and Colleges

Association of Public and Land-grant Universities

Commission on Independent Colleges and Universities

Consortium of Universities of the Washington Metropolitan Area

Council for Christian Colleges & Universities

Council for Higher Education Accreditation

Council of Independent Colleges

National Association of College and University Business Officers

National Association of Diversity Officers in Higher Education

National Association of Independent Colleges and Universities

National Association of Student Financial Aid Administrators

NASPA - Student Affairs Administrators in Higher Education

United Negro College Fund

University Risk Management and Insurance Association

*Attorneys for Amici Curiae*

Jessica L. Ellsworth

Stephanie J. Gold

Nathaniel A.G. Zelinsky

Hogan Lovells US LLP

/s/ Jessica L. Ellsworth

Jessica L. Ellsworth

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## INTERESTS OF *AMICI CURIAE*<sup>1</sup>

Colleges and universities have spent the past year and a half responding to the constantly changing circumstances of the novel COVID-19 pandemic, all the while striving to ensure their students could continue their studies, collaborate with peers and professors, and maintain the sense of community that colleges and universities provide. At the same time, these institutions have also acted to ensure their employees' safety and wellbeing, and the safety of their surrounding communities, and to support scientific research and studies of the COVID-19 virus and treatments (among other things). This appeal is from one of the over 300 tuition refund class actions that the plaintiffs' bar has filed against colleges and universities based on a false narrative that the unforeseen, unbudgeted for, and immediate pivot to largely online operations caused by COVID-19 was somehow a financial windfall to institutions. This *amicus* brief explains the financial impact of the pandemic to higher education institutions.

The **American Council on Education (ACE)** is the major coordinating body for American higher education. ACE's more than 1,700 members reflect the ex-

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<sup>1</sup> The parties to this appeal have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* states that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* or their counsel contributed money toward the preparation or filing of this brief.

traordinary breadth and contributions of four year, two year, public and private colleges and universities. ACE members educate two out of every three students in accredited, degree-granting U.S. institutions. ACE participates as amicus curiae on occasions such as this where a case presents issues of substantial importance to higher education in the United States.

The **Accreditation Council for Pharmacy Education (ACPE)** is the national agency for the accreditation of professional degree programs in pharmacy and providers of continuing pharmacy education. ACPE also offers evaluation and certification of pharmacy professional degree programs internationally and with ASHP accredits pharmacy technician education and training programs.

The **American Association of Community Colleges (AACC)** is the primary advocacy organization for the nation's community colleges. It represents more than 1,000 regionally accredited, associate degree-granting institutions.

**APPA** recognizes that the quality of academic programming is directly related to the quality of the educational facility, and enables educational institutions to share, elevate, and transform the learning environment. APPA provides training and professional development, performance measurement, and evaluation tools, standards, best practices, research, credentialing, and thought leadership to more than 17,000 educational facilities professionals from more than 1,200 learning institutions.

The **Association of Catholic Colleges and Universities (ACCU)** serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with Catholic higher education can contribute to the greater good of the world and the Church.

The **Association of Governing Boards of Universities and Colleges (AGB)** is the premier membership organization that strengthens higher education governing boards and the strategic roles they serve within their organizations. Through AGB's vast library of resources, educational events, and consulting services, and with 100 years of experience, 40,000 AGB members from more than 2,000 institutions, systems, and foundations are empowered to navigate complex issues, implement leading practices, streamline operations, and govern with confidence. AGB is the trusted resource for board members, chief executives, and key administrators on higher education governance and leadership.

The **Association of Public and Land-grant Universities (APLU)** is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities in the U.S., Canada, and Mexico. With a membership of 244 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU's agenda is built on the three pillars of increasing

degree completion and academic success, advancing scientific research, and expanding engagement. Annually, its 201 U.S. member campuses enroll 4.2 million undergraduates and 1.2 million graduate students, award 1.2 million degrees, employ 1.1 million faculty and staff, and conduct \$46.8 billion in university-based research.

The **Commission on Independent Colleges and Universities (CICU)** represents the 100+ private, not-for-profit colleges and universities in New York on issues of public policy. Founded in 1956, CICU is the largest such membership association in the country. Its members enroll 98 percent of all undergraduates who attend not-for-profit colleges in the state. Private, not-for-profit colleges in New York award 49% of bachelor's degrees, 72% of master's degrees, and 78% of doctoral and first-professional degrees earned in New York.

The **Consortium of Universities of the Washington Metropolitan Area** was founded in 1965 to foster collaboration for higher education across the National Capital Region. The Consortium is a non-profit organization comprised of all 18 regionally accredited colleges and universities in the National Capital Area, as well as two affiliate members including the Smithsonian Institute. The Consortium provides a unifying voice for our members locally, regionally, and nationally, as well as a force for increasing access, postsecondary success, and equitable economic and workforce development.

The **Council for Christian Colleges & Universities (CCCU)** is a higher education association of more than 185 Christian institutions around the world, representing 520,000 current students and over 3.6 million alumni. The CCCU's mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth. They are committed to graduating students who make a difference for the common good as redemptive voices in the world.

A national advocate and institutional voice for academic quality through accreditation, the **Council for Higher Education Accreditation (CHEA)** is a U.S. association of degree-granting colleges and universities that serves its members, students and society through advocacy for the value and independence of accreditation, recognition of accrediting organizations and commitment to quality in higher education. CHEA is the only national organization focused exclusively on higher education accreditation and quality assurance.

The **Council of Independent Colleges (CIC)** is the national organization for small and mid-sized independent colleges and universities, serving more than 650 private, nonprofit institutions and more than 75 higher education organizations with programs and services to support leadership, advance excellence, and enhance public understanding of independent higher education.

The **National Association of College and University Business Officers (NACUBO)**, founded in 1962, is a nonprofit professional organization representing chief administrative and financial officers at more than 1,700 colleges and universities across the country. NACUBO works to advance the economic vitality, business practices, and support of higher education institutions in pursuit of their missions.

The **National Association of Diversity Officers in Higher Education (NADOHE)** serves as the preeminent voice for diversity officers in higher education. Its membership includes more than 1,100 individuals and institutions representing over 750 colleges and universities, affiliated professional organizations, and state/regional NADOHE chapters across the United States.

The **National Association of Independent Colleges and Universities (NAICU)** serves as the unified national voice of private, non-profit higher education in the United States. With more than 5 million students attending 1,700 independent colleges and universities in all 50 states, the private sector of American higher education has a dramatic impact on our nation's larger public interests.

The **National Association of Student Financial Aid Administrators (NASFAA)** represents more than 28,000 student financial assistance professionals at nearly 3,000 colleges, universities, and career schools across the country. NASFAA provides professional development and services for financial aid administrators; advocates for public policies that increase student access and success;

serves as a forum on student financial aid issues, and is committed to diversity throughout all activities.

**NASPA - Student Affairs Administrators in Higher Education** is the leading voice of student affairs, driving innovation and evidence-based, student-centered practice throughout higher education, nationally and globally.

Since its founding in 1944, **United Negro College Fund (UNCF)** has helped to more than double the number of minorities attending college. UNCF serves as the nation's leading advocate for the importance of minority education and community engagement by providing financial support to 37 historically Black colleges and universities (HBCUs) and awarding more than 10,000 students scholarships worth more than \$100 million each year.

**University Risk Management and Insurance Association (URMIA)** promotes the advancement and application of effective risk management principles and practices in institutions of higher education.



## INTRODUCTION

In March 2020, America faced a rapidly-evolving crisis. For colleges and universities, the challenges were acute. Dormitories, classrooms, research laboratories, libraries, and arenas risked spreading COVID-19, endangering students, faculty, staff and surrounding communities. To safeguard public health and to comply with shelter-in-place orders, higher education institutions pivoted in the moment. They physically closed campuses in large part, while searching for and inventing solutions to allow them to continue to serve their students in unpredictable and unprecedented times. For colleges and universities—like so many other sectors of society—virtual platforms were part of the answer. Programs like Citrix, Microsoft Teams, and Zoom meant students could complete the last portion of their spring semester courses without interruption.

The rapid transition online was no small feat. Schools secured software licenses, trained professors, and transitioned additional services onto the internet, such as student healthcare, library resources, and career services—all in a matter of days. They reallocated funds on a dime to permit investment in digital and technology capability upgrades necessary to operate campuses remotely. Many institutions provided financial assistance to students as they travelled home and secured the laptops and other equipment and materials necessary to participate fully in the remaining part of the semester. As a result of these efforts, students were able to complete the

remaining weeks of their spring semester courses, and the class of 2020 graduated on time at institutions around the country.

This putative class-action lawsuit—and others like it—alleges that colleges and universities “saved significant sums of money” and thereby received an enormous windfall due to COVID-19. ROA 260, ¶ 129. Baylor’s brief explains why the Complaint fails as a matter of law. *See* Appellee’s Br. 17-59. But particularly fanciful is the suggestion that institutions received some kind of financial windfall from the quick and costly actions that they took to permit completion of the semester. To operate in the face of COVID-19, higher education institutions incurred tremendous and unexpected costs, beginning in March 2020 and continuing today. Meanwhile, revenue streams that are critical support for institutional operations—such as income from conferences, hospitals, dining halls, parking, athletic events, concessions, and summer programs—dried up. Far from a windfall, COVID-19 stressed tight budgets and exacerbated the financial challenges colleges and universities already faced. As ACE testified to Congress, by the end of 2020, academic institutions saw “at least \$120 billion in new expenses and lost revenue that [were] the direct result of the pandemic.”<sup>2</sup>

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<sup>2</sup> Letter from Ted Mitchell, President, Am. Council on Educ., to Nancy Pelosi, Speaker of the House, U.S. House of Representatives, Kevin McCarthy, Minority Leader, U.S. House of Representatives, Mitch McConnell, Majority Leader, U.S.

Now colleges and universities confront yet another COVID-related cost, this time from an aggressive plaintiffs' bar. The District Court correctly saw the complaint for what it was and dismissed it. This Court should affirm.

## ARGUMENT

### **I. WHEN THE COVID-19 PANDEMIC STRUCK, COLLEGES' AND UNIVERSITIES' PIVOT TO ONLINE PLATFORMS ENABLED THEM TO CONTINUE EDUCATING STUDENTS WITHOUT INTERRUPTION, AT CONSIDERABLE COST TO THE SCHOOLS.**

When COVID-19 hit in the spring of 2020, colleges and universities faced the unfortunate reality that they—like so many organizations in society—needed to reduce physical interactions among students, faculty, and staff in order to ensure safety. But even as colleges and universities sent students and employees home, they did not close up shop. Instead, institutions strove to ensure that students could continue their studies, receive their academic credits, and interact with their classmates and professors; they looked after employees and the surrounding community; and they maintained and updated their physical spaces in anticipation of students' return. In short they did what they needed to do to continue their mission: teaching, researching, and service.

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Senate, & Chuck Schumer, Minority Leader, U.S. Senate 1 (Dec. 2, 2020), <https://tinyurl.com/9u2dvaad>; *see also* Paul N. Friga, *How Much Has Covid Cost Colleges? \$183 Billion*, Chron. Higher Educ. (Feb. 5, 2021), <https://tinyurl.com/44pm35wr> (estimating the total cost across America's higher education institutions at \$183 billion).

This unforeseen, unprecedented, and immediate need to transition thousands and thousands of classes to remote learning and to secure campuses against COVID-19 was exorbitantly expensive for the higher education community. Many fixed costs remained in place, while new unexpected costs were added just as budgeted revenue streams disappeared. Far from a windfall, institutions faced substantial unfunded increases in expenditures which have totaled as much as \$24 billion to date.<sup>3</sup>

Consider some unanticipated expenses directly associated with remote instruction that *amici*'s members have reported. In a matter of days, schools purchased and licensed software such as Zoom, LinkedIn Learning, Dropbox, Bomgar, closed captioning software, and other specialty software packages for specific educational disciplines. Schools invested in expanded IT support services for online course formats, laptop loaner and purchase programs, and additional online-teaching resources for faculty, as just a few examples. One flagship midwestern university reported to ACE that it spent approximately \$8.2 million between March and June 2020 on software, hardware, faculty training in online instruction, IT-related costs, and other costs associated with the transition to online classes. This is not surprising given

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<sup>3</sup> See Friga, *supra*; see also, e.g., Letter from Drew Bogner, Interim President, & Keith Cushing, Vice President for Rsch., Admin., & Member Servs., to CICU Bd. of Trs., *2019 Economic Impact Overview* 3 (Apr. 26, 2021), <https://tinyurl.com/cjkzwbzx> (estimating, for example, that private, not-for-profit colleges and universities in New York state alone have experienced \$1.1 billion in unexpected costs since the pandemic began).

that the software license alone for each remote learning platform can cost hundreds of thousands of dollars.<sup>4</sup>

Formal lectures and seminars were far from the only aspect of an academic community that institutions gathered online, instead of in-person. Student academic support services—such as writing centers, tutoring centers, and library services—as well as school administration likewise moved online, requiring additional training and investment in technology resources for those who run and participate in those activities. Student groups and student activities began meeting and hosting events online, too.<sup>5</sup> And because colleges and universities provide healthcare to many of their students, schools invested resources in telehealth. These undertakings entailed extensive retooling, “training,” developing “guidelines,” and navigating “legal questions regarding” how to care “for students in their home states.”<sup>6</sup>

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<sup>4</sup> See Sabine Martin, *UI Spent Hundreds of Thousands to Upgrade Zoom, Other Online Learning Software*, *The Daily Iowan* (Oct. 13, 2020), <https://tinyurl.com/5y8zvmsx>.

<sup>5</sup> For example, Cornell’s calendar of online events for April and May 2020 lists events ranging from online yoga classes to Class of 2020 video projects to virtual escape room and guided beer tasting events. See Calendar, Cornell Univ., <https://tinyurl.com/2wmr36jh> (last visited Aug. 27, 2021).

<sup>6</sup> Am. Coll. Health Ass’n, *The COVID-19 Pandemic’s Effect on Campus Health Services: A Snapshot of Operating Status and Response, April 6-9, 2020*, at 13 (Apr. 2020) (“ACHA Snapshot”), <https://tinyurl.com/4cu2xh7x>; see Mary Butler, *Telehealth Helps College Students Receive Care During a Pandemic*, *J. Am. Health Info. Mgmt. Ass’n* (Apr. 29, 2020, 11:30 AM), <https://tinyurl.com/2k27m872> (“The university helped [Northwestern University Health Service (NUHS)] obtain enough

Critical mental healthcare for students posed particularly acute challenges. Prior to the pandemic, “[a]bout 52 percent of college counseling center directors said their center used no form of telehealth. . . . Only 3.4 percent of the directors . . . said they offered counseling via videoconferencing and 7.6 percent offered it via phone.”<sup>7</sup> And yet, schools did not hesitate to commit the resources necessary to transition counseling online when COVID-19 made it unavailable on campus and pandemic-related stress simultaneously increased students’ demand for mental health services.<sup>8</sup>

In those early days of the pandemic, schools also provided “financial assistance to help students leave campus quickly.”<sup>9</sup> They distributed laptops to facilitate

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laptops to provide telehealth services and advised them on the security of various video platforms, while [the medical director at NUHS] and her staff figured out the best way to use their electronic health record (EHR) to document telehealth visit notes.”).

<sup>7</sup> Greta Anderson, *Extending the Reach of Mental Health Therapy*, Inside Higher Ed (Oct. 1, 2020), <https://tinyurl.com/jttcpt3d>.

<sup>8</sup> See, e.g., *id.* (detailing schools’ adoption of telehealth counseling services); Greta Anderson, *Mental Health Needs Rise with Pandemic*, Inside Higher Ed (Sept. 11, 2020), <https://tinyurl.com/5he4hxph> (“Several recent surveys of students suggest their mental well-being has been devastated by the pandemic’s social and economic consequences, as well as the continued uncertainty about their college education and postcollege careers.”); Eric Lindberg, *For Students Worried About the Coronavirus or Just a Rash, USC Student Health Stays Open*, USC News (May 13, 2020), <https://tinyurl.com/3ruuy69t> (noting that the University of Southern California provided “new options to receive mental health support through expanded telehealth offerings”).

<sup>9</sup> Letter from L. Rafael Reif, President, Mass. Inst. of Tech., to MIT Cmty., *Letter Regarding MIT’s Financial Picture and Next Steps* (Apr. 13, 2020), <https://ti->

online instruction.<sup>10</sup> And they expanded or revamped food banks to ensure students—many of whom suffered financial hardship—could eat.<sup>11</sup>

Meanwhile, a number of institutions incurred costs to protect individuals who, for one reason or another, had to remain on campus. Many schools granted exceptions to COVID-related restrictions to permit some students to remain in dormitories, for instance due to personal hardship. (Data from the American College Health Association in April 2020 suggested that about 68% percent of schools had granted such exceptions.<sup>12</sup>) And while some research projects could be put on pause, other research could not be; certain experiments—such as those “involving animals and ongoing clinical trials”—needed to be attended to and continued.<sup>13</sup> Indeed, the story

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nyurl.com/43catf38; *see also, e.g.*, Juan Siliezar, *University Offers Coronavirus Resources and Help Guides*, Harv. Gazette (Mar. 11, 2021), <https://tinyurl.com/2pxrbymx>.

<sup>10</sup> *See, e.g.*, Elissa Nadworny, *Need A Laptop? Colleges Boost Loaner Programs Amid Pandemic*, NPR (Aug. 15, 2020, 7:01 AM ET), <https://tinyurl.com/uryxhuxx>; Steve Scauzillo, *Chaffey College Lending 5,000 Laptops to Students Amid Coronavirus Outbreak*, Daily Bulletin (Mar. 24, 2020, 4:56 PM), <https://tinyurl.com/yez342b4>.

<sup>11</sup> *See, e.g.*, Yeara Rosenthal, *Lehman’s Food Bank Goes Virtual to Continue Serving Students During Coronavirus*, Lehman Coll. News (Apr. 30, 2020), <https://tinyurl.com/nmfk2cn4>.

<sup>12</sup> ACHA Snapshot, *supra* at 5.

<sup>13</sup> Elizabeth Redden, *Empty Benches at Empty Lab Tables*, Inside Higher Ed (Mar. 30, 2020), <https://tinyurl.com/wrbpjkwz>; *see* Susan Svrluga, *Major Universities Suspend Most Lab Research—But Not Into Coronavirus*, Wash. Post (Mar. 21, 2020), <https://tinyurl.com/6tf5pkm>.

that will be told of the fight against COVID-19 will contain whole chapters about the remarkable work that was conducted in higher education research facilities, utilizing specialized equipment to sequence tests for hospitals.<sup>14</sup> And essential campus services—such as mail processing, groundskeeping, and repairs to address “electrical, heating, ventilation, air conditioning and plumbing issues”—remained ongoing.<sup>15</sup> To protect those who stayed on their campuses, colleges and universities adopted enhanced cleaning measures and safety protocols—all of which meant additional, unbudgeted expenses.

These unanticipated expenses mounted quickly. In April 2020, for instance, the Massachusetts Institute of Technology estimated that it had already incurred \$50 million in “new commitments.”<sup>16</sup> At the same time, some of schools’ largest preexisting costs remained fixed in the short term. “Instruction, including faculty salaries and benefits, [is] the largest single expense category at public 2-year (41 percent), public 4-year (27 percent), and private nonprofit 4-year (31 percent) degree-granting

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<sup>14</sup> See, e.g., *Purdue Starts Limited COVID-19 Testing in Diagnostic Lab; Goal to Expand State’s Capacity in Serving Patients*, Purdue Univ. News (Apr. 17, 2020), <https://tinyurl.com/te533ykr>.

<sup>15</sup> Nataleah Small, *COVID-19 Impacts Construction Projects, Campus and Facilities Maintenance*, The Daily Texan (Apr. 3, 2020), <https://tinyurl.com/bt7dem>; see *Campus Services*, Univ. of Ky. (updated Apr. 10, 2020), <https://tinyurl.com/yujzjvsx>.

<sup>16</sup> Letter from Reif, *supra*.



postsecondary institutions.”<sup>17</sup> Although institutions froze salaries and new hiring, measures short of furloughs or firings did not immediately reduce personnel costs.<sup>18</sup>

In anticipation of returning to in-person or hybrid instruction while the pandemic was ongoing, colleges and universities spent enormous sums, none of which had been expected when administrators prepared budgets many months earlier and some of which was mandated by law.<sup>19</sup> Schools further invested in tools to reduce transmission, such as personal protective equipment (PPE), masks, contact tracing and symptom tracking programs, air purifiers and filters, plexiglass barriers, and hand sanitizer.<sup>20</sup> They developed or licensed tests to diagnose infections, which could cost between \$88 and \$115 per individual test in the fall of 2020.<sup>21</sup> And they purchased additional technology to effectively broadcast in-person lectures outside

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<sup>17</sup> *Expenditures*, Nat’l Ctr. Educ. Stats., <https://tinyurl.com/429nzxjd> (last visited Aug. 27, 2021).

<sup>18</sup> *See, e.g.*, Letter from Reif, *supra* (detailing the Massachusetts Institute of Technology’s measures to freeze salaries and hiring).

<sup>19</sup> *See, e.g.*, N.Y. State Dep’t of Health, *Interim Guidance for Higher Education During the COVID-19 Public Health Emergency* 6 (June 28, 2020), <https://tinyurl.com/hhxxkzszp> (“Responsible Parties must identify where students who are exposed to, or infected with, COVID-19 will be residing and how daily needs (e.g., food, medication) will be met if it becomes necessary to have a period of quarantine or isolation.”).

<sup>20</sup> *See* Emma Whitford, *COVID-19 Mitigation Costs Still Add Up After Students Sent Home*, Inside Higher Ed (Oct. 9, 2020), <https://tinyurl.com/46yfk64a>; *Streamlining Yale’s COVID-19 Response with the Salesforce Platform*, It’s Your Yale (Oct. 15, 2020), <https://tinyurl.com/autmttc3>.

<sup>21</sup> Whitford, *supra*.

the lecture hall, made classroom modifications for social distancing, decreased dormitory density including through rental of additional housing, and created outdoor Wi-Fi hotspots to allow students to safely stream courses, among the many novel and unanticipated expenses.<sup>22</sup>

As focus turned to the fall of 2020, schools again supported students with financial needs. The economic downturn caused “over 63 percent of college students” to “experience[] financial losses directly or within their families due to the pandemic.”<sup>23</sup> Indeed, precisely because college students lack degrees and typically hold low-income jobs, “college students” were “less likely to have benefited” from the limited economic recovery to date.<sup>24</sup> As a result, schools received an increased number of requests for financial aid. In fact, ACE’s members reported that their “single largest COVID-related expense reported was increased financial aid to students.”<sup>25</sup>

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<sup>22</sup> See Natalie Schwartz, *How Colleges with Hybrid Instruction Can Support Online Students This Fall*, Higher Ed Dive (July 22, 2020), <https://tinyurl.com/7mf7bn38>; *Duke Reopening FAQ*, Duke Today (July 26, 2020), <https://tinyurl.com/nc3u5v4z>; Martin, *supra*.

<sup>23</sup> Letter from Mitchell, *supra* at 2.

<sup>24</sup> *Id.* at 2-3.

<sup>25</sup> *Id.* at 3.

As of December 2020, institutions reported spending an average of approximately \$12 million for “COVID-specific [e]xpenses.”<sup>26</sup> At Chapman University, the school estimated that it spent “\$20 million on technology and public health retrofits” to prepare for the fall 2020 semester.<sup>27</sup> And as of June 2021, Louisiana State University reported that “COVID-related expenses hit \$19.8 million for the main campus and \$41.8 million for all of the campuses.”<sup>28</sup> All told, according to one estimate, America’s colleges and universities have incurred “\$24 billion” in COVID-related costs.<sup>29</sup>

## **II. THE PANDEMIC ALSO REDUCED REVENUES AND FURTHER STRESSED TIGHT BUDGETS.**

As America’s colleges and universities faced unexpected costs, they confronted already tight budgets. Starting almost immediately in March 2020, the pandemic exacerbated budgetary constraints because it reduced or eliminated previously reliable sources of revenue. Data collected from 63 of ACE’s members higher education institutions, for example, revealed that those institutions lost \$4.45 billion in

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<sup>26</sup> *Id.* at 3-4.

<sup>27</sup> Shawn Hubler, *As Colleges Move Classes Online, Families Rebel Against the Cost*, N.Y. Times (Sept. 10, 2020), <https://tinyurl.com/skthjmsu>.

<sup>28</sup> Adrian Dubose, *LSU Sports Programs Lost \$81 Million During Pandemic. How Will They Recover?*, Daily Advertiser (June 23, 2021, 1:11 PM CT), <https://tinyurl.com/28sysh5c>.

<sup>29</sup> Friga, *supra*.

auxiliary revenue—such as sales and services provided to students, visitors, and community members—during the pandemic.<sup>30</sup> Given that those 63 institutions are just a fraction of America’s 4,500 degree granting institutions, the total sum across colleges and universities easily totals in the tens of billions.<sup>31</sup>

Here are just a few of the unexpected decreases in auxiliary revenues in March 2020: Many “of the country’s top hospitals are affiliated with universities,” and “[h]ospital revenues fell dramatically as elective procedures ground to a halt” in the spring of 2020.<sup>32</sup> In April 2020, Rutgers projected it would “lose \$60 million in clinical revenue.”<sup>33</sup> That June, the University of Rochester similarly announced “a projected [medical] revenue loss of \$334 million in the current fiscal year” due to the “cancellation of all nonessential surgeries and the closing of many doctor offices.”<sup>34</sup>

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<sup>30</sup> Letter from Mitchell, *supra* at 3.

<sup>31</sup> *See also* Letter from Bogner & Cushing, *supra* at 3 (estimating that private, not-for-profit institutions in New York state saw “\$1.4 billion in lost auxiliary revenue”); *cf.* Friga, *supra* (estimating \$85 billion in lost revenue across colleges and universities).

<sup>32</sup> Dick Startz, *University Finances and COVID-19: Different Schools, Different Risks*, Brookings (June 18, 2020), <https://tinyurl.com/y6p2rm2v>.

<sup>33</sup> Bob Makin, *Coronavirus: Rutgers Will Lose \$200 Million in Revenue Due to Pandemic*, *Barchi Says*, My Central Jersey (Apr. 9, 2020, 5:59 PM ET), <https://tinyurl.com/jsfkg22d>.

<sup>34</sup> *Financial Implications and Planning*, Univ. of Rochester (June 4, 2020), <https://tinyurl.com/wzcwf2my>.

Similar losses occurred across schools' balance sheets. "Most colleges run or host summer programs to supplement their budgets," which they rely on "for up to 10 percent of annual income."<sup>35</sup> But in the spring of 2020, schools canceled summer programs, costing "hundreds of millions of dollars in revenue."<sup>36</sup> Schools likewise faced depressed athletic revenues. For instance, in early March, the National Collegiate Athletic Association (NCAA) canceled its 2020 "March Madness" basketball tournament. As a result, NCAA Division I institutions received \$225 million in distributions—\$375 million less than the expected \$600 million.<sup>37</sup> To pick one example, Duke University lost "at least \$16.5 million in revenue due to the cancellation."<sup>38</sup> In early January 2021, Duke projected another \$20.5 million decrease in athletic revenue, primarily from lost ticket sales and absent fans.<sup>39</sup> Likewise, to date, Louisiana State University has reported a \$81 million loss "in revenue during the COVID-19 pandemic."<sup>40</sup>

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<sup>35</sup> Alexander C. Kafka, *Canceled and Altered Summer Programs Will Cost Colleges Hundreds of Millions*, Chron. Higher Educ. (Apr. 9, 2020), <https://tinyurl.com/4whp6rz3>.

<sup>36</sup> *Id.*

<sup>37</sup> *NCAA Presidents Set Revised Financial Distribution to Support College Athletes*, NCAA (Mar. 26, 2020), <https://tinyurl.com/3jee2a67>.

<sup>38</sup> Matthew Griffin, *Athletics Projects \$36M in Lost Revenue Due to COVID-19, Details Positive Tests Among Students and Staff*, Duke Chron. (Jan. 23, 2021), <https://tinyurl.com/5ys6b77p>.

<sup>39</sup> *Id.*

<sup>40</sup> Dubose, *supra*.

In total, according to data from ACE’s members, auxiliary revenues—such as revenue from bookstores, dining facilities, event tickets, parking, and conference and facility fees—decreased thirty-eight percent in the early days of the pandemic.<sup>41</sup> When combined with the unexpected increase in expenditures in that spring, *see supra* pp. 10-17, institutions experienced substantial negative hits to operating budgets. For instance, in April 2020, Michigan State University reported that its “revenue reductions and real costs [were] already in the \$50 million to \$60 million range.”<sup>42</sup> The University of Illinois projected that, by July 2020, “the estimated financial COVID-19 costs” from “additional expenditures, lost revenue and fee adjustments” would “exceed \$70 million.”<sup>43</sup> The University of Georgia system forecasted revenue losses of “\$340 million to \$350 million through the summer,” including lost “income from canceled camps, professional learning programs, study abroad courses

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<sup>41</sup> *See* Letter from Mitchell, *supra* at 3; Friga, *supra* (“One of the areas hardest hit, especially for large institutions with significant numbers of students not on campus, was auxiliary revenue. This would include losses in housing, dining, other spending, and especially athletics.”).

<sup>42</sup> Letter from Samuel L. Stanley Jr., President, Mich. State Univ., to Fac. & Staff, Mich. State Univ., *To Faculty and Staff: Novel Coronavirus Financial Implications* (Apr. 16, 2020), <https://tinyurl.com/s4p9x5rd>.

<sup>43</sup> Letter from Robert J. Jones, Chancellor, Univ. of Ill., to Acad. Pros., Civ. Serv. & Fac., Univ. of Ill., *Assessing COVID-19 Financial Impacts* (Apr. 23, 2020, 10:01 AM), <https://tinyurl.com/5avkuvkw>.

and other events.”<sup>44</sup> Around the same time, the “Texas A&M System reported \$147 million in lost revenue and pandemic-related expenses,” while “the University of Texas System estimated its losses at \$131 million.”<sup>45</sup>

As the pandemic continued into the fall of 2020, schools confronted another sobering reality: declines in enrollment and tuition revenue. For most institutions, tuition is a key source of funding, comprising between thirty-two percent of revenue at private nonprofit institutions and twenty percent at public ones.<sup>46</sup> But as a result of COVID-19, some students delayed or forwent education. By October, “overall postsecondary enrollment [was] down 3% compared to the same time [the prior] year.”<sup>47</sup> The decrease in enrollment was particularly stark among freshmen, with a “16.1% [drop] nationally and a 22.7% drop at community colleges in particular.

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<sup>44</sup> Maureen Downey, *Georgia University System Losses From Coronavirus Expected to Reach \$350M*, Atlanta J. Const. (Apr. 14, 2020), <https://tinyurl.com/bks3cb49>.

<sup>45</sup> Raga Justin, *Texas Universities Have Started Shedding Jobs and Are Bracing for a Serious Financial Hit*, Texas Trib. (Aug. 7, 2020, 7:00 AM CT), <https://tinyurl.com/k96a3vyh>.

<sup>46</sup> See Nat’l Ctr. for Educ. Stats., *The Condition of Education 2021: Postsecondary Institution Revenues* 1 fig.1 (last updated May 2021), <https://tinyurl.com/y4v9dwj9>.

<sup>47</sup> Todd Sedmak, *Fall 2020 Undergraduate Enrollment Down 4% Compared to Same Time Last Year*, Nat’l Student Clearinghouse (Oct. 15, 2020), <https://tinyurl.com/wsuj4ybr>.

First-time students account[ed] for 69% of the total drop in undergraduate enrollment.”<sup>48</sup> Additionally, “[new] international student enrollment” likewise “decreased by 43 percent.”<sup>49</sup> From a fiscal perspective, the absence of new students is particularly concerning. If those students never enroll, schools stand to lose multiple years of tuition. In some cases, institutions slashed tuition to retain students who might otherwise have been unable or unwilling to attend.<sup>50</sup>

Federal aid—which at a first glance seems substantial—failed to fill the gap between the decline in revenue and unexpected costs. For example, the “Cares Act passed in March provided \$14 billion to institutions, with about half going to student aid.”<sup>51</sup> In practice, that aid to colleges and universities fell far short of actually offsetting institutional losses. One study estimated that schools faced a total shortfall of \$146 billion to \$165 billion—after including COVID-19 relief funds.<sup>52</sup> According to a study conducted by the National Association of Independent Colleges and

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<sup>48</sup> *Id.* (internal quotation marks omitted).

<sup>49</sup> Julie Baer & Mirka Martel, Inst. Int’l Educ., *Fall 2020 International Student Enrollment Snapshot* (Nov. 2020), <https://tinyurl.com/39np9zs2>; *see also* Friga, *supra* (“Decreases in the number of international students (who often pay full tuition) further exacerbate the net-tuition picture.”).

<sup>50</sup> *See* Jessica Dickler, *Colleges Are Slashing Tuition to Entice Students Back*, CNBC (Oct. 30, 2020, 10:11 AM EDT), <https://tinyurl.com/yz8ex33f>.

<sup>51</sup> Friga, *supra*.

<sup>52</sup> *See id.* (calculating “a shortfall of \$146 billion to \$164 billion” in February 2021). Additionally, state legislatures reduced funding for public institutions, eliminating a major source of revenue for those schools. *See id.*



Universities in late 2020, federal funds failed to cover COVID-19 costs at every institution surveyed; for two thirds of respondents, federal aid “covered less than 25% of combined revenue losses and additional expenses.”<sup>53</sup>

### **III. THIS AND SIMILAR CLASS-ACTION LAWSUITS THREATEN SCHOOLS’ ALREADY STRAINED FINANCES.**

On top of those existing costs and reduced revenues, colleges and universities now face another threat: putative class-action lawsuits driven by the plaintiffs’ bar. These lawsuits force institutions to spend scarce resources rebutting the false narrative of a COVID-windfall. The story of COVID-19 on America’s campuses is one of courage and creativity, as administrators and instructors ensured that students safely continued learning in the face of crisis. This is something to celebrate, not penalize.

The District Court correctly dismissed this case. Despite enormous difficulty, higher education institutions continued to operate so that their students could learn, earn credits, and receive their degrees. Colleges and universities commendably attended to their mission and their responsibilities to their students despite the

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<sup>53</sup> *Survey: The Financial Impact of COVID 19 on Private, Nonprofit Colleges*, Nat’l Ass’n of Indep. Colls. & Univs., <https://tinyurl.com/3zdfafpn> (last visited Aug. 27, 2021); Victoria Yuen, *Mounting Peril for Public Higher Education During the Coronavirus Pandemic*, Ctr. for Am. Progress (June 11, 2020, 4:00 AM), <https://tinyurl.com/vcskz5mr> (reporting that costs in the spring of 2020 were “much higher than the federal funding [public institutions] will receive or have already received from the CARES Act.”).

pandemic. In contrast to appellants' claims, the only thing that would be unjust would be to allow these class-action lawsuits to proceed—and the plaintiffs' bar to continue to seek to extract multi-million dollar judgments from colleges and universities that embraced immediate and costly actions to permit their students to complete their spring semester even as COVID-19 spread through the country.

### CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

Respectfully submitted,

/s/ Jessica L. Ellsworth

JESSICA L. ELLSWORTH

STEPHANIE J. GOLD

NATHANIEL A.G. ZELINSKY

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5600

jessica.ellsworth@hoganlovells.com

September 17, 2021

*Counsel for Amici Curiae American  
Council on Education and 18 Other  
Higher Education Associations*

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/s/ Jessica L. Ellsworth  
Jessica L. Ellsworth

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on September 17, 2021. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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