ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

March 24, 2023

Via WWW.REGULATIONS.GOV

Dr. Nasser Paydar
Assistant Secretary
Office of Postsecondary Education
U.S. Department of Education
400 Maryland Avenue SW, Room 2C185
Washington, DC 20202

Re: Direct Grant Programs, State-Administered Formula Grant Programs
RIN 1840-AD72
Docket ID: ED-2022-OPE-0157

Request for Information Regarding First Amendment and Free Inquiry Related Grant Conditions
Docket ID: ED-2023-OPE-0029

Dear Dr. Paydar,

Public universities should not prevent students from speaking freely. Nor should they dictate how student organizations select their leaders. But the Biden administration's proposal threatens just that: it seeks to have the federal government turn a blind eye to First Amendment violations across the country by taking away critical protections for religious student groups.

The Biden administration should abandon its plans to rescind the U.S. Department of Education's well-crafted regulations protecting the First Amendment freedoms of students on campus. Rescinding these regulations would endanger the rights of religious students of all types—Christians, Jews, Muslims, Buddhists, Sikhs, and more. The Biden Administration should not reinstitute discrimination against religious students. Instead, the Biden administration should enforce the existing protections and educate students and universities about the First Amendment.

Alliance Defending Freedom thus submits the following comment on the Department's proposed rule[1] to rescind two Trump-era federal regulations[2] that require public colleges and universities receiving federal grants to ensure that religious student organizations receive the same rights, benefits, and privileges that are afforded to other student organizations. ADF supported creating these regulations,[3] and the Department should not rescind them.

BACKGROUND

Alliance Defending Freedom (ADF) is the world's largest legal organization committed to protecting religious freedom, free speech, and the sanctity of life. ADF has contributed to 72 Supreme Court victories, including several that undergird these regulations.[4] Since 2011, ADF has represented parties in 14 victories at the Supreme Court.[5] In 2018, *Empirical SCOTUS* ranked ADF first among "the top performing firms" litigating First Amendment cases.[6]

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[1] U.S. Dep't of Educ., *Notice of Proposed Rulemaking, Direct Grant Programs, State-Administered Formula Grant Programs*, 88 Fed. Reg. 10857–64 (Feb. 22, 2023) (NPRM). ADF also submits this information in response to the Department of Education's related request for information on "how regulations adding material conditions relating to First Amendment freedoms and free inquiry to Department grants have affected or are reasonably expected to affect decisions surrounding First Amendment and free speech-related litigation in Federal and State court and institutional policies on freedom of speech." U.S. Dep't of Educ., *Request for Information Regarding First Amendment and Free Inquiry Related Grant Conditions*, 88 Fed. Reg. 10881 (Feb. 22, 2023).

[2] 34 C.F.R. §§ 75.500, 76.500.

[3] Alliance Defending Freedom, Comment on Docket ID ED-2019-OPE-0080 (Feb. 18, 2020), https://bit.ly/3Fm0ECx.

[4] *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *accord* 85 Fed. Reg. 59937–45 (citing *Rosenberger* at least three times).

[5] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (victory for Thomas More Law Center); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *March for Life Educ. & Def. Fund v. California*, 141 S. Ct. 192 (2020); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019); *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (victories for S. Nazarene Univ. and Geneva Coll.); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (victory for Conestoga Wood Specialties Corp.); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

[6] Adam Feldman, *Supreme Court All-Stars 2013–2017*, Empirical SCOTUS (Sept. 13, 2018), https://bit.ly/2pm2NXn.

ADF's Center for Academic Freedom is committed to protecting freedom of speech and association for students and faculty so that everyone can freely participate in the marketplace of ideas without fear of censorship. Since 2006, the Center for Academic Freedom has represented clients in over 400 litigation victories for First Amendment freedoms on university campuses nationwide.[7] And it has helped countless other students and faculty ensure their First Amendment rights are respected in situations that did not ultimately require litigation but that still prove the need for—and preventive effect of—these two regulations.[8]

The importance of a robust enforcement of First Amendment freedoms on our nation's public university campuses is difficult to overstate. The Supreme Court has called these universities "peculiarly the marketplace of ideas."[9] Without this "marketplace of ideas," where all can share their views and associate to advance them, "our civilization will stagnate and die."[10] Thus, public universities should be places where young adults learn to exercise the First Amendment rights necessary to participate in our system of government and to respect others' exercise of the same rights even when their views differ. Indeed, teaching students about our constitutional system and the critical role they play in it as citizens is a necessary part of education. Students learn as much or more from universities' policies and practices of protecting or restricting association as they do from the classroom or from public statements.

The Department should be in the forefront of safeguarding student First Amendment rights, but the proposed rule seeks to remove important protections for students. In its February 22, 2023, proposed rule, the Department proposed rescinding the "Free Inquiry Rule" that added material conditions relating to First Amendment freedoms and free inquiry to Department grants for direct grant programs and state administered grant programs. As a material condition of receiving grants, these regulations provide that public institutions of higher education are required to comply with the First Amendment, and private institutions are required follow their stated institutional policies on freedom of speech, including academic freedom. Both provisions require as a material condition of the Department's grant that the grantee, state, or subgrantee "shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to

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[7] Alliance Defending Freedom, *Who We Are*, https://bit.ly/3JbKFbb (last visited Mar. 22, 2023).

[8] *See* Appendix 1 (providing examples since November 23, 2020).

[9] *Healy v. James*, 408 U.S. 169, 180 (1972).

[10] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs."[11]

By this proposal, the Department seeks to enable universities to impose nondiscrimination policies on religious student groups—policies that are inconsistent with the students' faith and that prevent student groups from selecting their own leaders and from speaking freely.

The Department did not claim it lacks legal authority to continue to make First Amendment compliance a material condition of federal funding. Instead, in support of the proposed rescission, the Department offers three policy reasons to roll back First Amendment safeguards: (1) that the regulations did not add material additional protections for student religious groups and are unnecessary to protect the First Amendment right to free speech and free exercise of religion; (2) that the regulations created confusion among institutions; and (3) that, despite not receiving any complaints triggering investigations, it was an unduly burdensome role for the Department to investigate complaints, and so it should leave constitutional violations to the courts to adjudicate. None of these reasons have any merit.

DISCUSSION

When it comes to protecting freedom for students on campus, actions speak louder than words. Public institutions should be models of free speech. Universities thus should protect students' ability to engage in free inquiry and to associate with like-minded students. But many universities have a well-documented history of discriminating against religious student organizations. This history of hostility to free speech and religious freedom teaches students precisely the wrong lesson about tolerating different viewpoints.

The federal government has an important role to play to protect students. But by removing all executive branch impediments to violating the rights of these groups and by leaving them only judicial redress when universities violate their rights, the Department sends a message that it is open season on religious student groups.

The Department thus should keep its current regulations. The regulations codified at 34 C.F.R. §§ 75.500(d) and 76.500(d) play a vital role in ensuring that

[11] 34 C.F.R. §§ 75.500(d), 76.500(d).

public universities remain a marketplace of ideas where all—including the religious—may share their views and associate with the likeminded to advance them. They provide religious students the benefit of another layer of protection for their priceless First Amendment rights. They impose on the Department no added burdens, for investigating these equal access claims is like any other discrimination claim its personnel already handle. They provide public colleges and universities added clarity—not confusion—as to their constitutional obligations, helping these officials to avoid personal liability and costly judgments.

Rather than defend the proposed rescission by invoking its true rationale—enabling universities and colleges to elevate discrimination policies over the First Amendment rights of student groups on campus, so that universities may target religious student groups for hostile treatment and exclusion—the Department's NPRM offered three policy rationales for the proposed rescission. Each is a mere pretext, offered to distract from the Department's true hostile purpose. Each rationale lacks any logical or evidentiary support.

The Department thus should abandon any plans to rescind these two regulations. The proposed rescission is arbitrary and capricious, and the Department should heed the on-the-ground evidence from ADF cases showing that protection is needed to safeguard the First Amendment rights of religious student groups on campus.

I. The Department's proposed rescission rests on an arbitrary and capricious foundation.

The Department's reason for this proposed rescission is simple: the Department seeks to enable educational institutions to use discrimination policies to impose requirements on student groups that are contrary to their religious beliefs, so that universities could more easily exclude, target, and coerce religious student groups—something that educational institutions are all too eager to do. The proposed rescission thus rests on a seriously faulty foundation: a view that religious student groups' exercise of First Amendment freedoms is a threat, rather than an important component of a free and pluralistic society.

A. The Department selectively heeds the voices of those that have discriminated against religious students and their organizations.

The Department has made clear that it is undertaking the proposed rescission at the behest of educational institutions and others who wish to elevate discrimination policies over the First Amendment so that they may more easily target religious student groups for coercion or for exclusion from campus. The

preamble to the NPRM thus relates how the Department has selectively heeded the voices of those who have discriminated against religious student groups—and how it ignored the voices of the targeted student groups.

The hostile basis for the Department's proposed rescission is clear from how it described its review of the current regulations. The Department recounted how it "conducted outreach and meetings" with "higher education and institutional stakeholders."[12] Later it noted that it "conducted outreach and listening sessions," again with "institutional stakeholders."[13] The concerns of these "institutional stakeholders" dominate the NPRM, being mentioned at least eleven times.[14] Indeed, when the Department summarized its rationale for not retaining these regulations, it cited input from one source: these "stakeholders."[15]

Yet "higher education and institutional stakeholders" is just a euphemism for public colleges and universities. These institutions have been violating the constitutionally protected rights of religious student organizations and the students who comprise them for decades, a habit that continues to the present.[16] It is the textbook definition of arbitrary and capricious to rescind regulations designed to prevent discrimination because the discriminators want to keep discriminating.

B. The Department ignores the voices of religious student organizations who have explained the need for these regulations.

Noticeably absent from the NPRM—aside from one brief allusion[17]—are the voices of religious students and their student organizations. Nor were they included in the Department's "listening sessions."[18] Indeed, the Department prioritized the

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[12] 88 Fed. Reg. 10859.

[13] 88 Fed. Reg. 10860–61.

[14] 88 Fed. Reg. 10859 (mentioned three times); *id.* at 10860 (mentioned once); *id.* at 10861 (mentioned twice); *id.* at 10862 (mentioned once); *id.* at 10863 (mentioned four times).

[15] 88 Fed. Reg. 10863.

[16] *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981) (finding public university violated the First Amendment by refusing a religious student group benefits available to other groups); *InterVarsity Christian Fellowship v. Univ. of Iowa*, 5 F.4th 855 (8th Cir. 2021) (same).

[17] 88 Fed. Reg. 10859 ("The Department also heard from representatives of other faith-based organizations that believe that the regulations fairly state current law, provide needed protections for students of all faiths, and ensure religious students feel welcome on public college campuses.").

[18] 88 Fed. Reg. 10860 (referencing listening sessions with "institutional stakeholders and representatives of faith-based communities," not religious student organizations).

views of religious universities,[19] entities that have no stake in these protections, over the voices of the students that these regulations protect.

Yet these voices were readily available to the Department. After all, in 2020, the Department received over 17,000 comments about the rules to protect students' First Amendment rights, including the two regulations at issue. Merely summarizing the comments related to these two regulations and responding to them consumed over 17 pages of the Federal Register.[20] Supporters of these rules detailed the vital role that religious student organizations play in the lives of their members, how many groups respond to the loss of recognition (and the attendant benefits) by just accepting this second-class status that inhibits their ministry, and how trying to assert their rights results in lengthy delays and distraction from their goal of serving students and increased anxiety and distress for their leaders.[21] The Department could have easily contacted any number of these groups to hear their perspectives. But it did not, suggesting that the review it launched in 2021 had a foregone conclusion.

C. The Department never contacted religious student organizations who have volunteered to defend these regulations in court.

At the very least, the Department could have contacted the religious student group who volunteered to defend these regulations in court. But again, it did not. Ratio Christi moved to intervene in that litigation to defend these regulations, explaining that "several universities have sought to exclude it from campus resources or from recognition as a registered student organization," that it had to litigate to defend its freedoms, and that these regulations "sought to redress this mistreatment, rather than leaving students to seek redress on their own or through litigation."[22]

The Department alludes to the still-pending litigation over these regulations, but it does not explain why it opposed any defense of these regulations even by a

[19] 88 Fed. Reg. 10859 (noting outreach and meetings with "faith-based organizations, including organizations representing religious [institutions of higher education]").

[20] 85 Fed. Reg. 59928–45.

[21] 85 Fed. Reg. 59928–37.

[22] Memo. in Supp. of Ratio Christi's Mot. to Intervene at 1, *Secular Student All. v. U.S. Dep't of Educ.*, No. 1:21-cv-00169 (D.D.C. Feb. 18, 2021), ECF No. 6-1, https://bit.ly/3yF43IS.

private religious student group.[23] Even less does the Department explain why it declined to conduct the same outreach to it as to other "stakeholders."

Despite having a religious student group seek to intervene on the same side as the Department, the Department failed even to reach out to hear this ally's perspective. Why? Because it had decided to jettison these protections for students, telling the court in April 2021 that its "new leadership" was "considering regulatory options . . . that may moot . . . this litigation."[24] So the review it launched four months later with a blog post already had a foregone conclusion.[25] The Department's position was clear: when it comes to campus life, it viewed the First Amendment as an obstacle to its ideological agenda, rather than as an important guarantee of liberty.

II. The Department is arbitrarily and capriciously insisting that the two regulations are too complex and burdensome for it to administer.

One rationale for the NPRM is administrative convenience: a key theme of the NPRM is that the regulations are too complex and burdensome for the Department to administer.

Not so. The regulations are simple, and they have required no effort from the Department to enforce. In fact, the Department admits it has no evidence to support this flip-flop from its 2020 position that the regulations are easily administrable.

A. Equal access cases are no more complex than other cases the Department routinely investigates.

The regulations at issue are not complex, and neither will the claims be arising under them. Indeed, when faced with such a claim, this Department need answer only three simple questions:

1. What "right, benefit, or privilege" is allegedly being denied to a religious student organization?

2. Is that "right, benefit, or privilege" at issue afforded to non-religious student organizations at the institution?

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[23] 88 Fed. Reg. 10861 & n.31 (referencing *Secular Student All. v. U.S. Dep't of Educ.*, No. 21-cv-00169 (D.D.C. Jan 19, 2021)).

[24] Jt. Mot. to Stay ¶¶ 2–3, *Secular Student All. v. U.S. Dep't of Educ.*, No. 21-cv-00169 (D.D.C. Apr. 20, 2021), ECF No. 21, https://bit.ly/3JkUofD.

[25] 88 Fed. Reg. 10859.

3. Is that "right, benefit, or privilege" being denied to the religious student group because of its faith-based "beliefs, practices, policies, speech, membership standards, or leadership standards"?[26]

These are no different from the questions this Department asks when addressing complaints of race-based, sex-based, or other types of discrimination. That is why this Department concluded in 2020 these equal access investigations are "similar to the types of investigations that the Department currently conducts."[27] In doing so, it highlighted how they represent "a discrete issue that the Department *may easily investigate*," precisely because they are so "limited in scope."[28] Indeed, investigators must simply substitute practices "informed by sincerely held religious beliefs" for other protected classifications. The Department's investigators can perform this substitution and carry out thorough investigations.

B. The Department admits it has no evidence to support its claims that the regulations are too burdensome to administer.

The Department claims that it "now find[s] reason to question" its 2020 conclusions about the limited scope of equal access complaints and their similarity to other investigations it conducts.[29] Yet the Department admits that it "has not received any complaints regarding alleged violations of [these regulations]."[30] It even asks the public to guess at "the likely . . . number of complaints."[31] Thus, it has conducted no investigations. So it has no basis for saying that the 2020 conclusions were wrong. Indeed, it—by its own admission—has no evidence that even calls them into question. It is simply acting arbitrarily, at the behest of its "new leadership."[32]

C. The Department arbitrarily ignores its prior distinction between equal access cases and other First Amendment violations, using one university's recalcitrance as a smokescreen.

To justify its capricious reversal on equal access cases, the Department misrepresents its 2020 findings. It now claims that in 2020, it concluded that

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[26] 34 C.F.R. §§ 75.500(d), 76.500(d).

[27] 85 Fed. Reg. 59945.

[28] 85 Fed. Reg. 59944–45 (emphasis added).

[29] 88 Fed. Reg. 10861.

[30] 88 Fed. Reg. 10863.

[31] *Id.*

[32] Jt. Mot. to Stay *supra* note 24, at ¶ 2.

"investigating First Amendment claims generally would be unduly burdensome in light of the existing First Amendment protections."[33] But the 2020 language referenced violations of different regulations: 34 C.F.R. §§ 75.500(b)–(c), 6.500(b)–(c). It referred to free speech claims other than those involving whether religious student organizations received the same rights, benefits, and privileges as other student groups. Indeed, when concluding that these equal access cases involved a "discrete issue that the Department may easily investigate," the Department explicitly noted that they do "not involve the full panoply of First Amendment issues that the other regulations in §§ 75.500(b)–(c) and 76.500(b)–(c) present."[34] The Department gives no reason for ignoring this distinction, reiterating the arbitrariness of its proposed rescission.

Next, the Department claims an attorneys' fees award illustrates the burden these regulations impose.[35] In reality, it shows the University of Iowa's recalcitrance in refusing to respect the First Amendment rights of religious groups. In 2017, Business Leaders in Christ sued, claiming the University derecognized it because of its faith-based criteria for leaders, and the district court found that the University selectively enforced its policies.[36] Rather than changing course, the University doubled down, instructed its officials to target more religious groups, and deregistered another 38, including InterVarsity.[37] InterVarsity's case went to summary judgment, and the individual defendants, having been denied qualified immunity, appealed and lost.[38] The Eighth Circuit did not struggle to identify whether the University treated religious groups differently. It was "hard-pressed to find a clearer example of viewpoint discrimination."[39] So the fee award has nothing to do with the complexity of the investigation; it has everything to do with University ideologues stubbornly refusing to comply with the First Amendment. Thus, it bolsters the need for these regulations.

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[33] 88 Fed. Reg. 10861 (citing 85 Fed. Reg. 59923).

[34] 85 Fed. Reg. 55944–45.

[35] 88 Fed. Reg. 10861 & n.36 (citing *InterVarsity Christian Fellowship v. Univ. of Iowa*, No. 3:18-cv-00080 (S.D. Iowa Nov. 18, 2021)).

[36] *InterVarsity Christian Fellowship*, 5 F.4th at 860–61; *see also Business Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969 (8th Cir. 2021)

[37] *InterVarsity Christian Fellowship*, 5 F.4th at 861.

[38] *Id.* at 862–83, 867.

[39] *Id.* at 864.

III. The Department is arbitrarily and capriciously insisting that the regulations confuse or burden public colleges and universities.

Another supposed reason for the NPRM is the administrative convenience of colleges and universities: the Department claims that the regulations confuse or burden public colleges and universities.

When it comes to the First Amendment, university officials regularly claim to be confused, despite having the benefit of their institution's general counsel and often their state's attorney general's office.[40] Yet the regulations' requirements are simple: treat religious student organizations the same way you treat all other student organizations. Indeed, this is just a slight variation of the Golden Rule. As the Eleventh Circuit observed when denying high school officials qualified immunity, it is "not unreasonable to expect the [officials]—who hold themselves out as educators—to be able to apply such a standard."[41] It is not unreasonable to expect university officials to obey the law, as explained by the Supreme Court many times,[42] and this Department was right to give them an added financial incentive to do so.

Supporting the NPRM based on universities' administrative convenience is an insufficient rationale. This rationale relies on basic misrepresentations of the administrative history, willful failures to understand the relevant laws, and a deliberate disregard of the evidence before the agency. It, too, appears to be just a pretext.

A. These claims ignore the text of the two regulations, which simply mandate equal treatment, and this Department's prior responses.

While the Department ignores the thousands of comments submitted by religious student groups in 2020, it recycles the comments that alleged that these two regulations "could be read to require [universities] to afford preferential treatment to religious student groups."[43] Whatever points these commenters might get for creative thinking, they flunk reading comprehension. The text of the regulations could not be clearer. They simply state that public universities "shall

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[40] *See, e.g.*, *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting the denial of cert.) (noting "university officers . . . have time to make calculated choices about enacting or enforcing unconstitutional policies").

[41] *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004)

[42] *See, e.g.*, *Widmar*, 454 U.S. 263; *Rosenberger*, 515 U.S. 819; *Southworth*, 529 U.S. 217.

[43] 88 Fed. Reg. 10860.

not deny to any" religious student organization "any right, benefit, or privilege that is otherwise afforded to other student organizations" because of the religious group's faith-based "beliefs, practices, policies, speech, membership standards, or leadership standards."[44] Nothing in this text remotely suggests that universities must or even may give religious groups preferential treatment. Nothing in the 2020 final rulemaking permits this interpretation of the regulations, as it explicitly rejects this.[45]

The Department also recycles comments from 2020 that allege that these regulations "would prohibit [universities] from applying neutral, generally-applicable nondiscrimination policies that would otherwise be compliant with the First Amendment."[46] Again, creativity does not change the regulations' text. And those regulations simply require universities to treat religious student groups the same as other student groups. Thus, any policies that apply to all student groups—the definition of neutral and generally applicable—could apply to religious ones. Again, the 2020 final rulemaking made this explicit, even detailing how universities who chose to adopt and even-handedly enforce an "all-comers" policy would still comply with these regulations.[47] Contrary to the Department's current assertions, the regulatory language did not need to permit this "expressly";[48] it is part and parcel of the notion that religious groups must be treated the same as nonreligious ones.[49]

[44] 34 C.F.R. §§ 75.500(d), 76.500(d).

[45] 85 Fed. Reg. 59940 ("The Department reiterates that the final regulations do not mandate preferential treatment for faith-based student organizations; instead, the regulatory text requires that religious student organizations not be denied benefits given to any other student group because of their religious nature.").

[46] 88 Fed. Reg. 10860.

[47] 5 Fed. Reg. 59937–43.

[48] 88 Fed. Reg. 10860.

[49] 85 Fed. Reg. 59939 ("§§ 75.500(d) and 76.500(d) clarify that public institutions allowing student organizations to restrict membership or hold certain standards for leadership may not implement non-neutral policies that single out religious student organization for unfavorable treatment.").

B. These claims ignore the narrow limits of *Christian Legal Society v. Martinez.*

The Department's discussion of "all-comers" policies[50] suggest it is trying to conjure a conflict between these regulations and *Christian Legal Society v. Martinez*.[51] Yet such a conflict remains a figment of the imagination.

As the Department detailed in 2020,[52] *Martinez* remains a very narrow decision, affecting only institutions that adopt and evenhandedly enforce an "all-comers" policy. The institution in *Martinez* adopted a policy that "mandate[d] acceptance of all comers," meaning that all recognized groups had to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of her status or beliefs."[53] This policy applied to all sixty student groups on campus, including political, religious, and ideological ones.[54] The Court was clear that it was only evaluating this "all-comers" policy,[55] and it recognized that student organizations could challenge even this type of policy if it was selectively enforced.[56] But if such a policy were even-handedly enforced, then religious groups would be treated no differently than non-religious ones, and so these regulations would not be violated.

The Department now claims the 2020 Notice of Reporting Process calls into question whether universities can apply "neutral and generally applicable policies."[57] Nonsense. That notice simply repeated *Martinez*'s own definition of an all-comers policy and clarified that a "policy with enumerated protected classes is not an all-comers policy."[58] It then explained that a true all-comers policy must require, for example, pro-abortion groups to accept pro-lifers as members and leaders, Muslim groups to accept non-Muslims, fraternities to accept women, sororities to accept men, and so on.[59] In thus distinguishing policies with

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[50] 88 Fed. Reg. 10860 & n.30.

[51] *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010).

[52] 85 Fed. Reg. 59938–39.

[53] *Martinez*, 561 U.S. at 671 (cleaned up).

[54] *Id.* at 709.

[55] *Id.* at 678 ("This opinion, therefore, considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution.")

[56] *Id.* at 697–98.

[57] 88 Fed. Reg. 10860 n.30.

[58] 85 Fed. Reg. 73511.

[59] *Id.*

enumerated protected classes from all-comers policies, this notice merely summarized *Martinez*'s own distinction. *Martinez* refused to read the policy at issue as "prohibiting discrimination on several enumerated bases" and instead read it as "a requirement that all [organizations] accept all comers."[60] Nothing in this distinction undermines a university's ability to enforce neutral and generally applicable policies, as those policies treat all groups the same.

C. The Department has received no new evidence showing that any genuine confusion or burdens on institutions exists.

Though the Department repeatedly asserts that these regulations confuse or burden universities,[61] it admits that it "has not received any complaints regarding alleged violations of §§ 75.500(d) and 76.500(d)," leading it to estimate that it "will receive fewer than 5 complaints annually."[62] Thus, it has conducted no investigations, and neither it nor any universities have any evidence–concrete or otherwise—to support these claims of confusion. As if to drive this point home, the Department asks the public to opine on how these regulations "have generated burdens."[63] This total lack of evidence belies the Department's claim that it is acting on a "reasoned determination."[64] It is just flip-flopping because of its "new leadership."[65]

D. The alleged conflict between these regulations and state or institutional policies is easily resolved.

The Department highlights how universities fear that these two regulations might conflict with state policies or their own institutional rules.[66] The answer to any such concern is simple: federal law, especially the highest law of our land, trumps any contrary rules.[67] After all, these regulations simply codify the First

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[60] *Martinez*, 561 U.S. at 675

[61] *See, e.g.*, 88 Fed. Reg. 10863 ("[Universities] have expressed confusion about the interplay. . . . Rescinding §§ 75.500(d) and 76.500(d) would reduce the continued confusion that [universities] and others have cited. . . .").

[62] 88 Fed. Reg. 10863.

[63] *Id.*

[64] 88 Fed. Reg. 10862.

[65] Jt. Mot. to Stay, *supra* note 24, at ¶ 2.

[66] 88 Fed. Reg. 10861 ("[Universities'] concerns include that the regulations . . . may conflict with institutional and State nondiscrimination policies."

[67] U.S. Const. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstand-

Amendment's requirement that the government cannot treat religious entities worse than non-religious ones. This is something the Supreme Court has made clear in cases about policies at K–12 schools,[68] universities,[69] and elsewhere.[70] Indeed, it is now so clear that university officials who ignore it lose their qualified immunity and are personally liable.[71] The First Amendment does not bow to some university's student handbook, as anyone who passed high school government should know.

In short, this aspect of the NPRM's analysis thus provides even more support for the conclusion that the NPRM is no more than an arbitrary flip-flop—a change in position made with no changing circumstances and made without even showing a basic awareness of the position that it is abandoning.

IV. The Department is arbitrarily and capriciously deciding to trust universities to safeguard the very rights they have a long, documented record of violating.

Another rationale offered for the NPRM is that universities—who have a long and well-documented history of violating the First Amendment rights of religious student organizations—can somehow now be trusted to respect the same rights of those same groups.[72] This ignores both the evidence submitted to this Department in 2020 and the well-known litigation over these issues; and it also assumes that government officials will always behave, an assumption the First Amendment forbids.

A. The Department is ignoring the voluminous comments from 2020 showing the need for these regulations.

The Department claims that universities will "make a good-faith effort to abide by the First Amendment irrespective of" these regulations.[73] Yet in 2020, the Department received over 17,000 comments, and it specifically highlighted how the "tremendous amount of support for these provisions demonstrates that these

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ing.").

[68] *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

[69] *See, e.g.*, *Widmar*, 454 U.S. 263; *Rosenberger*, 515 U.S. 819; *Southworth*, 529 U.S. 217.

[70] *See, e.g.*, *Reed*, 576 U.S. 155; *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246 (2020), *Carson v. Makin*, 142 S. Ct. 1987 (2022).

[71] *See, e.g.*, *Business Leaders in Christ*, 991 F.3d at 979–86; *InterVarsity Christian Fellowship*, 5 F.4th 865–67; *Apodaca v. White*, 401 F. Supp. 3d 1040, 1059 (S.D. Cal. 2019).

[72] 88 Fed. Reg. 10861–62 (leaving these "important constitutional questions to the institutions").

[73] 88 Fed. Reg. 10863.

regulations are indeed material and necessary to reinforce First Amendment freedoms at public institutions."[74] Indeed, summarizing the "overwhelming number of comments received in support of these final regulations"[75] consumed almost ten pages of the Federal Register.[76] They detailed the importance of religious student groups, both for their members and for campus diversity; the fact that many religious student groups succumb to the hostility they experience at the hands of university officials, preferring second-class status to asserting their rights; the fact that appealing to university officials forces groups "to navigate a bureaucratic maze" with the threat of derecognition always present; and the fact that taking legal action to assert their constitutional rights often involves significant distraction from their mission, increased anxiety for their leaders, and increased polarization on campus.[77] These experiences contradict the Department's current trust of university officials. Instead, they show that universities "are using 'tolerance' as an excuse to hurt religious organizations."[78] Perhaps this is why the Department now ignores this "overwhelming" support.[79]

Furthermore, in 2020, this Department highlighted how even "the substance of the numerous oppositional comments confirmed the need for a final rule requiring equal treatment for religious groups."[80] They illustrated that "[b]ias against religion and religious student groups is a growing problem."[81] This fatally undercuts the Department's current, blithe assumption that university officials will always behave.

B. The Department is arbitrarily minimizing the history of litigation, which shows the continuing need for these regulations.

Moreover, in 2020, the litigation that many religious student groups had to file to ensure that universities respected their rights highlighted need for these

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[74] 85 Fed. Reg. 59937.

[75] 85 Fed. Reg. 59941; *accord id.* at 59944 (noting "a tremendous number of comments replete with examples of the differential treatment that faith-based organizations suffer").

[76] 85 Fed. Reg. 59928–37.

[77] *Id.*

[78] 85 Fed. Reg. 59941; *accord id.* at 59943.

[79] 85 Fed. Reg. 59941

[80] *See, e.g.*, 85 Fed. Reg. 59940.

[81] 85 Fed. Reg. 59941.

regulations.[82] To this we add other examples—examples of litigation,[83] and of situations resolved short of it under these regulations and thanks to their preventive effect.[84] The Department recognizes that this litigation continues, citing recent examples.[85] But for reasons it does not explain, it concludes that this extensive record of litigation, which just a few years ago attested to the need for protecting religious groups from universities, now shows universities will respect the constitutional rights of those same groups. This is textbook caprice.

C. In no other context would the Department defer to institutions with this record of illegal conduct.

If the Department faced "a tremendous number of comments replete with examples of the differential treatment that [a racial minority] suffer[ed]" at public universities,[86] and if it also had numerous concrete examples of litigation based on this racial discrimination from across the country,[87] there is simply no way it would "continue to believe that [universities] will generally make a good-faith effort to abide by the [Fourteenth Amendment's Equal Protection Clause]."[88] This is particularly true if it had evidence that many members of this racial minority just accepted their second-class citizen status, rather than assert their rights,[89] or if these universities insisted on tailoring minority rights in the best interest of their campuses.[90]

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[82] 85 Fed. Reg. 59941 & n.92 (citing the district court predecessors of *Business Leaders in Christ*, 991 F.3d 969, and *InterVarsity Christian Fellowship*, 5 F.4th 855); *id.* at 59942 (referencing "numerous examples of cases in which Federal courts found that public universities discriminated against religious student organizations in violation of the First Amendment by withholding or denying other rights, benefits, and privileges afforded to secular student organizations"); *id.* at 59944 (similar, citing *Rosenberger*, 515 U.S. 819, and the predecessor of *Business Leaders in Christ*, 991 F.3d 969).

[83] *See, e.g.*, *Apodaca*, 401 F. Supp. 3d 1040; Memo. & Order, *Ratio Christi at Univ. of Neb.-Lincoln v. Kenney*, No. 4:21-cv-3301 (D. Neb. Jul. 13, 2022), ECF No. 28; Compl., *Ratio Christi at Univ. of Col., Col. Springs v. Sharkey*, No. 18-cv-02928 (D. Col. Nov. 14, 2018), ECF No. 1; Compl., *Ratio Christi at Univ. of Hous.-Clear Lake v. Khator*, No. 4:21-cv-3503 (S.D. Tex. Oct. 25, 2021), ECF No. 1.

[84] *See* Appendix 1 (listing at least a dozen examples of colleges and universities that denied or delayed recognition to religious student organizations that ADF assisted).

[85] 88 Fed. Reg. 10861 & n.32, 36.

[86] 85 Fed. Reg. 59944.

[87] *See supra* Part IV.B.

[88] 88 Fed. Reg. 10863.

[89] 85 Fed. Reg. 59931.

[90] 88 Fed. Reg. 10859; *accord id.* at 10861.

The same could be said if the Department had such evidence of discrimination against women, the disabled, individuals with a particular national origin, or any other protected classification. And if universities were discriminating against student organizations that served these groups, this Department would crack down, recognizing that each act of discrimination affected numerous minority students. Religious students and the student organizations they form should receive no less vigorous protections from this Department. This Department has no rational basis for trusting so blindly that their tormentors will behave, given less incentive to do so.

D. The First Amendment prohibits the Department from just trusting that universities will suddenly respect First Amendment rights.

Even if there were reason to "believe [universities] generally make a good-faith effort to abide by the First Amendment,"[91] the First Amendment prohibits this. As the Supreme Court explained: "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*."[92] This is why when universities say essentially, "Trust us; we may interfere, but not *impermissibly*," courts refuse.[93] They refuse to "entrust the guardianship of the First Amendment to the tender mercies of [a university's] discriminatory harassment/affirmative action enforcer," let alone its diversity, equity, and inclusion office.[94] This Department has no justification for its blithe trust that universities will treat religious groups the same as others.

E. First Amendment rights are not something universities can customize to their institutional desires.

Universities complain these regulations interfere with their ability to "tailor their policies to best meet the needs of their student populations and campuses."[95] But they—and apparently this Department—forget that these regulations merely restate what the First Amendment requires.[96] These requirements are so clear that officials who ignore them lose their qualified immunity.[97] Officials who want to

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[91] 88 Fed. Reg. 10863.

[92] *United States v. Stevens*, 559 U.S. 460, 480 (2010).

[93] *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477, 482 n.7

[94] *Id.*

[95] 88 Fed. Reg. 10859; *accord id.* at 10861.

[96] *See supra* notes 68–70.

[97] *See, e.g.*, *Business Leaders in Christ*, 991 F.3d at 979–86; *InterVarsity Christian Fellowship*,

conduct a cost-benefit analysis need to remember: "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on [public university officials] outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that [university officials think that] some speech [or association] is not worth it."[98] In short, the First Amendment is already the supreme law of the land, not advice that university officials can accept or reject, modify or tailor at their whim.

V. The Department is arbitrarily and capriciously insisting that only the judicial branch should protect students' First Amendment rights.

As its last theme, and as its last rationale for the proposed rescission, the Department oft reiterates its desire to abdicate any responsibility for ensuring that universities respect the First Amendment rights of religious student organizations, leaving these students with only a judicial remedy.[99] Thus, the Department would abandon its duty to enforce the law, would treat religious students different than any other group experiencing discrimination, and impose easily avoidable burdens on both students and university officials.

A. The executive branch has an independent duty to enforce the law.

The Department recognizes that when universities deny religious student organizations the rights, benefits, and privileges afforded other student organizations, they are violating the First Amendment.[100] But when universities

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5 F.4th 865–67; *Apodaca*, 401 F. Supp. 3d at 1059.

[98] *Stevens*, 559 U.S. at 470.

[99] *See, e.g.*, 88 Fed. Reg. 10861 (citing the ability of religious student organizations to file federal lawsuits as reason for "not . . . believe[ing] that a threat of remedial action with respect to the Department's grants is necessary to make the guarantees of the First Amendment . . . a reality at public institutions"); 88 Fed. Reg. 10861–62 (noting rescission would "leave adjudication of these complex and important constitutional questions to . . . the judiciary"). The Department does not claim that it lacks the legal authority to enact or enforce the current regulations—nor could it do so because no such grounds exist. Moreover, any attempt in the final rule to claim that the Department lacks legal authority could not be made without violating the Administrative Procedure Act: it would be an arbitrary and capricious decision that was not subject to proper notice and a public opportunity to comment.

[100] *See, e.g.*, 88 Fed. Reg. 10859 ("We also emphasized that public colleges and universities generally may not deny student organizations access to school-sponsored forums because of the groups' religious or nonreligious viewpoints. . . ."); *id.* at 10860 ("Public [universities] are rightly required to comply with First Amendment guarantees, including the free exercise of religion."); *id.* at 10862 (reiterating the Department's "commitment to religious freedom" at public universities).

violate these freedoms, the Department intends to tell these groups: "Don't bother us. Go to court."

In so doing, the Department is ignoring its independent duty to enforce the law and protect inalienable rights. Securing these priceless freedoms is why we have government, not just courts.[101] The executive branch is specifically charged to "take care that the laws be faithfully executed."[102] The First Amendment, which the Department concedes universities violate, is the supreme law.[103] Thus, the Department, as part of the executive branch, has an independent duty to ensure that universities that receive its grants respect the First Amendment rights of religious students and their organizations. This is not a duty it can shirk, hoping courts will fill the void.

B. The Department does not relegate other minorities facing discrimination to the sole protection of the judicial branch.

If the Department were confronted with a "a tremendous number of comments replete with examples of" racial discrimination,[104] it would not turn a blind eye to the situation. If it had compiled a list of examples in which victims of racial discrimination had prevailed in court,[105] it would not tell future victims to try their luck at litigation, with all the costs, burdens, stress, and uncertainty litigation entails. Indeed, its zeal in doing whatever it could to eradicate racial discrimination would intensify all the more if it had evidence that many victims of this racial discrimination just accepted their second-class citizen status, intimidated at the prospect of litigation.[106]

The same could be said of discrimination against any other protected class. Why are religious students and the organizations they form the only protected class to whom the Department says, "Don't bother us; take your chances in court"?

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[101] *See* Decl. of Indep. ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."); U.S. Const. pmbl. (noting the federal government's purpose is to, *inter alia*, "secure the Blessings of Liberty").

[102] U.S. Const. art. II § 3.

[103] U.S. Const. art. VI ("This Constitution . . . shall be the supreme law of the land[.]").

[104] 85 Fed. Reg. 59944.

[105] *See supra* Part IV.B.

[106] 85 Fed. Reg. 59931.

C. The Department's abdication would only increase litigation, imposing avoidable burdens on students and increasing confusion and liability for universities.

Of course, if the Department rescinds these regulations, the result will be more litigation. More religious student groups will sue, recognizing that they have no other choice when universities trample on their First Amendment freedoms. As the 2020 comments attest, this means that the Department will impose added stress and anxiety on these students and will expose them to greater on-campus backlash.[107] All of this could easily be avoided if the Department would simply retain regulations that restate the First Amendment's demands.

As lawsuits multiply, so will the number of officials who will have violated the First Amendment's clear requirements. For they will interpret this removal as giving them the freedom to tailor their policies as they see fit.[108] But the First Amendment's requirements are so clearly established that these officials will be held personally accountable, as qualified immunity will not allow them to evade accountability for their actions.[109] If the Department truly wants to bring clarity to universities, minimize their liability, and help them avoid the costs of litigation,[110] it will retain these regulations that clearly state universities' constitutional obligations.

VI. The Department is arbitrarily and capriciously insisting that it lacks evidence that these regulations benefit anyone.

Throughout the NPRM, the Department suggests these regulations have benefited (and removing them would harm) no one.[111] This claim overlooks uncontroverted facts from 2020, ignores the practical impact of rescission, and absurdly pretends its long-expressed hostility to religious student organizations has had no effect.

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[107] *See, e.g.*, 85 Fed. Reg. 59931–37.

[108] *See supra* Part IV.E.

[109] *See, e.g.*, *Business Leaders in Christ*, 991 F.3d at 979–86; *InterVarsity Christian Fellowship*, 5 F.4th 865–67; *Apodaca*, 401 F. Supp. 3d at 1059.

[110] 88 Fed. Reg. 10861 n.36 (noting that the University of Iowa paid $544,508 in attorneys' fees for denying religious student organizations rights, benefits, and privileges given to other groups).

[111] 88 Fed. Reg. 10863 (noting the Department has "not received any complaints regarding alleged violations of §§ 75.500(d) and 76.500(d)" and that rescinding them 'would not have costs for students or campus communities").

A. The comments this Department received in 2020 amply attest to the need for these regulations and the benefit they supply.

As previously detailed,[112] the Department received over 17,000 comments about these regulations in 2020. The "tremendous amount of support for these provisions demonstrates that these regulations are indeed material and necessary to reinforce First Amendment freedoms at public institutions."[113] Even "the substance of the numerous oppositional comments confirmed the need for a final rule requiring equal treatment for religious groups."[114] But it described the number of supportive comments as "overwhelming,"[115] with many "replete with examples of the differential treatment that faith-based organizations suffer."[116]

These comments and the experiences they relate did not disappear just because the Department got "new leadership."[117] Indeed, as the Department recognizes, litigation over universities' refusal to treat religious student organizations the same as other student groups continues.[118] And its list of cases is unavoidably incomplete.[119] These are the groups and the students who benefit from these common-sense regulations that give universities added incentive to comply with the First Amendment.

B. Rescinding these two regulations would remove an entire stratum of protection for First Amendment rights, emboldening universities to keep violating these priceless freedoms.

Despite the Department's claim that rescinding these regulations will "not have costs for students,"[120] it will. For as the Department admits earlier, rescinding them will leave religious student groups only a judicial remedy.[121] With these

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[112] *See supra* Part IV.A.

[113] 85 Fed. Reg. 59937.

[114] *See, e.g.*, 85 Fed. Reg. 59940.

[115] 85 Fed. Reg. 59941.

[116] 85 Fed. Reg. 59944.

[117] Jt. Mot. to Stay, *supra* note 24, at ¶ 2.

[118] 88 Fed. Reg. 10861 & n.32, 36.

[119] *See supra* notes 83–84 (listing more examples of litigation over benefits denied to religious student organizations that were available to other student groups).

[120] 88 Fed. Reg. 10863.

[121] *See, e.g.*, 88 Fed. Reg. 10861 (citing the ability of religious student organizations to file federal lawsuits as reason for "not . . . believ[ing] that a threat of remedial action with respect to the

regulations, students in religious student groups have two options for ensuring that their rights are respected: (1) invoking this Department's assistance, or (2) going to court. If these regulations were rescinded, the first option would disappear, leaving students with the far more burdensome, costly, and stressful option of litigation.[122]

Furthermore, if the Department rescinds these regulations, universities will interpret this as authorization to do what they already want to do: treat the First Amendment rights of religious student groups as a ball of playdough that they can mold as they wish.[123] Abandoning the Department's duty to enforce the law is bad enough;[124] emboldening universities to trample First Amendment rights is even worse. This Department will benefit students and universities if it retains regulations that outline the First Amendment's requirements and that provide another layer of protection for those fundamental and priceless liberties.[125]

C. The Department's hostility to religious student groups explains their unwillingness to trust this Department with their rights.

Any lack of prior complaints to the Department stems from the Department's own hostility to religious student groups under the Biden administration.

The Department makes much of receiving no "complaints regarding alleged violations" of these regulations.[126] But this claim ignores both the timeline of events, its own expressions of hostility to the rights of religious student organizations, and the preventive effect of having these regulations on the books.

These regulations went into effect on November 23, 2020.[127] Two days later, the Department unveiled an email address to which religious student organizations could report violations.[128] Because of COVID-19, many universities had significantly curtailed their student organization programs. And thus, many were not recognizing any new student organizations or had limited their review of

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Department's grants is necessary to make the guarantees of the First Amendment . . . a reality at public institutions"); 88 Fed. Reg. 10861–62 (noting rescission would "leave adjudication of these complex and important constitutional questions to . . . the judiciary").

[122] *See supra* Part V.

[123] 88 Fed. Reg. 10859; *accord id.* at 10861.

[124] *See supra* Part V.A.

[125] *See supra* Part V.C.

[126] *See, e.g.*, 88 Fed. Reg. 10863.

[127] 85 Fed. Reg. 59916.

[128] 85 Fed. Reg. 75311.

student group constitutions. Either way, this reduced the chance of a violation occurring—not because of any change of heart in higher education, but solely because of the pandemic.

By April 20, 2021, just five months after these regulations went into effect, the Department announced in court filings that they were on the chopping block.[129] It announced that it was considering "regulatory options" that would moot any legal challenge to these rules.[130] Religious student organizations likely concluded that the Department, under its "new leadership," was not committed to vindicating their rights and thus that submitting complaints would be an exercise in futility.[131] The Department's repeated filings containing this claim only drove the point home.

What's more, published reports soon emerged that this Department had closed channels created to allow students and student organizations to report violations of their First Amendment rights.[132] This only reaffirmed the impression religious student organizations received from the Department's other acts: submitting complaints would serve no purpose.

The Department cannot send a consistent, public message that it just does not care about investigating violations of the rights of religious student groups and then turn around and fault those groups for failing to submit examples of violations.

If anything, the lack of complaints illustrates the benefits of the clarity these regulations provide. Universities are responding to the incentives these regulations create, and so they are respecting the rights of religious student organizations without waiting to be sued. That is a win-win result for everyone.

VII. The Department should consider the important evidence of how universities are violating the First Amendment.

The Department should continue to protect the First Amendment rights of religious student groups on camps. The current regulations have had an important role in preventing and limiting free-speech violations, and the evidence on the ground shows how important these protections have been.

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[129] Jt. Mot. to Stay, *supra* note 24, at ¶¶ 2–3.

[130] *Id.*

[131] *Id.* In any event, Appendix 1 includes a formal complaint submitted to the Department, documenting many such instances of First Amendment issues on campus in the last two years. The existence of this complaint thus independently negates the Department's rationale.

[132] *See* Christian Schneider, *Under Biden, Education Department quietly shut down Trump-era 'free speech hotline'*, Coll. Fix (Aug. 16, 2022), https://bit.ly/3FbkAI8.

Any rulemaking by the Department thus will be factually incomplete and legally infirm unless the Department considers the long and mounting evidence showing the unconstitutional treatment of religious student groups on campus. This evidence should be considered in three distinct ways.

First, the Department should consider the best evidence of the present regulation's salutary effect on free speech: the number of free-speech cases resolved short of litigation. Just since November 23, 2020, many colleges and universities have denied or delayed recognition to religious student organizations. But the proposed regulations encouraged many out-of-court early resolution of First Amendment violations.[133] This detailed evidence of the early resolution of free-speech conflicts between colleges and student groups are in Appendix 1. These examples show the benefits and positive impact of the existing regulations. The regulations give universities an added incentive to comply with the First Amendment without waiting to be sued—an incentive that is having the intended effect.

Second, the Department also should consider all the evidence necessary for a robust regulatory impact analysis of the proposed rulemaking.[134] The Department must consider the many benefits of the existing regulations, and it should examine the real costs to religious student groups that will come from rescinding these protections. ADF and Ratio Christi have already submitted to the Department detailed comments about the proper regulatory impact analysis of the proposed rescission, which ADF sets forth again in Appendix 2 and incorporates by reference. These regulatory impact analysis comments explain how the Department should identify and measure the costs and benefits of the proposed rescission, and why there is no need to rescind students' protections.

Third, the Department should also consider the evidence developed in the following cases, which shows how colleges and universities have acted unconstitutionally—and why the Department's enforcement of First Amendment protections is needed.[135] Contrary to the Department's position, the problem has not

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[133] This evidence was also submitted to the Department as a formal complaint.

[134] *See* Appendix 2 (Matthew S. Bowman & Mallory Rechtenbach, Alliance Defending Freedom, & Corey Miller, President/CEO Ratio Christi, E.O. 12866 Meeting, Religious Liberty and Free Inquiry Rule, Rulemaking RIN: 1840-AD72 (March 1, 2022)).

[135] This comment does not provide an exhaustive list of First Amendment violations on campus—if such a list is even possible. Evidence from other groups, such as the Christian Legal Society and the Becket Fund, for example, confirms what ADF knows from practice: First Amendment violations are widespread and long-running on campuses across the country. *See, e.g.*, Christian Legal Society, *When Colleges and Universities Exclude Religious Student Groups: A Serious Problem* (last updated Mar. 2023), https://bit.ly/3neIOev (detailing dozens of First Amendment violations at college

miraculously disappeared, such that anyone can trust universities to follow the law in this area.

A. *Secular Student Alliance v. U.S. Department of Education*[136]

ADF attorneys representing the Christian student organization Ratio Christi moved in federal court to intervene in defense of the existing regulations that requires all public colleges and universities that are federal grant recipients to comply with the First Amendment. The existing regulations prevent public universities from denying religious student organizations equal access to campus resources and benefits based on that organization's beliefs, speech, or religious requirements for choosing its leaders and members. Americans United for Separation of Church and State filed suit to challenge the regulation, implemented during the Trump administration, on behalf of the Secular Student Alliance.

The Biden Administration would have been on firm ground to defend the validity of these regulations in federal court. It should have welcomed Ratio Christi's participation and sought to defend Ratio Christi's rights in court. But rather than do so, and rather than even reach out to Ratio Christi to discuss whether the group continues to experience unconstitutional treatment on campus, the Department simply suggested that it intended to walk back these regulations.[137] In August 2021, the Department announced via blog post that it was reviewing the regulations and consulting certain stakeholders—stakeholders other than ADF, Ratio Christi, or the many other student groups on campus whose rights have been violated.[138]

Even though the Department did not consider the effect of these regulations on religious student groups, the litigation filings and exhibits in the *Secular*

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campuses). The Department should thoroughly examine and consider all of this important evidence of free-speech violations on campus.

[136] *See* ADF, *Secular Student Alliance v. U.S. Department of Education*, https://adflegal.org/case/secular-student-alliance-v-u-s-department-education (last updated Mar. 16, 2023).

[137] Jt. Mot. to Stay, *supra* note 24 ("The Parties hereby request a stay of this case to allow Defendants to consider regulatory options that may obviate the need for this litigation. . . . ED has informed undersigned counsel for Defendants that it is considering regulatory options related to the Rule that may moot or limit the issues in this litigation. To preserve judicial resources and maximize the efficient resolution of this case, the Parties jointly request that the Court stay this case to allow Defendants time to consider regulatory options related to the Rule"). The intervention motion, which the Department opposed, had yet to be ruled upon before the joint stay request, making the stay functionally unopposed and not subject to the usual process of adversarial testing.

[138] U.S. Dep't of Educ., *Update on the Free Inquiry Rule* (Aug. 19, 2021), https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/.

Student Alliance case provide important evidence of the need for the existing regulation to protect religious student groups.[139] The Department should consider and heed that evidence now, which shows the necessity for the Department to help enforce the First Amendment on campus.

As a declaration in the case explained, Ratio Christi is a nationwide Christian apologetics organization whose mission is to defend the intellectual plausibility of the Christian faith on campus and explain how the Christian viewpoint relates to personal, vocational, and cultural aspects of life. Any student can attend Ratio Christi events and join the organization, but like many other clubs, it requires that those who lead the organization share its beliefs.

Ratio Christi provides important benefits for college campus. Religious student organizations like Ratio Christi serve students in many ways. They connect students to both local and global service opportunities, provide spiritual guidance, emotional support, and a sense of belonging to otherwise-isolated students.

Among the campuses where Ratio Christi has chapters, affiliates, and members are public universities that receive direct or state-administered grants of federal funds from the Department, making them subject to the Department's regulations. Students at these public universities, including members of the Ratio Christi student chapter there, pay mandatory student activity fees that go to provide official university funding for recognized student organizations.

But because of Ratio Christi's theological beliefs informing its leadership requirements, many of Ratio Christi's student chapters have been denied by a university registered status, limiting their access to funding, event space, and administrative support. For instance, in one case in Georgia, Ratio Christi encountered a tiny "speech zone" that exiled a pro-life display to an area comprising less than 0.08% of a 405-acre campus.[140] After Ratio Christi sued, the university agreed to eliminate its speech zone so that students will be free to speak freely in all outdoor areas of campus and officials no longer have free rein to charge security fees in any amount.

Between 2011 and the end of 2020, Ratio Christi resolved at least 30 disputes over access to campus with universities—short of resorting to litigation. Only after

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[139] *See* Appendix 3 (*Secular Student All. v. U.S. Dep't of Educ.*, Ratio Christi's Mot. to Intervene, Memo. in Supp., Miller Decl. in Supp., and Exs. 1–9 thereto); Appendix 4 (*Secular Student All. v. U.S. Dep't of Educ.*, Exs. 10–11); Appendix 5 (*Secular Student All. v. U.S. Dep't of Educ.*, Exs. 12–14 and Reply Brs. in Supp. of Mots. to Intervene).

[140] *See* Compl., *Ratio Christi of Kennesaw State Univ. v. Olens*, No. 1:18-cv-00956-TWT (N.D. Ga. Feb. 20, 2018), ECF No. 1, https://bit.ly/3nc80SV.

arduous and long negotiations did these chapters obtain express or de facto exemptions from the policies. Each of these disputes required Ratio Christi to secure the assistance of legal counsel to engage in negotiations and other provide other formal assistance to obtain access to campus resources. Even seeking these changes short of litigation takes time and effort for students.

Ratio Christi has also been targeted by the University of Iowa—an attempt that only failed because of court protection. As comments submitted by the Christian Legal Society's student chapter at the University of Iowa College of Law showed, a document prepared by the University during litigation documented that if the University were to prevail in court, it would not allow the Ratio Christi student group to remain on campus—nor would it allow 31 other religious groups to be on campus either: Agape, Chinese Student Fellowship; Athletes in Action; Bridges International; Business Leaders in Christ; Campus Bible Fellowship; Campus Christian Fellowship; Chabad Jewish Student Association; Chi Alpha Christian Fellowship; Chinese Student Christian Fellowship; Christian Legal Society; Christian Medical Association; Christian Pharmacy Fellowship; Cru; Geneva Campus Ministry; Hillel; Imam Mahdi Organization; International Neighbors at Iowa; InterVarsity Graduate Christian Fellowship; J. Reuben Clark Law Society; Latter-day Saint Student Association; Lutheran Campus Ministry; Multiethnic Undergrad Hawkeye InterVarsity; Muslim Students Association; Newman Catholic Student Center; Orthodox Christian Fellowship; Ratio Christi; The Salt Company; Sikh Awareness Club; St. Paul's University Center; Tau Omega Catholic Service Fraternity; Twenty Four Seven; and Young Life. This evidence shows that the threat to religious groups includes not just Christian groups, but also Muslim, Jewish, and Sikh groups.

Ratio Christi's continued ability to access college campuses depends on ensuring that universities respect its freedom to define itself according to its governing documents, to follow its statements of belief and human sexuality, and to hold to its membership and leadership policies for student clubs. Many officials and students object to Ratio Christi chapters receiving student fees and other campus resources.

The First Amendment protects Ratio Christi in at least three ways. *First*, federal requirements of viewpoint neutrality ensure equal access to campus resources, and they ensure that, if students must pay mandatory student activity fees, Ratio Christi has an equal opportunity to access these fees subsidizing student activities neutrally as to their viewpoints. *Second*, the First Amendment protects the free exercise of religion, and it protects religious groups from being targeted for unequal treatment because of their religious identity, exercise, and activities. *Third*, the First Amendment also guarantees freedom of association—that is, the

right to gather around shared beliefs. Colleges and universities receiving federal funds should not be permitted to thwart the First Amendment through mandates that allow people who want to undermine the mission of a student group to become leaders of it.

The Department's regulations were implemented in no small part to prevent public colleges and universities from forcing student organizations to accept individuals who apply for leadership positions into leadership even if they do not believe in the group's mission, or even actively oppose it. This change helped students by creating a positive learning environment that respects students' constitutional rights. It also sought to avoid a situation in which students need to seek recourse from unconstitutional policies in federal court.

Because of the Department's regulations, public colleges and universities, including the public universities at which Ratio Christi may start future student chapters, are now required on condition of federal funding to respect religious student clubs and not implement policies that would exclude them from the benefits available to all other student clubs. As Appendix 1 explains, this rule has thus enabled Ratio Christi to resolve many disputes short of litigation, including on a faster timeline than would have been expected from litigation.

Were the regulations not in place, and were universities to create and enforce unconstitutional policies, Ratio Christi's students would lose access to critical resources, and educational opportunities that would have been available to students, including Ratio Christi's members, would be degraded or lost entirely. Universities will be more likely to violate Ratio Christi students' First Amendment rights by denying them viewpoint-neutral access to campus resources and by affording preferential access to all other groups. Universities that create or maintain unconstitutional policies marginalize religious students and exclude religious student groups from campus benefits available to other students. This will create particular disproportionate harm to Ratio Christi members because many Christian students come from historically disadvantaged backgrounds, especially immigrant, poor, and rural backgrounds. It will also create various intangible and other harms to Christian students because of the disrespectful stigma caused when universities equate students' faithful theological beliefs with, as the Secular Student Alliance Plaintiffs put it, "legally mandated university support for invidious discrimination."

B. *Ratio Christi at Univ. of Colorado, Colorado Springs v. Sharkey*[141]

Represented by ADF, Ratio Christi has gone to court several times to stand up for its students' First Amendment rights on campus. One example is when Ratio Christi faced viewpoint discrimination in Colorado over its leadership requirements.

The University of Colorado, Colorado Springs refused to grant the group registered status for several years because of its requirement that student leaders share its religious beliefs. The University's denial limited its access to funding, meeting and event space, and administrative support.[142] The University's policy allowed its officials to deny registered status to a group because the organization selects leaders that share and will advocate for the organization's religious or political philosophy, and the policy also gave officials unlimited discretion to approve or reject student groups, even groups that meet all the published requirements.

Ratio Christi's November 2018 lawsuit identified ways in which the University treated Ratio Christi differently than other groups. For example, non-religious groups were allowed to select members who support their purposes. And the University allowed fraternities that admit only men and sororities that admit only women to continue as registered student organizations, in contradiction to the university's policy against "discriminating based on sex."[143]

After Ratio Christi filed suit, the University updated its policies in May 2019 to ensure that any student club may require its leadership to promote the purposes of the club and hold beliefs consistent with the group's mission.[144]

This case shows that, even when a settlement is reached shortly into litigation, significant harm can still result. Ratio Christi had to incur substantial resources to exercise its First Amendment rights: it took 170 attorney hours and many hours from Ratio Christi staff and students—before the University even filed

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[141] *See* ADF, *Ratio Christi at the University of Colorado, Colorado Springs v. Sharkey*, https://bit.ly/3lBb76g (last updated Mar. 16, 2023).

[142] *See* Compl., *Ratio Christi at Univ. of Colo., Colo. Springs v. Sharkey*, No. 1:18-cv-02928 (D. Colo. Nov. 14, 2018), ECF No. 1, https://bit.ly/42zQqZ0.

[143] *See* ADF, *Colorado university to Christian students: 'Let non-Christians lead your group if you want recognition'* (Nov. 15, 2018), https://bit.ly/3FKpa0m.

[144] Settlement Agreement, *Ratio Christi at Univ. of Colo., Colo. Springs v. Sharkey*, No. 1:18-cv-02928 (D. Colo. Apr. 30, 2019), https://bit.ly/3z0MNOg.

its answer—to arrive at a settlement by which the University agreed to modify its policy.

This case also shows the importance of protecting First Amendment freedoms. Like any other student group at a public university, religious student organizations should be free to choose their leaders without the government meddling. It would be absurd for the university to require the vegan student group to appoint a meat-lover as its president. Likewise, the University of Colorado shouldn't force Christian students to let atheists or other non-Christians lead their Bible studies to become a registered club. Despite claiming inclusiveness and diversity as its core values, the University was failing to foster real diversity of thought and was, instead, discriminating against a Christian group based on its beliefs.

Today's university students will be tomorrow's legislators, judges, university presidents, and voters, but at the University of Colorado, students were learning the wrong message: that government can dictate who can lead certain student groups. Instead, public universities model the First Amendment values they are supposed to be teaching to students.

C. *Ratio Christi at the University of Houston-Clear Lake v. Khator*[145]

Ratio Christi also teamed with ADF to file a federal lawsuit against the University of Houston-Clear Lake for discriminating against the group's Christian beliefs by excluding Ratio Christi from Registered Student Organization status and the benefits that come with that recognition.

The University excluded Ratio Christi because it requires its leaders to agree with its values and mission. Other organizations have leadership requirements but are recognized by the University. But when Ratio Christi applied for recognition as a registered student organization, the University rejected the application and revoked its invitation to the student organization fair because Ratio Christi's constitution requires its leaders to be Christians—not members of another faith or of no faith.[146] Unlike other groups at the University, the students of Ratio Christi could not reserve space, invite speakers, or access the pool of funds they paid into

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[145] *See* ADF, *Ratio Christi at the University of Houston-Clear Lake v. Khator*, https://adflegal.org/case/ratio-christi-university-houston-clear-lake-v-khator (last updated Mar. 16, 2023).

[146] *See* ADF, *Christian student group files suit over discrimination at University of Houston-Clear Lake* (Oct. 25, 2021), https://adflegal.org/press-release/christian-student-group-files-suit-over-discrimination-university-houston-clear-lake.

that is reserved for student organizations, speakers, and events because the University excluded Ratio Christi from Registered Student Organization status.

As a result of the Fall 2021 lawsuit, the University of Houston-Clear Lake fully recognized the Christian student organization as a registered club on campus, granting them equal treatment among their peer groups.[147] As part of a settlement, the University agreed to a policy change that allows Ratio Christi, and other campus groups, to choose leaders who agree with their values and mission.[148] As part of the settlement, the University added the following language to its Student Organization Handbook: "A student organization may limit Officers to those members who subscribe to the tenets of that organization." The University also added transparent guidelines for how a student group should gain approval to become a registered student organization, and an appeal process if a denial occurs.

It's natural and expected that a Christian organization would require its leaders to be Christian; the university allows other organizations to have similar, commonsense leadership requirements. But University officials were discriminating against Ratio Christi and banishing them from a fair, free exchange of ideas specifically because of their religious beliefs. The Department thus has an important role to play to ensure that university officials must act consistently with the law to ensure that all students are treated fairly and without discrimination based on their faith.

D. *Ratio Christi at the University of Nebraska-Lincoln v. The Members of the Board of Regents of the University of Nebraska*[149]

Another example of when Ratio Christi has had to go to court to defend its First Amendment freedoms is when it filed a federal lawsuit against the University of Nebraska-Lincoln for failing to distribute money collected from mandatory student fees to student organizations in a fair, viewpoint-neutral manner.

ADF attorneys representing Ratio Christi filed a federal lawsuit in October 2021 after the University denied Ratio Christi's request of $1,500 in student activity

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[147] *See* ADF, *Days after ADF lawsuit, Christian student group receives equal treatment at University of Houston-Clear Lake* (Oct. 29 2021), https://adflegal.org/press-release/days-after-adf-lawsuit-christian-student-group-receives-equal-treatment-university.

[148] *See* ADF, *Another First Amendment win for Christian student group* (Feb. 15, 2022), https://adflegal.org/press-release/another-first-amendment-win-christian-student-group.

[149] *See* ADF, *Ratio Christi at the University of Nebraska-Lincoln v. The Members of the Board of Regents of the University of Nebraska*, https://adflegal.org/case/ratio-christi-university-nebraska-lincoln-v-members-board-regents-university-nebraska (last updated Mar. 16, 2023).

funding to bring in a respected philosopher who taught at UNL for several decades because, according to the University, it could not promote "speakers of a political and ideological nature," as if it had not yet heard that *Rosenberger* struck down such rules as viewpoint discrimination. The University told Ratio Christi that, to receive any funding, the student group would have to "provide another spokesperson with a different ideological perspective" to counterbalance Dr. Robert Audi's Christian views. Yet the University spent thousands of dollars each year hosting and funding events that are political and ideological in nature without imposing the same requirement.

A federal court then entered partial judgment against the University officials who discriminated against Ratio Christi by failing to distribute money collected from mandatory student fees to student organizations in a fair, viewpoint-neutral manner. The parties settled the remaining claims after the University revised its funding policies to provide transparency and accountability in the process. The University changed its policy on how it distributes student fees to student organizations "to promote the availability of diverse viewpoints to UNL students" and ensure allocation of funding is done in a "viewpoint neutral manner."

It's the duty of university officials to ensure student organizations are treated fairly and objectively, not blatantly discriminated against because of a club's particular religious or ideological viewpoint, as happened to Ratio Christi.

E. *Apodaca v. White*[150]

Another case that shows the need to enforce the First Amendment rights of student groups is *Apodaca v. White*. ADF attorneys filed a federal lawsuit on May 2017 on behalf of Students for Life and its campus president, Nathan Apodaca, who were prevented from bringing pro-life speakers to campus under a university's discriminatory funding policies.

In that case, California State University-San Marcos officials funded pro-abortion and other favored views with almost $300,000 in mandatory fees charged of all students, but denied Students for Life $500 in funding to host a visiting speaker on "Abortion and Human Equality" to provide a contrasting view. The University had more than 100 recognized student groups. Although the University said that it prohibits any of those groups from spending activity fee grants on expenses to bring speakers to campus, the Gender Equity Center and the LGBQTA Pride Center enjoyed preferential status, and as such, were exempt from that rule and the standard $500 cap. In the 2016–17 academic year, those two "centers"

[150] *See* ADF, *Apodaca v. White*, https://bit.ly/3FI1Gc6 (last updated Mar. 16, 2023).

received a combined $296,498 for speech and expressive activities—more than 21% of all mandatory student activity fees the programming board received for that year—compared to only $38,629 for the more than 100 other groups combined (less than 3%). That year the GEC hosted the ABC's of LGBTQ: Queer Women and the so-called "Pleasure Party." The LGBQTA Pride Center hosted "Kink 101"—which was an interactive workshop and discussion of bondage, dominance, sadism, masochism, and fetish-style practices. These and the centers' other advocacy events were funded exclusively from mandatory student fees. From these fees, Students for Life applied for a $500 "Leadership Funding" grant to host pro-life speaker and University of North Carolina-Wilmington Professor Mike Adams to provide an alternative view. But although Apodaca, like other Students for Life members, paid the same mandatory student activity fees that all students pay as a condition of enrollment, he and his pro-life peers were denied equal access to those fees to bring Dr. Adams to campus.[151]

Universities should encourage all students to participate in the free exchange of ideas, not concoct elaborate funding schemes to award their favored few with first-class status while denying even economy class to opposing views. California State University-San Marcos spared no expense to fund the advocacy of its preferred student advocacy groups but denied funding for speakers from Students for Life and similar student groups. The result was a two-track system by which the University compelled some students to fund the speech of their peers with whom they may disagree, but prohibited those same students from using these funds to present a different viewpoint. Under the First Amendment's guarantee of free speech, these unfair and discriminatory policies are unconstitutional.

A federal district court agreed in August 2019. It held, "These 'back room deliberations' are exactly [the] type of considerations the First Amendment is designed to prevent. Nothing prevents these officials from encouraging some views while suppressing others through cosponsorship funding."[152] With almost half a million students and 23 campuses, the California State University was one of the largest four-year university systems in the United States. As a result of this case and the post-judgment settlement, a Chancellor's directive in February 2020 ordered all 23 campuses to review and revise their policies to comply with the Constitution's viewpoint-neutrality requirement.[153]

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[151] *See* ADF, *Cal State–San Marcos gives $300,000 to Gender Equity and LGBTQA Centers, $0 to Students for Life* (May 18, 2017), https://bit.ly/3lz5zJD.

[152] *Apodaca*, 401 F. Supp. 3d at 1058; *see also* ADF, *Court: 'Back-room deliberations' at Cal State–San Marcos unconstitutional* (Aug. 14, 2019), https://bit.ly/3TE1AZ2.

[153] *See* ADF, *Pro-life student group's lawsuit prompts systemwide policy change at nation's largest*

VIII. The Department should consider alternative approaches.

The main reason for the Department's proposed rescission is simple: the Department seeks to enable universities to impose nondiscrimination requirements on religious student groups that are inconsistent with the students' faith. That reason is impermissible. It reflects nothing more than hostility to religion, to free speech, and to the First Amendment.

The Department's purpose for this proposed rescission is thus constitutionally suspect. By declining to defend the past regulations and proposing to rescind them, the Department has created an impression of hostility to religion—an impression of hostility that itself gives rise to serious First Amendment concerns. The Department should not single out protections for religious student groups for repeal, while leaving other, more preferred rights to robust federal enforcement. Nor should the Department seek to elevate discrimination policies over the First Amendment.[154] And the Department should not rely on evidence and political pressure from private parties who are hostile to religious student groups. Indeed, the Department's hostility to religion is itself a potential basis under *Masterpiece* for invalidating the proposed rescission, if finalized.[155]

Each purported rationale for the proposed rescission cannot distract from this purpose. Each rationale is no more than a flimsy pretext. These rationales collapse on any scrutiny and they are employed just as cover for an impermissible purpose.

The Department thus should abandon the proposed rescission. Instead, it should enforce the existing regulations, engage in public outreach to educate students about their rights and their opportunities to file complaints, and defend the current regulations in court. The Department could easily hire lawyers and other professionals with the needed expertise in First Amendment law and education. Indeed, if the Department were to publicize its complaint procedures, educate colleges and universities about their First Amendment obligations, and reach out to affected student groups, the Department could take even greater steps towards protecting the First Amendment rights of students on campus.

In the alternative, if the Department finalizes the proposed rescission, the Department should *at a minimum* distance itself from universities and commenters

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university (Feb. 4, 2020), https://bit.ly/3JWfi65.

[154] Religious exemptions are fully compatible with the First Amendment, as the Department's own successful defense of the Title IX religious exemption showed. *Hunter v. U.S. Dep't of Educ.*, No. 6:21-cv-00474-AA, 2023 WL 172199, at 1 (D. Or. Jan. 12, 2023).

[155] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719 (2018).

who have disparaged religious students' exercise of their First Amendment freedoms.[156] *First*, the Department should acknowledge that colleges and universities have a long history of violating the First Amendment rights of student groups, especially faith-based groups. *Second*, the Department should state its appreciation of the role of religious student groups on campus, especially religious student groups historically targeted by universities. *Third*, the Department should set forth why it disagrees with and does not share the hostile views shown toward religion—and shown toward Christian student groups in particular—by educational institutions and commenters. *Fourth*, most important, the Department should recognize that under the First Amendment, religious student groups have the right to select their own leaders, that free speech "zones" are unconstitutional, and that colleges may not deny funding or recognition to religious student groups that require their leaders to share their faith and to live out their shared beliefs.

CONCLUSION

Universities should model the First Amendment values they're supposed to be teaching students; they should not have unilateral power to dictate how student organizations select their leaders. All students should be protected to gather together and freely speak and engage in the marketplace of ideas on campus under the First Amendment.

That is why the Department of Education was right to enact a regulation that prohibits colleges and universities from violating the First Amendment. The solution to disagreement and diverging views on campus is not to enable more government censorship. The answer is more speech.

Respectfully Submitted,

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[156] The Department should also take into account the Supreme Court's forthcoming decision in *303 Creative v. Elenis*, No. 21-476 (U.S.), which will clarify the interplay with the First Amendment and discrimination policies. It would also be appropriate to reopen the comment period after this decision to allow for full and reasoned decision making by the Department about its import.

ATTACHMENTS

Appendix 1 Formal complaint submitted to ED OCR with examples of colleges and universities that denied or delayed recognition to religious student organizations that ADF assisted

Appendix 2 Matthew S. Bowman & Mallory Rechtenbach, Alliance Defending Freedom, & Corey Miller, President/CEO Ratio Christi, E.O. 12866 Meeting, Religious Liberty and Free Inquiry Rule, Rulemaking RIN: 1840-AD72 (March 1, 2022)

Appendix 3 *Secular Student All. v. U.S. Dep't of Educ.*, Ratio Christi's Mot. to Intervene, Memo. in Supp., Miller Decl. in Supp., and Exs. 1–9.

Appendix 4 *Secular Student All. v. U.S. Dep't of Educ.*, Exs. 10–11

Appendix 5 *Secular Student All. v. U.S. Dep't of Educ.*, Exs. 12–14; Reply Brfs. in Supp. of Ratio Christi's Mot. to Intervene