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February 20, 2020

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

RE: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program (RIN 1840-AD45)

Dear Secretary DeVos:

I write in strong opposition to the proposed rule to modify regulations governing partnerships between the federal government and faith-based grantees in taxpayer funded social service programs. This harmful proposal seeks to expand the breadth of permissible religious discrimination against employees who work in programs that are funded by the U.S. Department of Education (ED or the Department) and operated by faith-based grantees. Taken together, these proposed policy changes are misguided and harmful to both employees and beneficiaries in federally funded programs. Moreover, the proposed rule seeks to make several misguided policy changes that will expand the exposure of students in the higher education sector to discrimination. Accordingly, I urge the Department to immediately withdraw this proposed rule as it pertains to the issues outlined in this letter.

The release of eight departments' proposed rules to undermine the rights of employees, beneficiaries, and students in federally funded programs on National Religious Freedom Day underscores this Administration's fundamental misunderstanding of religious liberty as envisioned by our founders.

On National Religious Freedom Day, the United States of America celebrates the Virginia Statute for Religious Freedom (Virginia Statute) and the adoption of religious liberty as a core value to our democracy as delineated in the First Amendment to the Constitution. Over two centuries ago, the Virginia Statute, drafted by Thomas Jefferson, was adopted by the Virginia General Assembly. It would later serve as the basis for the First Amendment to the Constitution, outlining the right to free exercise of religion and the prohibition of the establishment of religion by the government. The Virginia Statute warns us against allowing religious views to supersede civil rights by stating, “our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry.”¹ In Jefferson’s absence, James Madison would shepherd the religious freedom bill through the Virginia General Assembly to win its passage.² In the first United States Congress, then Congressman James Madison drew upon the Virginia Statute and offered an amendment to the Constitution that read in part, “[t]he Civil Rights of none shall be abridged on account of religious belief or worship.”³ Former Supreme Court Justice Wiley B. Rutledge noted Virginia’s role in the development of the First Amendment, “[t]he great instruments of the Virginia struggle...became the warp and woof of our constitutional tradition.”⁴ Thus, the history of the First Amendment is deeply rooted in the history of the Virginia Statute and the understanding that civil rights cannot and should not be diminished according to one’s religious belief and conscience.⁵ Unfortunately, with these proposed rules, the Administration contravenes the weight of this history and seeks to embolden religious discrimination against employees, beneficiaries and students in federally funded programs.

I. Proposed rule changes to regulations governing partnerships between the Federal Government and faith-based grantees:

The rule proposed by the U.S. Department of Education seeks to allow expansive taxpayer funded religious employment discrimination in its programs.

The rule proposed by the Department seeks to allow expansive and pervasive religious taxpayer funded discrimination against employees in programs that are operated by faith-based grantees. One of President George W. Bush’s signature domestic initiatives was the Faith-Based Initiative.⁶ Central to this initiative was a proposal to apply so-called Charitable Choice rules across federal programs to specify how faith-based grantees contract with the federal

¹ *Act for Establishing Religious Freedom, January 16, 1786*, DBVa Library of Virginia, <https://edu.lva.virginia.gov/dbva/items/show/180> (last visited Feb. 10, 2020).

² *Id.*

³ *Religion and the Founding of the American Republic*, Library of Congress, <http://www.loc.gov/exhibits/religion/rel06.html> (last visited Feb. 10, 2020).

⁴ Merrill D. Peterson, *Jefferson and Religious Freedom*, *The Atlantic* (Dec. 1994), <https://www.theatlantic.com/past/docs/issues/96oct/obrien/peterson.htm>.

⁵ *See id.* (“The justices on the bench and the advocates at the bar were much influenced in their understanding of the ‘free exercise’ clause by their understanding of the Virginia statute and the circumstances that had produced it.”).

⁶ *Radio Address of the President to the Nation*, The White House, <https://georgewbush-whitehouse.archives.gov/government/fbci/president-initiative.html> (last visited Feb. 10, 2020).

government.⁷ Charitable Choice stipulates that religious organizations are entitled to the religious exemption under *Title VII of the 1964 Civil Rights Act* (Title VII)⁸ making it clear that religious organizations operating grant programs with federal funds can apply a taxpayer funded religious test to employees working in federal social service programs.⁹ President Bush's Faith-Based Initiative legislation, applying Charitable Choice rules across the spectrum of federal social service programs, failed in Congress due to the controversy of permitting federally funded religious employment discrimination in grant programs funded with taxpayer money.¹⁰ After failing to pass this legislation in Congress, the Bush Administration issued regulations to apply Charitable Choice rules, including the expansion of the Title VII religious exemption, to all federally funded social service programs. I strongly opposed these proposals at the time, because they permitted religious employment discrimination in federally funded programs.

Under Title VII, religious employers are afforded an exemption from the religious nondiscrimination provision designed to protect workers against religious discrimination in employment. This exemption allows religious organizations to employ co-religionists in all aspects of their organization when using their own funds. At the time of Congress' deliberations on the exemption in 1964 and in 1972, there was no contemplation that it would apply to organizations receiving direct federal funds; in fact, the extension of the Title VII religious exemption to federally funded positions as part of Charitable Choice provisions flies in the face of the legislative history of that exemption as supporters to expand the exemption to nonreligious positions justified their amendment by indicating that religious organizations were using their private funds for these positions.¹¹

The current proposed rule seeks to expand upon the misguided Bush-era policy to make it clear that religious employers not only can condition employment on the basis "of a particular religion"¹² but also on "acceptance of or adherence to the religious tenets of the organization".¹³ This action is in spite of the fact that previous polls on this issue indicated "[t]he public ... continues to overwhelmingly reject the idea that religious groups that receive funding for social

⁷ *Id.*

⁸ 42 U.S.C. § 2000e-1(a).

⁹ Fundamentally, the extension of the Title VII religious exemption to federally funded positions flies in the face of the legislative history of that exemption as supporters justified the exemption by indicating that religious organizations were using their private funds for these positions. See Melissa Rogers, *Federal Funding and Religion-based Employment Decisions*, in *Sanctioning religion? Politics, Law, and Faith-based Public Services*, 105-24 (David K. Ryden et al. eds., 2005).

¹⁰ Joe Richardson, Cong. Research Serv., RL32736, *Charitable Choice Rules and Faith-Based Organizations*, 5 (2006).

¹¹ See Melissa Rogers, *Federal Funding and Religion-based Employment Decisions*, in *Sanctioning religion? Politics, Law, and Faith-based Public Services*, 105-24 (David K. Ryden et al. eds., 2005).

¹² Title VII § 702.

¹³ *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institutions Program, and Strengthening Institutions Program*, 85 Fed. Reg. 3190, 3221, 3222, 3225 (Jan. 17, 2020) (to be codified at 34 CFR Parts 75, 76, 106, 606, 607, 608, and 609).

service programs should be able to hire only people who share their religious beliefs[.]”¹⁴ It is particularly troubling that the proposed rule would so broadly expand the religious exemption that it would allow religious organizations, including possibly for-profit companies, claiming sincerely held religious beliefs to discriminate in federally funded positions against, for example, Catholics, Jews, LGBTQ individuals, pregnant and unmarried couples, interracial married couples, divorced men and women, single parents, and other workers who do not conform to the employers’ beliefs. This expansion in discrimination continues to shift the weight of the Federal Government from supporting the victim of discrimination to supporting the so-called right to discriminate with federal funds. That is a profound change in the civil rights landscape.

Furthermore, Congress has twice specifically rejected allowing taxpayer funded employment discrimination based on adherence to an employer’s religious tenets. During Congress’ consideration of the very first Charitable Choice provision in the *Temporary Assistance for Needy Families* (TANF) program, “the conference agreement deleted the provision in the Senate substitute which permitted recipient organizations to require their employees to adhere to the organizations’ religious tenets...”¹⁵ More recently, in 2017, Congress stripped out of the Fiscal Year 2017 *National Defense Authorization Act* (NDAA) a similar provision that would have allowed employers, using taxpayer funds, to discriminate on the basis of adherence to religious tenets.¹⁶ Accordingly, the purported expansion of religious freedom under the proposed rule is a one-way street that comes at the expense of the religious liberty and conscience of employees working for taxpayer funded faith-based grantees. This proposed rule furthers a political and religious agenda requiring taxpayers to fund discriminatory practices in contradiction to clear congressional deliberations on this issue.

The proposed rule removes key protections for beneficiaries in programs that are directly funded by the Department under the guise of promoting equal treatment for faith-based grantees.

The Department proposes to delete a current regulatory requirement that applies to faith-based grantees to provide written notice to beneficiaries regarding their rights to not be discriminated against on the basis of religion or their refusal to participate in religious activities. In addition, the current regulation requires that faith-based grantees provide written notice to beneficiaries informing them that any religious activity that is offered by a faith-based grantee must be separate in time *or* location from publicly funded services and that the beneficiaries have a right to an alternative service provider if they object to the religious character of the grantee. The proposed rule seeks to eliminate both the requirement to provide beneficiaries with a notice of

¹⁴ Seventy-four percent of individuals polled strongly oppose allowing faith-based organizations operating a federally funded social service program to hire based on religion and religious belief. *See Faith-Based Programs Still Popular, Less Visible*, Pew Research Center Religion & Public Life (Nov. 16, 2009), <https://www.pewforum.org/2009/11/16/faith-based-programs-still-popular-less-visible/>.

¹⁵ David Ackerman, Cong. Research Serv., RL30388, *Charitable Choice: Constitutional Issues and Developments through the 106th Congress* 6 (2000), available at <https://digital.library.unt.edu/ark:/67531/metadc813329/>.

¹⁶ Noel Gutierrez-Morfin, *Controversial 'Religious Liberty' Provision Puts Defense Bill in Limbo*, NBC (Oct. 25, 2016, 5:13 PM), <https://www.nbcnews.com/feature/nbc-out/controversial-religious-liberty-provision-puts-defense-bill-limbo-n669266>.

rights as well as to eliminate the right to an alternative provider if they object to the faith-based provider. In proposing these changes, the Department argues that “[t]hese regulations imposed burdens on faith-based organizations and treated faith-based organizations differently than other organizations.”¹⁷

Ensuring the religious liberty rights of beneficiaries in federally funded programs is not an undue burden. Fundamentally, Congress creates these programs to serve beneficiaries and to meet specific programmatic goals. The proposed rule undermines how beneficiaries are served in federally funded programs and thus, interferes with Congressional intent in authorized programs. Additionally, it is clear that religious organizations may offer religious activities before and after the federally funded program.¹⁸ The elimination of these protections begs the question of how beneficiaries are supposed to know that the religious activity is “voluntary” and that they have a right to access government funded services without being subject to religious indoctrination or discriminated against on the “basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice”?¹⁹ It is particularly troubling considering that some beneficiaries in programs covered by the proposed rule may be vulnerable individuals, and may become, in essence, a captive audience to religious instruction in order to access services.

The proposed rule also ignores the twenty-year history of these provisions where there were extensive debates over the inclusion of religious activity before, *during*, and after federal programs and how to ensure the rights of beneficiaries to access services notwithstanding any religious activity that may be offered. Many supporters of Charitable Choice, including previous administration officials, acknowledge that the religious experience is exactly what is being offered to beneficiaries.²⁰ The former Deputy Director of the Office of Faith-Based and Community Initiatives under President George W. Bush, David Kuo, acknowledged that congressional supporters, “... wanted to allow groups that aimed to convert people to a particular faith to be able to receive direct federal grants...they wanted to allow evangelism-heavy programs to get federal money.”²¹ Another Bush Administration official, Robert Polito, who was the Director of the Center for Faith-based and Community Initiatives at the Department of Health and Human Services, indicated that Administration’s position on this issue, “[i]f tax dollars are used for secular elements of ...[a grant] program- like a computer or van- the rest [of the federally funded program] can have a religious base.”²²

¹⁷ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190, 3192 (Jan. 17, 2020) (to be codified at 34 CFR Parts 75, 76, 106, 606, 607, 608, and 609).

¹⁸ *Id.* at 3199, 3217.

¹⁹ *Id.* at 3192.

²⁰ See Marvin Olasky, *Rolling the Dice*, World Magazine (Aug. 4, 2001), https://world.wng.org/2001/08/rolling_the_dice.

²¹ David Kuo, *Tempting Faith* 160 (2006).

²² Laura Meckler, *Bush Admin. Rewriting Charity Rules*, The Edwardsville Intelligencer (Sept. 2, 2002, 7:00 PM), <https://www.theintelligencer.com/news/article/Bush-Admin-Rewriting-Charity-Rules-10572847.php>.

As a member of Congress who participated in numerous debates over the years regarding these provisions, I heard assertions from Charitable Choice’s congressional supporters that programs are successful because of their religious nature and that religion is a methodology for treatment.²³ Thus, the beneficiary protections that currently exist—and that the proposed rule now seeks to remove—were in fact put in place as a direct response to the extensive history of those debates in Congress and the public sphere. The beneficiary protections also attempted to protect the delicate balance between the religious activity of faith-based providers and securing the religious liberty rights of beneficiaries under Charitable Choice provisions.

Moreover, the beneficiary safeguard provisions that provide beneficiaries a written notice of rights, including the right to an alternative provider, were modeled after other previous Charitable Choice provisions, including those that exist in statute.²⁴ For instance, the first Charitable Choice provision was enacted as part of the TANF statute and specifically outlines the right of beneficiaries to an alternative provider if they raise an objection.²⁵ Similarly, the Charitable Choice provision subsequently enacted as part of the *Substance Abuse Mental Health Services Act* (SAMHSA) also provides that beneficiaries with objections to a faith-based grantee are entitled to an alternative provider and further, beneficiaries are required to be notified of their rights.²⁶ Thus, the beneficiary protections that the proposed rule now seeks to undo have been part of Charitable Choice since its creation and are vital to protect the religious liberty of beneficiaries.

Finally, the current regulatory safeguards regarding written notice to beneficiaries of their rights, including the right to an alternative provider, were put in place by the Obama Administration after seeking recommendations from a diverse set of stakeholders. The President’s Advisory Council on Faith-based and Neighborhood Partnerships (Advisory Council) issued a report with twelve recommendations—including the provisions at issue under the proposed rule—that had unanimous support. The report included the notice and alternative provider recommendation to “[a]ssure the religious liberty rights of the clients and beneficiaries of federally funded programs by strengthening appropriate protections” noting that “[t]here is clear precedent for and consensus for the vigorous protection of the religious of beneficiaries of federally funded programs.”²⁷ The proposed rule now seeks to remove the very protections endorsed by this diverse set of stakeholders, including both critics and supporters of Charitable Choice, on the Advisory Council.

²³ *Faith-Based Solutions: What Are the Legal Issues? Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 14 (2000) (Testimony of Representative Robert C. “Bobby” Scott).

²⁴ President Bush’s Faith-Based Initiative legislation ((CARE Act of 2002, H.R. 7, 107th Cong.(2001)), passed by the House of Representatives with the support of two hundred and seventeen Republican Members of Congress includes both a right to an alternative provider and a right to notice of rights for beneficiaries. See *Final Votes for Roll Call 254*, Office of the Clerk U.S. House of Representatives, <http://clerk.house.gov/evs/2001/roll254.xml> (last visited Feb. 14, 2020).

²⁵ 42 U.S.C. §604(a).

²⁶ 42 U.S.C. §290kk-1(f).

²⁷ President’s Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President 140–41* (2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

The proposed rule eliminates core safeguards for beneficiaries and adds language that will result in beneficiaries being forced to participate in religious activities in programs funded with indirect federal financial assistance.

The Supreme Court has recognized a constitutional distinction involving the funding of religious entities between those programs funded with direct aid, where the government chooses a provider who may have a religious affiliation to provide services to beneficiaries, and programs funded with indirect aid, where funding is provided to beneficiaries who make a genuine private choice among a range of providers, including religious and secular options. The current regulations reflect the constitutional balance by ensuring a range of choices, including a secular option, for beneficiaries in indirectly funded programs. The proposed rule eliminates the current requirement for a secular option to be offered and coerces beneficiaries in need of services to participate, simply by attending a program, in religious activities if those activities are part of the program.²⁸ Furthermore, the proposed rule will allow religious discrimination against beneficiaries in indirectly funded programs in plain violation of Executive Order 13559, which states: “organizations, in providing services supported in whole or in part with Federal financial assistance, and in their outreach activities related to such services, should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief”.²⁹ To do this, the proposed rule adds a new definition of “federal financial assistance” that makes clear it does not include “indirect aid”.³⁰ Accordingly, “indirect aid” programs are excluded from the nondiscrimination requirement in the proposed 34 CFR §75.52(e) and 34 CFR § 76.52(e).³¹

In *Zelman v. Simmons-Harris*, the U.S. Supreme Court upheld the constitutionality of a tuition assistance program that provided funds to eligible families to use at public and private, including religious, schools. In the majority opinion, the Chief Justice wrote, “[i]t permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.”³² To qualify as a program of “true private choice”

²⁸ “[A]n organization that participates in a program funded by indirect financial assistance need not modify its programs activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program and may require attendance at all activities that are fundamental to the program.”

Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190, 3221, 3225 (Jan. 17, 2020) (to be codified at 34 CFR Parts 75, 76, 106, 606, 607, 608, and 609).

²⁹ Exec. Order No. 13,559, 75 Fed. Reg. 71319 (Nov. 17, 2010).

³⁰ The proposed rule defines “indirect aid” as funds that are rendered “by means of a voucher, certificate, or other similar means of government-funded payment provided to a beneficiary who is able to make a choice of a service provider.” At the same time, it states that “federal financial assistance does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.” (See Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190, 3222, 3225 (Jan. 17, 2020) (to be codified at 34 CFR Parts 75, 76, 106, 606, 607, 608, and 609).

³¹ The definition of federal financial assistance does not include indirect aid. 85 Fed. Reg. 3222, 3225.

³² *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

it must (a) be “entirely neutral with respect to religion”; (b) provide “benefits directly to a wide spectrum of individuals;” and (c) permit “individuals to exercise genuine choice among options public and private, secular and religious.” The proposed rule eliminates the requirement that a secular option be made available to beneficiaries. Furthermore, the program at issue in *Zelman* prohibited discrimination, including on the basis of religion, against participants, and it also required *all* providers to follow rules and procedures set forth by the state.³³ In contrast, the proposed rule permits religious discrimination against beneficiaries and allows beneficiaries to be compelled to participate in religious activity as part of the provision of services funded by the indirect aid. Given that the proposed rule would permit the Department to provide additional accommodations to faith-based grantees, it is not even clear that faith-based grantees will be required to follow the same rules for the delivery of services to all of its beneficiaries.³⁴

The proposed rule is a misapplication of the narrow ruling of *Trinity Lutheran* to justify changes in existing regulations governing partnerships between faith-based grantees and the Federal Government.

The Department proposes to revise the current regulations governing partnerships between faith-based entities and the Federal Government “[i]n response to the U.S. Supreme Court decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer* 137 S. Ct. 2012 (2017)”. (*Trinity Lutheran*).³⁵ In *Trinity Lutheran*, the Court was asked to decide whether a church-run early childhood education center was eligible to participate in a Missouri state grant program that provided recycled tires to resurface playgrounds.³⁶ The Court held that the State of Missouri violated the Free Exercise clause of the First Amendment to the Constitution by denying the church’s eligibility to participate in the state grant program solely because of the church’s religious status.³⁷ Although the Court found that Missouri cannot refuse to provide funding solely because of the religious nature of a daycare center, the majority opinion also clarified the narrowness of its ruling when it stated that the case “involves express discrimination based on religious identity with respect to playground resurfacing,” and that the Court was “not address[ing] religious uses of funding or other forms of discrimination.”³⁸

In the proposed rule, the Department misapplies the limited holding in *Trinity Lutheran* because: the ruling in its own terms applied to playground resurfacing; nothing in the ruling requires or permits beneficiaries be stripped of their religious liberty rights in taxpayer funded programs, whether directly or indirectly funded; and nothing in the ruling requires or permits employees to submit to a religious test in federally funded grants. Rather, the proposed rule is a reflection of

³³ *Id.* at 645, 646.

³⁴ The proposed rule creates two new appendices that make it clear that faith-based grantees might be afforded additional exemptions.

³⁵ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg 3190, 3190 (Jan. 17, 2020) (to be codified at 34 CFR Parts 75, 76, 106, 606, 607, 608, and 609).

³⁶ *Trinity Lutheran*, 137 S. Ct. 2012, 2017 (2017).

³⁷ *Id.* at 2019-20.

³⁸ *Id.* at 2024 n.3.

this Administration's distorted view of religious liberty as a one-way street, where religious freedom is expanded for faith-based grantees and employers at the expense of the religious liberty rights and exercise of conscience of employees working in programs funded with federal taxpayer dollars and beneficiaries receiving services in federal grant programs.

II. Proposed rule changes regarding higher education provisions:

The proposed rule misapplies First Amendment protections on private institutions of higher education, withholding federal funds³⁹ for violations regarding free speech at both public *and* private schools.

Publicly funded colleges and universities are considered state actors, subject to First Amendment prohibitions on the policing of free speech. In contrast, private institutions of higher education (IHEs) are not constitutionally prohibited from limiting speech. In fact, most private institutions adopt policies or codes that both recognize the need to preserve academic freedom and recognize the need to preserve a respectful, safe learning environment. Yet, the proposed rule blurs the distinctions between public and private IHEs and seeks to condition Department grant funding to such institutions on compliance with free speech provisions: either the First Amendment at public schools or speech codes in the case of private IHEs. This is a heavy-handed proposal, which threatens to upend existing free-speech policies on campuses nationwide, in ways the Department may not currently anticipate. Fundamentally, the proposal is a solution in search of a problem.

The proposed rule requires private institutions to “comply with their own stated institutional policies regarding freedom of speech, including academic freedom...”, and lack of compliance may result in the loss of Department funding and possible liability under the Federal False Claims Act (FCA).⁴⁰ When faced with such large potential risks, it would not be surprising if some private IHEs seek to alter or eliminate altogether their free speech policies to reduce their liability and exposure to the enforcement mechanisms laid out by the proposed rule. Thus, the proposed rule could have a chilling effect on promoting academic freedom and free speech at private institutions.

³⁹ The Department of Education proposed rule proposes to allow the withholding of all education funds, except for Title IV or student driven funds, from public and private institutions of higher education that are in violation. Exec. Order No.13,864 potentially permits the withholding of ALL federal funds, including research grants that come from other departments. It is not clear if the administration will propose rules for *other* departments to permit a withholding of federal research and education grants from institutions of higher education where there is a violation to free speech. See Exec. Order No. 13,864, 84 Fed. Reg. 11401 (Mar. 21, 2019), Sec. 3 (a), (b) and (c). <https://www.govinfo.gov/app/details/DCPD-201900165>.

⁴⁰ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg 3190, 3191 (Jan. 17, 2020) (to be codified at 34 CFR Parts 75, 76, 106, 606, 607, 608, and 609).

This proposal is not necessary in a world where speech on college campuses is not nearly as fraught as many claim. According to a 2017 the Foundation for Individual Rights and Education (FIRE) survey there were 35 documented attempts to block a controversial speaker from appearing on a college campus in.⁴¹ Of these 35 attempts, 19 were successful. On the campuses of the over 4,700 degree-granting higher education institutions in the United States, there were just 19 successful attempts to limit the speech of controversial speakers. This is hardly a crisis that necessitates tying all federal funding to what could be single violations, regardless of their size or scope.

In their most recent assessment of school restrictive free speech policies, FIRE noted that there has been an over a fifty-percentage point increase in the number of schools that have such policies since they began tracking such policies in 2009.⁴² In response to concerns about campus speech (both its restriction and the capability to harass), private schools are taking the time to develop policies that balance free expression and community principles. Furthermore, the opinion data show that current college-age young people are generally more tolerant of beliefs than any other age demographic in the country. By an objective measure the current system is working, controversial speakers are not being silenced, and students are more tolerant of the beliefs of others. The proposed rule is a reflection of a partisan fixation on a non-existent “free speech crisis” and seeks to utilize the full powers of the Federal Government to solve a “problem” most schools have already addressed.

The proposed rule seeks to exempt student religious clubs from uniform nondiscrimination standards applicable to all student groups at public colleges and universities.

The proposed rule would force public colleges and universities to grant official recognition and provide funding to student religious groups even if their policies and practices violate uniform nondiscrimination “all comers” policies otherwise applicable to all student groups.⁴³ Currently, many colleges and universities have nondiscrimination policies for any student group that desires official recognition and/or to receive funding from the school. A nondiscrimination policy is a “viewpoint neutral condition” designed to ensure a level playing field for all students who want to participate in official student clubs.⁴⁴ Nondiscrimination policies ensure that the leadership and other opportunities afforded by recognized student organizations are available to all students. Moreover, such a policy is viewpoint-neutral because it applies only to an organization’s conduct, not its views.

Under the proposed rule, as a condition of receiving federal funds, public colleges and universities are prohibited from denying any benefit (including official recognition) to a religious student organization “because of the beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization.” Simply put, a religious student

⁴¹ Foundation for Individual Rights and Education, *Disinvitation Database*, <https://www.thefire.org/research/disinvitation-database/> (last visited Feb. 18, 2020).

⁴² Foundation for Individual Rights and Education, *Spotlight on Speech Codes 2020*, <https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2020/> (last visited Feb. 18, 2020).

⁴³ These policies allow any student who applies to participate in a viewpoint-neutral school sponsored group.

⁴⁴ *Christian Legal Soc. Chapter v. Martinez*, 561 U.S. 661 (2010).

organization is free to limit its membership to one race, religion, nationality, or other criterion and still receive funding from their public IHE. The Department proposes to single out religious student groups for preferential treatment over secular student groups allowing them to violate a public IHEs uniform nondiscrimination policies and still be entitled to funding and official recognition. This suggestion of a right of a religious student organization to discriminate and still receive public funding contrasts with the 2010 case *Christian Legal Soc. Chapter v. Martinez (Christian Legal Society)*, where the Supreme Court found that a law school's nondiscrimination policy did not violate the rights of a Christian legal student club. The Court found "...this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership..."⁴⁵ As the Supreme Court made clear in that case, schools may impose conditions for participation in student groups as long as those conditions are reasonable and viewpoint-neutral.

Under the First Amendment, students at public colleges and universities have the right to form clubs and organizations, including those that have a religious purpose. Furthermore, public colleges and universities may not prohibit students from forming such groups and may have to provide access to facilities as they would to any other group. However, no student group, religious or otherwise, is entitled to sponsorship or funding for such activities when that group's policies violate the school's nondiscrimination policy or any other rules for sponsorship. Here, the Department would force public colleges and universities to officially recognize and provide a subsidy to religious student organizations whose policies or practices violate the school's nondiscrimination for all student groups.

The proposed rule expands the number of institutions of higher education that would qualify for a religious exemption and be able to discriminate based on sex.

Under the proposed rule, the Department expands the types of schools, and in turn the number of institutions that may qualify for the religious exemption under *Title IX of the Education Amendments of 1972* (Title IX), the federal law that prohibits sex discrimination in federally funded education programs. Title IX already allows broad exemptions for religious educational institutions that are "controlled by religious organizations" when the requirements under Title IX are "inconsistent with their religious tenets."⁴⁶ This proposed rule would significantly expand the criteria that may be relied upon in determining whether an education institution is controlled by a religious organization for the purpose of religious exemption under Title IX. As a result, the proposed rule would allow IHEs to discriminate, even though that institution may only have a tenuous relationship to religion.

⁴⁵ *Id.*

⁴⁶ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg 3190, 3206 (Jan. 17, 2020) (to be codified at 34 CFR Parts 75, 76, 106, 606, 607, 608, and 609).

Taken together with the Administration's previously proposed Title IX rule⁴⁷ which would no longer require schools to file their religious exemptions to Title IX until a claim of discrimination is alleged against them, this proposed rule will result in critical information for students about the colleges they seek to attend being kept from them until it is too late. In turn there could be an increase in the number of students who may face sex discrimination from schools with latent religious affiliations, who subsequently would be unable to seek relief. For example, a school could rely on religious tenets when creating policies or practices regarding a student's religious belief, sex, choice to have a child out of wedlock, choice of non-traditional areas of study for their particular sex, use of birth control, or his or her sexual orientation or gender identity. But, a student may find themselves in violation of the IHE's tenet and beliefs, under this proposed rule, even though the student had no reason to believe that the school held such affiliations. As a result, the proposed rule could also financially harm students who would face disciplinary action, school transfer, or loss of college course credits because she or he inadvertently violated an institutional belief unclear to the student.

The Department justifies proposing such criteria to establish that an educational institution is "controlled by a religious organization" on the claim that it "must take into account [the *Religious Freedom Restoration Act* (RFRA)] in promulgating its regulations and must not substantially burden a person's exercise of religion through its regulation."⁴⁸ When Congress passed RFRA, it did so to restore a heightened protection for religious exercise following *Employment Div. v. Smith*,⁴⁹ especially for religious minorities. RFRA requires that government action may only substantially burden a person's free exercise of religion if it is in furtherance of a compelling government interest and if the imposition on that free exercise is the least restrictive means to attain that interest. Thus, the government is barred from creating a religious accommodation—such as under RFRA—that causes harm or results in discrimination.⁵⁰ Further, under the Constitution, "an accommodation must be measured so that it does not override other significant interests,"⁵¹ "impose unjustified burdens on other[s],"⁵² or have a "detrimental effect on any third party."⁵³

⁴⁷ Title IX of the Education Amendments of 1972, 83 Fed. Reg. 61462 (No. 230) (Proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) available at <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>.

⁴⁸ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190, 3207 (Jan. 17, 2020) (to be codified at 34 CFR Parts 75, 76, 106, 606, 607, 608, and 609).

⁴⁹ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

⁵⁰ See *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005); see also *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703, 708–10 (1985).

⁵¹ *Cutter*, 544 at 722 (2005).

⁵² *Cutter*, 544 U.S. at 726; see also *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989).

⁵³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter*, 544 U.S. at 720). Indeed, every member of the Court, whether in the majority or dissent, reaffirmed that the burdens on third parties must be considered. See *id.* at 2786–87 (Kennedy, J., concurring); *id.* at 2790, 2790 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting); see also *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

The Department has failed to lay out a rationale to explain how the current framework poses a burden to religious educational institutions, and its reliance on RFRA is contrary to the law's original purpose – which is to protect sincerely held religious beliefs of religious minorities. Additionally, the Department erroneously interprets RFRA as providing a rationale to expand the ability to claim an exemption from existing law (in this case Title IX), in anticipation of claims by religious organizations that their free exercise is burdened.⁵⁴ Using RFRA in this manner is at odds with the tailored approach required by that very law. For example, in *California v. U.S. Department of Health and Human Services*, the United States Court of Appeals in the Ninth Circuit raised serious concerns with the Department's use of RFRA in this manner by noting, "...the religious exemption operates in a manner fully at odds with the careful, individualized, and searching review mandate by RFRA...the agencies here claim an authority under RFRA—to impose a blanket exemption for self-certifying religious objectors—that far exceeds what RFRA in fact authorizes."⁵⁵ In this case, involving the ACA's contraceptive coverage rule, the Department sought to create a religious exemption to remedy what it believed was a RFRA violation concerning the religious accommodation provided for in the ACA. The Ninth Circuit also questioned the Department's authority to even remedy RFRA claims, suggesting "[i]nstead, RFRA appears to charge the *courts* with determining violations," not a government agency.⁵⁶ Indeed, RFRA provides a specific remedy for alleged violations, stipulating that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."⁵⁷ Furthermore, the proposed rule tries to use RFRA as a sword—to preemptively authorize religious exemptions—whereas RFRA lays out a defensive framework to be claimed as a shield by affected individuals.

In closing, this proposed rule will lead to violations of the religious liberty rights and conscience of employees and beneficiaries in federally funded programs and increase students' exposure to discrimination at their colleges and universities. For Department funded programs, it steadfastly advances the religious freedom of religious providers while subjecting employees to a taxpayer funded religious test for their jobs and eviscerates safeguards for beneficiaries as well as students. Further, the proposed rule seeks to bestow special treatment for religious student groups to shield them from uniform nondiscrimination standards that colleges and universities set for all their official student groups. Taken together, these policies do real damage to our nation's founding principle of religious freedom undermining the core value of an individual's freedom of conscience to not "otherwise suffer on account of his religious opinions or belief; but

⁵⁴Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg 3190, 3207 (Jan. 17, 2020) (to be codified at 34 CFR Parts 75, 76, 106, 606, 607, 608, and 609).

⁵⁵ *California v. U.S. Department of Health & Human Services*, 941 F.3d 427, 428 (9th Cir. 2019).

⁵⁶ *Id.*

⁵⁷ 42 U.S.C. § 2000bb-1(c).

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that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.”⁵⁸

I urge the Department to immediately withdraw the proposed rule related to these issues.

Sincerely,



ROBERT C. “BOBBY” SCOTT
Chair

⁵⁸ *Act for Establishing Religious Freedom, January 16, 1786*, DBVa Library of Virginia, <https://edu.lva.virginia.gov/dbva/items/show/180> (last visited Feb. 10, 2020).