March 24, 2023

SUBMITTED VIA FEDERAL eRULEMAKING PORTAL
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Dr. Miguel Cardona, Secretary of Education
Attention: Ashley Clark
U.S. Department of Education
400 Maryland Avenue SW
Room 2C185
Washington, DC 20202

Re: Comment on the Department's Notice of Proposed Rulemaking
Direct Grant Programs, State-Administered Formula Grant Programs
Agency/Docket Number: ED–2022–OPE–0157
RIN: 1840–AD72
Document Number: 2023–03670

Dear Secretary Cardona:

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Our organization is composed of former U.S. Department of Education ("Department") appointees who are experts in education law and policy, in particular the areas covered by the Department's proposed regulations.

On February 22, 2023, the Department's Office of Postsecondary Education published a notice of proposed rulemaking ("2023 NPRM") announcing plans to rescind regulations protecting religious student organizations ("RSOs") at public colleges and universities from discriminatory treatment on the basis of their exercise of First Amendment rights. The regulations the Department proposes to rescind, issued in September 2020 by the Department under Secretary Betsy DeVos, recognize as a material condition of federal direct grants and state-administered grants that a public institution of higher education not deny to an RSO benefits otherwise available to student organizations at that institution due to the RSO's "beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs."

The Department issued that rule ("2020 Rule") in response to President Donald Trump's Executive Order 13864 on improving free inquiry in higher education ("EO 13864")[1] and due to its grave concerns that the federal government, through its grant programs, is funding public colleges and universities that misapply or ignore U.S. Supreme Court precedent requiring that they respect the rights to freedom of speech, free exercise, and freedom of association of students and faculty on campus.

Less than three years later, with the sole evident variable being a new president in the White House, the Department's concerns have inexplicably evaporated. While pleading for the general public to accept that this administration remains committed to academic freedom and religious liberty, the Department proceeds to eradicate a vital tool for RSOs seeking to defend their First Amendment rights against pervasive threats, as documented extensively in this comment, of discriminatory treatment by public colleges and universities. It does so on grounds that, on any sustained level of scrutiny, collapse in on themselves and leave in their wake a purpose that is patently political, in defiance of federal law prohibiting agency rulemaking that is "arbitrary" or "capricious."[2]

DFI calls on the Department to recognize what it recognized less than three years ago, that student groups that come together to support religious beliefs currently in disfavor on college and university campuses are suffering discriminatory treatment at the hands of administrators purporting to carry out the public will, and that taxpayers should not fund such unconstitutional behavior that undermines freedom of expression and free inquiry at these institutions.

The Department should abandon its arbitrary, capricious, and ill-conceived plans to undermine the protection of RSOs' First Amendment rights at public colleges and universities and withdraw its proposal to rescind these important regulations.

I. Background

A. Recognition of Student Groups and the Rise in Discriminatory Treatment of RSOs

Because the Department in its brief NPRM ignores the context in which it issued the 2020 Rule, including the threats of derecognition and other invidious harms faced by RSOs at the hands of many public college and universities in recent decades, it is worth relating that background here.

Through their various "recognition" processes for the potentially hundreds of student groups on their campuses, colleges and universities wield a substantial amount of power as gatekeepers to vital benefits that may determine whether these groups wither or thrive. As the Christian Legal Society ("CLS") explains, college or university recognition generally means access to free meeting

[1] Exec. Order No. 13864, 84 Fed. Reg. 11,401 (Mar. 26, 2019) (hereinafter "EO 13864").
[2] 5 U.S.C. § 706(2)(A).

spaces on campus, listing on the institution's website, the ability to post announcements on campus and to online announcement boards, permission to participate in student activity fairs, and eligibility for event funding—including travel funds to bring an outside speaker to campus.[3]

As CLS explained in its public comment on the Department's rulemaking culminating in the 2020 Rule, RSOs have been meeting on public college and university campuses since the 1950s, if not earlier.[4] They began experiencing widespread discriminatory treatment at these institutions in the 1970s, when administrators began to claim, without legitimate basis, that they could not offer the benefits associated with recognition described above (including the provision of light and heat in meeting spaces) to RSOs due to the U.S. Constitution's prohibition of laws "respecting an establishment of a religion."[5] After the Supreme Court had disposed of such Establishment Clause claims in its seminal 1981 case *Widmar v. Vincent*,[6] some public colleges and universities began using their discrimination policies to justify withdrawing recognition and accompanying benefits from RSOs that had been operating, in some cases, for decades.[7]

Specifically, these public institutions argue that RSO standards requiring their leaders to affirm their commitment to certain beliefs informed by their religion violate policies prohibiting student groups from discriminating on the basis of status or belief.[8] Importantly, these public colleges and universities have used their nondiscrimination policies to pursue the derecognition of RSOs while failing to apply them on an equivalent basis to student groups, such as fraternities, sororities, or political party-affiliated clubs (*e.g.*, College Democrats, College Republicans), that have membership or leadership requirements based on status or belief.

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[3] Christian Legal Society, FAQ Regarding U.S. Department of Education's Proposal to Rescind Protections for Religious Student Organizations on Public College Campuses, 1, https://www.christianlawstudents.org/sites/default/files/site_files/Center%20Legislation/FAQ%20regarding%20Protecting%20Religious%20Student%20Groups.pdf.

[4] Letter from Kimberlee Wood Colby, Director of the Center for Law & Religious Freedom, Christian Legal Society, to Lynn Mahaffie, Deputy Assistant Secretary for Policy, Planning, and Innovation, Office of Postsecondary Education, Department of Education, Feb. 18, 2020, at 4 (hereinafter "CLS 2020 Comment"), *available at* https://www.regulations.gov/comment/ED-2019-OPE-0080-16196.

[5] *Id.*

[6] 454 U.S. 263, 270–275 (1981) (concluding that a public university could not rely on the Constitution's Establishment Clause to withdraw recognition and access to campus facilities from an RSO because it refused to state that its meetings were not "for purposes of religious worship or religious teaching").

[7] CLS 2020 Comment, *supra*, at 6 (citing Michael Paulson, *Colleges and Evangelicals Collide on Bias Policy*, N.Y. TIMES, Jun. 9, 2014, A1).

[8] *See, e.g.*, CLS 2020 Comment, *supra*, at 7 (listing multiple examples of the use of public institutions' nondiscrimination policies in attempts to withdraw recognition from RSOs on public college and university campuses).

B. Institutional Confusion Following *CLS v. Martinez*

In *Christian Legal Society Chapter of the University of California v. Martinez* (2010),[9] the Supreme Court decided the very narrow issue of whether a public law school had violated the free speech rights of a CLS chapter by denying it an exemption from a fictional policy, invented for the purpose of litigation,[10] requiring all recognized organizations to accept *any* student, regardless of status or belief, as a member or leader ("all-comers policy").[11] The case thus does *not* stand for the proposition that public colleges or universities may apply their nondiscrimination policies selectively to withdraw recognition from RSOs that require leaders or members to affirm certain beliefs informed by their religion.

Despite the case's exceedingly narrow reach, many public college and university administrators incorrectly interpreted *CLS v. Martinez* to authorize them to withdraw recognition and its associated benefits from RSOs that required such a statement of affirmation to become a leader or member.[12] Indeed, in its comment on the Department's 2020 rulemaking, CLS provided a litany of examples highlighting public college and university administrators' inappropriate use of nondiscrimination policies to target RSOs while exempting or ignoring the selective policies of other student groups:

- In 2010, Ohio State University inquired of its student government whether it should withdraw recognition from RSOs that maintained religious leadership or membership requirements. The student government replied that "every student, regardless of religious belief, should have the opportunity . . . to apply or run for a leadership position within those organizations." In 2011, the Ohio Legislature intervened, passing legislation preventing the

[9] 561 U.S. 661 (2010) (hereinafter "*CLS v. Martinez*").
[10] *Id.* at 711–712 (Alito, J., dissenting) (explaining how the Hastings College of the Law admitted at the outset of the litigation that its nondiscrimination policy "permits political, social and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs" but backtracked on this admission in its subsequent filings by inventing a novel "all-comers" policy that it could show no evidence of having written down or applied in the past).
[11] *Id.* at 669.
[12] *See, e.g.*, Letter from Michael Stokes Paulsen, Distinguished University Chair & Professor of Law, The University of St. Thomas (Minneapolis, Minnesota), to Lynn Mahaffie, Deputy Assistant Secretary for Policy, Planning, and Innovation, Office of Postsecondary Education, Department of Education, Feb. 18, 2020, at 2 (hereinafter "Paulsen 2020 Comment"), https://www.regulations.gov/comment/ED-2019-OPE-0080-15225 (noting the "confusion" *CLS v. Martinez* caused for college administrators and praising the 2020 proposed free inquiry rule for remedying that confusion).

university from withdrawing recognition of RSOs due to the leadership and membership requirements at issue.[13]

- In 2011, Texas A&M administrators pressured an RSO to remove from its policies a religious requirement for leaders and voting members, requiring legal intervention to prevent the group from having its recognition withdrawn and being forced to pay up to $7000 per year for access to meeting space.[14]

- In 2012, Boise State University informed RSOs that it planned to adopt a policy that would require withdrawal of recognition if these groups maintained their religious leadership requirements.[15] The Idaho Legislature responded with legislation protecting these RSOs from the university's threat.[16]

- In 2014, the California State University ("CSU") system implemented a new student organization policy that withdrew recognition from RSOs that required their leaders to affirm their religious beliefs, including some that had existed for over 60 years.[17] The university system delegated to students the responsibility to read the constitutions of student groups, revise them to comply with the system's policy, and return them to the groups with a warning that their recognition would be withdrawn if they failed to accept the changes.[18] In 2015, the RSO InterVarsity Christian Fellowship negotiated an agreement with CSU allowing them to return to campuses within the system but not permitting them to limit its leadership expressly based on religion.[19] The CSU nondiscrimination policy requiring all organizations—except for fraternities and sororities—to accept any enrolled student as a member or leader remains on the books.[20]

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[13] CLS 2020 Comment, *supra*, at 12.
[14] *Id.* at 11.
[15] *Id.* at 15.
[16] *Id.*
[17] *Id.* at 9.
[18] *Id.* at 10.
[19] *See* https://www.christianpost.com/news/small-miracle-cal-state-re-recognizes-intervarsity-as-official-student-group-after-stripping-ministrys-recognition-for-requiring-leaders-to-be-christian-140707/.
[20] *See* California State University Student Activities Policy, https://calstate.policystat.com/policy/10170470/latest/ ("No campus shall recognize any student organization unless its membership and leadership are open to all currently enrolled students at that campus, with the limited exception that a social fraternity or sorority may impose a gender limitation as permitted by Education Code Section 66273.").

- In 2015, Indiana University proposed a nondiscrimination policy that would prohibit RSOs from requiring their leaders to subscribe to the groups' religious beliefs.[21] On its website, the university made clear the selectivity of the policy in its application to RSOs, stating that such groups would not be able to enforce religious belief requirements for their leadership but that fraternities and sororities could still exclude individuals from membership based on their sex (thus distinguishing the policy from the all-comers policy at issue in *CLS v. Martinez*).[22] A coalition of Muslim, Jewish, Catholic, and Protestant student groups signed a letter opposing the policy.[23] One RSO leader emphasized the immense amount of work required to oppose the new policy and to cause the university, after an entire academic year had passed, to shelve plans to implement it: "Around the middle of the school year, I started to feel the toll of the amount of time I was devoting to this project in addition to my regular class load, law journal, moot court, and on-campus interviews for summer clerkships. It seemed that no matter how hard we worked, the university remained firm in its determination to enact the policy."[24]

- During the 2015–2016 school year, Southeast Missouri State University refused to recognize an RSO due to the group's requirement that its leaders affirm their religious beliefs. Only after lengthy pressure on the administration by several RSOs did the university agree to recognize RSOs that maintain leadership standards including affirmation of certain religious beliefs.[25]

- In 2016, the student bar association at the University of North Texas Dallas College of Law called on the law school not to recognize a CLS student chapter due to its religious leadership requirement. Law school administrators did not recognize the RSO until the second semester of the 2016–2017 academic year.[26]

- In 2017, Wayne State University warned the InterVarsity Christian Fellowship student group that it would lose recognition unless it changed its requirements that leaders affirm their religious beliefs,[27] requiring the student group to resort to litigation in federal court to vindicate its First Amendment rights.[28] In 2021, after several years of litigation, a federal district court granted InterVarsity's request for an injunction prohibiting Wayne State from

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[21] *Id.* at 8.
[22] *Id.* at 16.
[23] *Id.*
[24] *Id.* at 17.
[25] *Id.* at 19.
[26] *Id.*
[27] *Id.* at 7.
[28] *Id.* at 18.

revoking its recognized status and found that university administrators were entitled to qualified immunity only on one of InterVarsity's multiple claims.[29]

- In 2018, University of Iowa administrators informed its CLS chapter that it would lose its recognition because it required an affirmation of religious beliefs.[30] During the ensuing litigation, the University of Iowa filed a court document listing the 32 groups that would no longer be recognized under its policy, including Catholic, Evangelical Christian, Jewish, Muslim, Orthodox Christian, Sikh, and other RSOs.[31] The list included only faith-based groups.[32] In 2019, a federal district court held that the administrators had violated the First Amendment by withdrawing recognition from two of the RSOs and that they could not claim qualified immunity because their conduct had violated the "clearly established" rights of the students, thus exposing them to personal liability for their actions.[33] In 2021, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's judgment.[34]

- In 2019, the University of West Georgia revoked its recognition of Sigma Alpha Omega, a Christian women's student group, because it limited its membership to Christians. Only after the RSO obtained legal assistance to apply pressure on administrators did it regain university recognition.[35]

The confusion generated by the Supreme Court's decision in *CLS v. Martinez*, and the resulting discrimination against RSOs at universities across the country, is demonstrated by the adoption by at least 14 states of legislation protecting religious students at public colleges.[36]

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[29] *Intervarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785 (E.D. Mich. 2021).
[30] CLS 2020 Comment, *supra*, at 7.
[31] *Id.* at 8.
[32] *Id.*
[33] *Id.* at 18 (quoting *InterVarsity Christian Fellowship v. University of Iowa*, 408 F. Supp.3d 960, 990 (S.D. Iowa 2019)).
[34] *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 865 (8th Cir. 2021) (hereinafter "*Intervarsity*").
[35] CLS 2020 Comment, *supra*, at 19.
[36] As of February 2020, these states were Arizona, Ohio, Idaho, Tennessee, Oklahoma, North Carolina, Virginia, Kansas, Kentucky, Louisiana, Arkansas, Iowa, South Dakota, and Alabama. CLS 2020 Comment, *supra*, at 19–20.

C. The Department's 2020 Free Inquiry Rule

On March 21, 2019, the President signed EO 13864.[37] For the purpose of advancing federal government policy to "encourage institutions [of higher education] to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated policies regarding freedom of speech for private institutions," the order directs federal agencies, including the Department, "to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies."[38] As of the time of this writing, EO 13864 remains in effect and thus binds the Department.[39]

On January 17, 2020, the Department published a NPRM announcing its plans to carry out the instructions of EO 13864 by, among other things, amending federal regulations setting out the material conditions of direct grants and state-administered grants to institutions of higher education to add conditions related to free inquiry and academic freedom.[40] On September 23, 2020, after receiving and considering over 17,000 public comments on the proposed rule, the Department published its final rule, the purpose of which was "to encourage institutions of higher education to foster environments that promote open, intellectually engaging, and diverse debate . . . ."[41]

In pertinent part, the 2020 Rule added two major material conditions to the Department's direct and state-administered grant programs for higher education. First, the rule requires public institutions that receive grants under these programs to comply with First Amendment guarantees, "including protections for freedom of speech, association, press, religion, assembly, petition, and academic freedom," and requires private institutions that receive grants under these programs to "comply with [their] own stated institutional policies regarding freedom of speech, including academic freedom . . . ."[42] To aid with the enforcement of these conditions, the rule directs the grant recipients to send to the Secretary a copy of any final, non-default judgment by a state or federal court that a public institution has violated the First Amendment or that a private institution has violated its institutional policy regarding freedom of speech or academic freedom.[43]

Second, the rule prohibits public colleges and universities that receive federal direct or state-administered grants from denying "to any student organization whose stated mission is religious

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[37] EO 13864, *supra*.
[38] *Id.* at 11,401–11,402.
[39] *See* https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021 (containing a full list of President Biden's executive orders).
[40] 85 Fed. Reg. 3190, 3191, 3196 (Jan. 17, 2020) (hereinafter "2020 NPRM").
[41] 85 Fed. Reg. 59,916, 59,916 (Sep. 23, 2020) (hereinafter "2020 Rule").
[42] *Id.* at 59,978–59,980.
[43] *Id.*

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 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."[44]

The Department explained that it was issuing the 2020 Rule pursuant to EO 13864, the First Amendment to the U.S. Constitution, and the Secretary's general regulatory authority "to ensure that all institutions of higher education . . . that receive Federal research or education grants from the Department 'promote free inquiry.'"[45] It explained, "The hallmark of education includes an opportunity to learn from diverse viewpoints and to consider and be challenged by ideas, opinions, theories, and hypotheses."[46] The Department emphasized that its provisions in support of free inquiry are aligned with the Higher Education Act of 1965, which recognizes that "an institution of higher education should facilitate the free and open exchange of ideas"[47] and that "no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution."[48]

The rule noted the importance the U.S. Supreme Court has placed on academic freedom, quoting *Keyishian v. Board of Regents of the University of the State of New York* for the proposition that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . ." and *Tinker v. Des Moines Independent Community School District*, where the Court acknowledged that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[49] According to the Department in 2020, "These final regulations help ensure that students and teachers will retain their constitutional rights to freedom of speech at public institutions."[50]

Specifically in relation to student organizations, the Department explained in its 2020 NPRM that such groups "enable individuals sharing common characteristics or beliefs to unite towards

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[44] *Id.* at 59,979, 59,980.
[45] *Id.* at 59,916 (footnotes omitted).
[46] *Id.* at 59,964.
[47] 20 U.S.C. § 1011a(a)(2)(C), *quoted in* 2020 Rule, *supra*, at 59,964.
[48] 20 U.S.C. § 1011a(a)(1), *quoted* in 2020 Rule, *supra*, at 59,964.
[49] 2020 Rule, *supra*, at 59,916 (quoting *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969)).
[50] *Id.*

common goals, even if those goals are not shared by a majority of the student body or the public institution's administration. This right to expressive association includes the right of a student organization to limit its leadership to individuals who share its religious beliefs without interference from the institution or students who do not share the organization's beliefs."[51]

The text and preamble of the 2020 Rule were repeatedly clear about what kind of institutional policies the rule prohibits and that if a public college or university merely provides equal treatment to all student groups, it would not be found in violation of the policy. "By its very definition, a neutral policy of general applicability binds *all* organizations, and thus is permissible under §§ 75.500(d) and 76.500(d); therefore, an authentic all-comers policy would be neutral and generally applicable."[52]

Later, it reiterated: "A public institution of higher education may adopt a generally applicable policy, such as an authentic all-comers policy, which applies equally to all student organizations and which requires all student organizations to allow any student to participate, become a member, or seek leadership positions in the organization, regardless of the student's status or beliefs. A public institution also may adopt a generally applicable policy that allows all student organizations to set their own qualifications for membership and leadership. A public institution also may adopt other types of generally applicable policies with respect to student organizations as long as such policies apply equally to all student organizations, including religious student organizations. None of these scenarios give[s] religious student organizations an exemption or preferential treatment, but merely equal treatment, which is required under the First Amendment."[53]

Later, it reiterated once again: "Public institutions remain free to adopt generally applicable membership policies, such as an all-comers policy, but a public institution may not selectively enforce its policies to target religious student organizations so as to deny them any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution."[54]

And yet again, it reiterated: "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. Therefore, rather than giving religious student organizations special treatment, the regulation explicitly requires the opposite outcome—that religious student organizations at public institutions be afforded equal treatment."[55]

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[51] 2020 NPRM, *supra*, at 3214 (footnotes omitted).
[52] 2020 Rule, *supra*, at 59,939.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 59,940.

And another time, it reiterated: "[A] university does not have to choose between compliance with State law and securing Federal funding in the form of grants; it is free to enforce an all-comers policy, which is permissible under Martinez, in order to comply with any State anti-discrimination laws as long as it applies that policy equally to all student organizations as stipulated in *Martinez*."[56]

Finally, in the Department's notice of the reporting process for information under the rule, it stated *once again* that "an 'all-comers' policy as described in *Christian Legal Society v. Martinez* does not violate the Final Rule's requirement regarding equal treatment of religious student organizations at public institutions in 34 CFR 75.500(d) and 34 CFR 76.500(d)."[57]

The text of the final regulations thus explicitly bars discriminatory treatment, not equal treatment, and the Department made exhaustively clear that any policy that treats organizations equally would be permitted under the regulations.

The Department provided for administrative enforcement to reinforce the associational and expressive rights of students at public colleges and universities, beyond any right of students to engage in costly and time-consuming legal action against their public college or university. The 2020 NPRM noted that if institutions were in violation of this material condition of their grants, "the Department could pursue existing remedies for noncompliance, which include imposing special conditions, temporarily withholding cash payments pending correction of the deficiency, suspension or termination of a Federal award, and potentially debarment."[58]

The 2020 Rule became effective November 23, 2020.[59]

D. The Department's 2021 Blog Post

On August 19, 2021, less than nine months after the 2020 Rule became effective—and with a new president in the White House—the Department published a blog post authored by the acting head of its Office for Postsecondary Education previewing plans to roll back the current regulations' protections of free inquiry and academic freedom.[60]

While observing that "the First Amendment requires that public colleges and universities not infringe upon students' rights to engage in protected free speech and religious exercise, such as

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[56] *Id.* at 59,942.
[57] 85 Fed. Reg. 75,310, 75,311 (Nov. 25, 2020) (citation omitted).
[58] 2020 NPRM, *supra*, at 3214 (citing 34 C.F.R. § 75.901 (cross-referencing 2 C.F.R. § 200.338); 2 C.F.R. § 180.800).
[59] 2020 Rule, *supra*, at 59,916.
[60] *See* https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/.

associating with fellow members of their religious communities and sharing the tenets of their faith with others," the blog post notes that the intersection of such rights with student organization policies and federal law and policy can create "complex questions" that "[p]ublic colleges and universities, their students, and the courts have historically been responsible for resolving . . . ."[61] Apparently with a desire to absolve itself of any obligation to deal with any such "complex questions" involved in protecting the speech and associational rights of religious students, the blog post announces that "we anticipate publishing a notice of proposed rulemaking in the Federal Register to propose rescinding parts of the Free Inquiry Rule."[62]

E. The Department's 2023 NPRM

The Department's 2023 NPRM falsely assures the public about the Department's commitment to the rights to free speech and religious liberty while simultaneously undercutting those rights by taking a sledgehammer to existing protections for religious students and RSOs facing discriminatory treatment from hostile administrators at public college and university campuses.

Following the rhetorical pattern of its 2021 blog post, the 2023 NPRM echoes the hollow claim that it "deeply values religious liberty and free expression,"[63] then proposes to rescind completely 34 C.F.R. §§ 75.500(d) and 76.500(d), which protect the rights of students and RSOs to expressive association by making institutional compliance in protecting those rights a material condition to continue to receive federal direct and state-administered grants.[64]

The 2023 NPRM cites three reasons for rescinding these current regulations. First, the Department asserts that the current regulations are unnecessary to protect the exercise of First Amendment rights, claiming that removal of the protections for students and RSOs provided by the current regulations "would not affect" requirements for public colleges and universities "to comply with First Amendment guarantees, including the free exercise of religion."[65]

Second, the Department points to concerns that "§§ 75.500(d) and 76.500(d) create confusion about the interplay between these regulations and other nondiscrimination requirements," particularly that these regulations "could be interpreted to require [institutions of higher education] to go beyond what the First Amendment mandates and allow religious student groups to discriminate against vulnerable and marginalized students."[66] In the same vein, institutional stakeholders supposedly commented that enforcing these protections "would undermine individual

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[61] *Id.*
[62] *Id.*
[63] 88 Fed. Reg. 10,857, 10,860 (Feb. 22, 2023) (hereinafter "2023 NPRM").
[64] *Id.* at 10,864.
[65] *Id.* at 10,860.
[66] *Id.* at 10,859.

institutions' ability to tailor their policies to best meet the needs of their student populations and campuses within existing legal constraints" and called on the Department to allow decision-making on these policies to "remain at the institutional level, with the entities best positioned to ensure respect for religious expression and exercise and protection against unlawful discrimination for students on campuses."[67]

Third, the Department claims that investigating institutions for potential violations of §§ 75.500(d) and 76.500(d) and enforcing these material conditions impose undue burdens on departmental resources. "The First Amendment is a complex area of law with an intricate body of relevant case law. Closely contested cases, such as those in which there is some uncertainty about whether a public institution's policy is neutral and generally-applicable or about whether the institution has applied such policies without discriminating on the basis of a religious organization's beliefs or character, are typically very fact-intensive, and litigated thoroughly through the courts. A proper review of an alleged violation could require the Department to devote extensive resources to investigate the allegation given the nature of these cases."[68] Yet, although the Department can point to no instance where it has had to review an alleged violation of the 2020 Rule, it complains that "no office in the Department has historically been responsible for investigating First Amendment violations."[69] Despite its concerns related to the burdens of enforcing the regulations, the Department reveals elsewhere in its 2023 NPRM that it "has not received any complaints regarding alleged violations of §§ 75.500(d) and 76.500(d) at the time of publishing this document."[70] The Department's concerns are simply pretextual and reflect an inappropriate animus toward student religious groups.

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[67] *Id.* Notably, the Department admits in the NPRM that it "also heard from representatives of other faith-based organizations that believe that the regulations fairly state current law, provide needed protection for students of all faiths, and ensure religious students feel welcome on public college campuses." *Id.* Other than providing cursory and unpersuasive reasoning to justify its proposed regulations, however, the Department fails to directly engage with these views, which demonstrate the value of the 2020 Rule in protecting the associational and expressive rights of "students of all faiths." This failure also demonstrates that the Department has no interest in addressing the view of faith-based groups and the arbitrary and capricious nature of its rulemaking.
[68] *Id.* at 10,861.
[69] *Id.*
[70] *Id.* at 10,863.

II. The Department's Faulty "Reasons" in Favor of Rescinding §§ 75.500(d) and 76.500(d) Are Arbitrary and Capricious.

A. The Department's Argument that the Protections Provided by §§ 75.500(d) and 76.500(d) Are Unnecessary Is Arbitrary and Capricious.

The Administrative Procedure Act ("APA") requires courts to set aside federal agency rulemaking that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[71] The Department's conclusion that it should rescind §§ 75.500(d) and 76.500(d) because the First Amendment already protects the rights of students to freedom of speech, freedom of association, and religious liberty is based on flawed reasoning and is thus arbitrary and capricious.

The Department proposes to rob students at public colleges and universities of an essential tool that clarifies the responsibility of these institutions to respect their First Amendment rights to form RSOs and apply university policies equally to all student groups, deters them from violating these rights, and assists students in vindicating these rights without resorting to litigation that is costly to both parties—sometimes prohibitively so.

In place of the benefits of these clearly defined regulations, the Department proposes to "continue to encourage all [institutions of higher education] to protect students' opportunities to associate with fellow members of their religious communities, to share the tenets of their faith with others, and to express themselves on campus about religious and nonreligious matters alike."[72] In other words, the Department plans to replace current regulations that condition concrete funding for public colleges and universities on their respect for students' First Amendment rights with a "pretty please" to institutions begging that they respect the Constitution. The stark difference between these two scenarios, combined with the many examples examined earlier in this comment of public colleges and universities violating or threatening to violate students' First Amendment rights under the Department's currently preferred regulatory regime, throws into sharp relief the absurdity of the Department's argument that the regulations are not necessary to protect students' speech, religious liberty, or associational rights. The Department's reasoning is therefore arbitrary and capricious.

In its 2023 NPRM, the Department pointedly ignores two key benefits of the current regulations that undermine the Department's argument that they are unnecessary to protect the rights of students at public colleges and universities. First, the current regulations clarify the responsibilities of administrators of such institutions toward their students, giving them information about what the Constitution and the Department require when they consider whether to not recognize or

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[71] 5 U.S.C. § 706(2)(A).
[72] 2023 NPRM, *supra*, at 10,862.

withdraw recognition from an RSO and helping them to avoid costly and protracted litigation.[73] Second, in cases where an administrator at a public college or university is hostile toward the religious purposes of an RSO—or is primed to cave in to pressure from students or faculty members who are hostile to an RSO—the current regulations, by threatening continued grant funding to the institution, serve as a powerful deterrent against carrying out unconstitutional conduct in discriminating against that RSO.[74]

The University of Iowa's deregistration of two RSOs due to their religious leadership standards is instructive on this point. After the university withdrew its recognition—in 2017 and 2018, respectively—due to a novel interpretation of its anti-discrimination policy, these RSOs fought a years-long legal battle with the university over its selective application of the policy that ended with a legal victory in the U.S. Court of Appeals for the Eighth Circuit in 2021. Meanwhile, the university performed a compliance review of this policy that targeted dozens of RSOs, including those of minority religions, for deregistration.[75]

Although the outcome of this lengthy legal battle was a victory for the RSOs, the resources the students and university were required to pour into the litigation were considerable, as the Department itself recognizes in the 2023 NPRM, stating that plaintiffs were awarded $533,508 in attorney's fees and an estimated 873 billed hours of expenses.[76] The Department arbitrarily and capriciously considers these figures in its discussion of the burdens it claims it will experience investigating allegations under and enforcing §§ 75.500(d) and 76.500(d) without applying the same reasoning to its discussion of the need for these regulations, which is evident in light of these costs.

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[73] *See, e.g.*, CLS 2020 Comment, *supra*, at 20 ("The proposed regulations will help college administrators avoid litigation and personal liability. By clarifying that college administrators may not exclude religious student groups from campus, the proposed regulations should prevent costly litigation, with its wasteful expenditure of taxpayers' money. Unnecessary confusion has arisen on many college campuses as a result of some college administrators denying recognition to religious student groups if, as often happens, the administrators mistakenly believe the college has a policy that it does not have, or they fail to apply their policy evenhandedly.").

[74] *Cf.* https://www.nationalaffairs.com/publications/detail/restoring-free-inquiry-on-campus ("[U]nofficial federal guidance on sexual harassment in the Obama years, issued using informal mechanisms like 'Dear Colleague' letters, proved to have a catalytic effect on higher education. Colleges and universities are risk averse and enormously concerned about getting crosswise with Washington. The degree to which executive action in support of free and open inquiry may alter the calculus of campus leaders when it comes to speech codes and campus policies should not be underestimated.").

[75] *InterVarsity*, *supra*, at 864.

[76] 2023 NPRM, *supra*, at 10,861 n.36.

Armed with the text of the current regulations, which clearly prohibit the University of Iowa's deregistration of the two RSOs on the basis of their leadership standards and threaten the university with defunding if they fail to comply, it is extremely likely that the deregistered RSOs would not have been required to vindicate their rights in any court of law—much less fight for their cause up to and in an appellate court. The University of Iowa also would not have been forced to spend substantial sums of money that it could otherwise have spent on education and research. The benefits of clarification of constitutional standards and deterrence against denial of constitutional rights are obvious in the context of this litigation.

The Department must examine its proposal to rescind §§ 75.500(d) and 76.500(d) in light of the University of Iowa litigation described above and state whether its proposal is likely to result in more or less litigation and other legal costs on behalf of RSOs to vindicate their rights than under the current regulations. If the Department finds that rescinding these regulations would result in more litigation between RSOs and universities—an outcome DFI believes is highly likely—the Department must calculate and balance those costs against any claimed benefits of the rescission. Otherwise, it is acting in an arbitrary and capricious manner.

Not all RSOs in America have the resources of the RSOs that took the University of Iowa to court and won—and not all could expect to be awarded attorneys fees at the end of their costly litigation. Many RSOs may not be willing to risk the reputational injuries among fellow students, student groups, or faculty that might be associated with taking a public college or university to court—especially RSOs inspired by religions that have a relatively small number of adherents in this country compared to Christianity, such as Islam and Sikhism. These RSOs and their student members would undoubtedly prefer to work behind the scenes *with* administrators to remedy the violation of their First Amendment rights rather than file a costly and high-profile lawsuit *against* the administrators to vindicate these rights. §§ 75.500(d) and 76.500(d), by conditioning grant funding on adherence to the First Amendment, make it much more likely that administrators will be primed to cooperate with these RSOs rather than risk a loss in vital funding.

The Department must explain whether (and why) it believes *all* RSOs suffering violations of their First Amendment rights have the resources to sue their public colleges or universities in state or federal court. It must also explain whether (and why) it believes some RSOs will be less likely to assert their constitutional rights in courts due to reputational concerns on campus. It must also explain whether it believes the RSOs that are less likely to be able to afford to pursue litigation or more likely to fear reputational injuries as a result of this litigation are more likely to be targeted with discriminatory treatment on the basis of their First Amendment rights at public colleges and universities.

If the Department agrees with DFI that cost or reputational concerns are likely to deter some RSOs from pursuing litigation, then it must explain why it is taking away a vital tool of these vulnerable RSOs (such as those RSOs associated with minority religions) in persuading institutions not to

violate their First Amendment rights without resorting to litigation and balance these costs against the claimed benefits of the proposed rescission. If it does not offer an explanation of these issues, as well as calculate the cost of rescission to RSOs, then it is acting in an arbitrary and capricious manner.

In its 2023 NPRM, the Department arbitrarily and capriciously ignores the clarificatory and deterrent effects of the current regulations and seems to think that taking one's college to court is inexpensive, simple, and not fraught with negative potential consequences to students' education, credentials, and future career.[77] Instead of taking away this tool from RSOs, the Department should abandon its proposed rulemaking and enforce the protections of §§ 75.500(d) and 76.500(d).

B. The Department's Failure to Consider the Evidence It Possesses on the Frequency of Violations of RSOs' First Amendment Rights Is Arbitrary and Capricious.

Prior to publishing the 2020 Rule, the Department received a substantial amount of evidence that the prevalence of discriminatory treatment of RSOs justifies administrative enforcement of their free speech and religious liberty rights as a material condition of federal direct and state-administered grants. Now, not even three years later, the Department almost completely ignores this evidence, and when it does cite evidence of the widespread nature of these violations, it does so merely in an unpersuasive and conclusory attempt to justify abandoning administrative enforcement of the provisions (because it claims, without factual support or data, enforcement would be unduly burdensome to the Department). This failure to properly weigh the evidence in its 2023 NPRM is arbitrary and capricious.

By referencing facts recited in CLS's public submission in response to the 2020 NPRM, DFI has already cited 10 examples of the prevalence of selective, discriminatory treatment of RSOs at public colleges and universities for exercising religious standards for leadership or membership. In at least four of those instances, the RSOs suffering the discriminatory treatment were required to resort to legal pressure or litigation to vindicate their rights; in at least two instances, the state legislature was constrained by events to pass a law to protect RSOs' rights to maintain religious leadership or membership standards. These examples clearly demonstrate widespread confusion among public college and university administrators in the wake of *CLS v. Martinez* about their constitutional obligation to implement their nondiscrimination policies in an even-handed manner that does not burden religious students' exercise of their First Amendment rights—and consequently the need for the current regulations.

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[77] *See, e.g.*, 2023 NPRM, *supra*, at 10,861 ("If IHEs *do* discriminate against religious student organizations on the basis of the organizations' beliefs or character, such organizations can and do seek relief in Federal and State courts . . . .") (emphasis in original).

Indeed, these examples are but a few of the "overwhelming" and "tremendous" number of comments and "abundant" evidence the Department cited in the preamble of its 2020 Rule that it determined at the time provided a compelling case for the Department to make protection of RSOs' First Amendment rights a material condition of continuing to receive federal grants.[78] In light of the evidence provided by the comments and ongoing litigation over the First Amendment rights of RSOs due to the confusion generated by *CLS v. Martinez*,[79] the Department determined that it must protect the rights of students attending public colleges and universities receiving federal grants to freedom of speech, freedom of association, and freedom of religious exercise associated with the First Amendment. The Department does not cite any evidence or data to support a reversal of this determination.

The Department does not (and cannot) deny that discriminatory treatment of RSOs on public college and university campuses across the country is a problem, but it fails to mention this

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[78] *See, e.g.*, 2020 Rule, *supra*, at 59,940 ("The overwhelming number of comments in support of these final regulations demonstrate that there are instances in which religious student organizations are treated unequally and discriminated against on college campuses, and support our determination that these final regulations are necessary to remedy such discrimination against religious student organizations."); *id.* at 59,941 ("The overwhelming number of comments received in support of these final regulations regarding religious student organizations and recent case law about religious student organizations being denied the rights and benefits afforded to other student organizations at public institutions demonstrate these final regulations are indeed necessary." (citing *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960 (S.D. Iowa 2019); *Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 899 (S.D. Iowa 2019)); *id.* at 59,944 ("[T]he Department received a tremendous number of comments replete with examples of the differential treatment that faith-based organizations suffer compared to secular student organizations, only some of which are described above. These anecdotes concerned religious student organizations at hundreds of schools across the country; came from national nonprofit organizations, professors, faculty advisors, students, and lawyers; and described experiences that occurred over decades."); *id.* at 59,941 ("Bias against religion and religious student organizations is a growing problem as many commenters noted that public institutions have become increasingly less diverse and more hostile towards religious student organizations. This trend is caused by institutions moving away from the First Amendment and seeking to establish viewpoint uniformity, which is not good for those in the minority or the majority."); *id.* at 59,943 ("Given the abundant evidence noted by commenters regarding schools 'denying generally available benefits' to religious groups 'solely on account of religious identity,' these regulations are necessary to make the guarantees in the First Amendment, including the Free Exercise Clause, a reality at public institutions." (footnote omitted)).

[79] *See, e.g.*, 2020 Rule, *supra*, at 59,944 (citing *Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885 (S.D. Iowa 2019)); *id.* at 59,964 (citing *Apodaca v. White*, 401 F. Supp. 3d 1040 (S.D. Cal. 2019), where a federal district court held that California State University San Marcos had violated the First Amendment rights of a pro-life student organization in allocating student fee funds)).

evidence in its 2023 NPRM when weighing the true costs of rescinding §§ 75.500(d) and 76.500(d) against any claimed benefits of the proposed rescissions. Tellingly, with regard to the Department's claim to "deeply value" academic freedom and religious liberty on campus, the agency only deploys examples of recent and ongoing litigation with regard to RSOs to demonstrate that it should do *nothing* to protect RSO's First Amendment rights (beyond merely suggesting to public colleges and universities that they respect the First Amendment rights of their students and faculty). Specifically, the Department cites at least five court cases involving claims of First Amendment violations by student groups at colleges and universities in several states merely to show that "the Department's longstanding practice was to defer to courts to adjudicate First Amendment matters, including those involving religious student organizations, and to order appropriate remedies without Departmental involvement."[80] While the Department considers these cases as examples of the costs that *it* might incur to safeguard student rights and the use of federal funding by enforcing §§ 75.500(d) and 76.500(d), the Department arbitrarily and capriciously fails to calculate the uncontested costs that *students and RSOs* will suffer if the Department unwisely rescinds these regulations.

If it proceeds with rescinding §§ 75.500(d) and 76.500(d), the Department must explain why it is doing so considering the "overwhelming" and "tremendous" number of comments citing "abundant" evidence of widespread discriminatory treatment of RSOs on their First Amendment rights that it received less than three years ago, in the 2020 rulemaking, as well as the evidence of recent and ongoing litigation to which it refers in the 2023 NPRM. It must examine each of the 10 examples of the targeting of RSOs by public colleges and universities summarized previously in this comment and explain whether the rescission of §§ 75.500(d) and 76.500(d) would saddle RSOs and affiliated students in similar positions as those described with additional costs in vindicating their First Amendment rights.

The Department must specifically consider the costs of the proposed rescission of the 2020 Rule on the protection of First Amendment rights of student groups formed on the basis of minority religions and whether these religions are at risk of marginalization due to the rule's rescission. The Department then must calculate and properly weigh the costs of the proposed rule for students who are currently protected by the current regulations against any claimed benefits.

If the Department fails to do any of these things, then it is acting in an arbitrary and capricious manner.

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[80] 2023 NPRM, *supra*, at 10,861 (citing, in footnotes 32 and 38, multiple instances of recent litigation and complaints filed against institutions alleging violations of the First Amendment).

C. The Department's Failure to Consider Its Vital Interest in Not Funding Public College and University Programs or Activities that Violate Students' First Amendment Rights Is Arbitrary and Capricious.

In its 2023 NPRM, the Department unconvincingly asserts that the current regulations are unnecessary because RSOs and affiliated students may already assert their First Amendment rights in federal and state courts. This assertion completely ignores that the Department has an entirely separate and critical interest in conditioning federal grant funding on public colleges and universities' respect for First Amendment rights: the interest of the federal government in denying funding to institutions of higher education that do not respect academic freedom and free inquiry of students and faculty on their campuses and reserving such funding for colleges and universities that respect these bedrock principles.

The federal government currently spends tens of billions of dollars on research and development at institutions of higher education, comprising approximately roughly 60 percent of these institutions' funding in this area.[81] As Frederick Hess and J. Grant Addison explained in 2018, "The size and nature of Washington's investment give it a clear stake in ensuring that colleges and universities that take federal research funds adhere to the tenets of responsible science—including the assurance that research questions, methods, and reporting will be guided by an inviolable commitment to free inquiry."[82]

As the 2020 Rule repeatedly recognized, Congress has expressed numerous times in federal laws its disapproval of federal funding of institutions of higher education that violate free speech and association protections. For instance, it has stated that "no student attending an institution of higher education . . . should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under [numerous] education program[s], activit[ies], or division[s] of the institution[s] directly or indirectly receiving financial assistance."[83] Congress has rightly recognized that "an institution of higher education should facilitate the free and open exchange of ideas" and "students should not be intimidated, harassed, discouraged from speaking out, or

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[81] https://www.nationalaffairs.com/publications/detail/restoring-free-inquiry-on-campus (stating that, as of 2015, the federal government spent nearly $38 billion of research and development funds at institutions of higher education).

[82] *Id.* ("When it comes to research funded by federal taxpayers, . . . it's imperative that recipients operate in institutions committed to open inquiry—where hypotheses can be generated and research questions pursued freely, regardless of the feathers they ruffle or feelings they hurt. Researchers cannot fear that the wrong topic, point of view, terminology, or conclusion will run afoul of university strictures or prevailing sentiments.").

[83] 20 U.S.C. § 1011a (cited in 2020 Rule, *supra*, at 59,917).

discriminated against" due to their ideas or expression of those ideas.[84] Since 1871, Congress has provided for the liability of government officials acting in their official capacity who violate the First Amendment, including those on campus.[85] In the preamble of its 2020 Rule, the Department cited the Religious Freedom Restoration Act ("RFRA") as a basis for §§ 75.500(d) and 76.500(d), asserting that "[t]hese final regulations as material conditions of a Department's grant . . . will help ensure that any entity, acting on behalf of the Department with respect to a grant, does not substantially burden a person's free exercise of religion" in violation of RFRA.[86]

In 2020, the Department also wisely recognized that its interest in diverting federal funding from institutions of higher education that do not respect free inquiry is "intertwined" with its interest in funding only programs that respect free speech and association on campus.[87] The U.S. Supreme Court in *CLS v. Martinez* agreed that discrimination by institutions of higher education against student groups on the basis of their speech has impacts on the quality of those institutions' educational programs: "A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process."[88] As Justice Anthony Kennedy explained in his concurrence in that case, "Many educational institutions, including respondent Hastings College of the Law, have recognized that the process of learning occurs both formally in a classroom setting and informally outside of it. Students may be shaped as profoundly by their peers as by their teachers. Extracurricular activities, such as those in the Hastings 'Registered Student Organization'

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[84] 20 U.S.C. § 1011a(2)(C)–(D) (cited in 2020 Rule, *supra*, at 59,917).
[85] 42 U.S.C. § 1983 (cited in 2020 Rule, *supra*, at 59,917).
[86] 2020 Rule, *supra*, at 59,942 n.98.
[87] *Id.* at 59,916–59,917 ("[A]cademic freedom is intertwined with, and is a predicate to, freedom of speech itself; and injury to one is tantamount to injury to both. Academic freedom's noble premise is that the vigilant protection of free speech unshackled from the demands and constraints of censorship will help generate new thoughts, ideas, knowledge, and even questions and doubts about previously undisputed ideas. Although academic freedom's value derives itself from the fact that its 'results . . . are to the general benefit in the long run,' academic freedom is also inherently important in a free society.") (footnotes omitted); *id.* at 59,917 ("When free speech is suppressed, academic freedom is the casualty many times over, 'for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.' Neither harm is tolerable, and these regulations endeavor to protect academic freedom, as a part of free speech, at institutions of higher education." (quoting Chairman's Letter to the Fellows of the Yale Corporation, Report of the Committee on Freedom of Expression at Yale, Yale University (Dec. 23, 1974)); 2020 NPRM, *supra*, at 3212 ("The Supreme Court has long deemed the axiom 'that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech' to be 'beyond debate.' (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)).
[88] *CLS v. Martinez*, *supra*, at 687 (citing *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 831 n.4 (2002)).

program, facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self. The Hastings program is designed to allow all students to interact with their colleagues across a broad, seemingly unlimited range of ideas, views, and activities."[89]

The 2020 Rule made clear that one of its key purposes was to avoid directing federal funding toward programs in higher education that do not promote free inquiry, whether or not students at the relevant institutions choose to engage in litigation to enforce their First Amendment rights: "[T]he Department endeavors to ensure that all institutions of higher education . . . that receive Federal research or education grants from the Department 'promote free inquiry.' Denying free inquiry is inherently harmful at any institution of higher education because students are denied the opportunity to learn and faculty members are denied the opportunity to freely engage in research and rigorous academic discourse."[90] The Department recognized in 2020 that it has an interest in only providing federal grant funding to organizations that respect free inquiry, including by not selectively targeting RSOs that have religious leadership or membership requirements with threats of derecognition based on the exercise of their First Amendment rights. That interest certainly has not abated in that time.

Inexplicably, however, the Department makes no mention of such an interest and implies that this interest does not exist, because it does not explicitly consider the costs to the Department and to taxpayers in rescinding the protections of §§ 75.500(d) and 76.500(d) in preventing the Department's funding for institutions of higher education that violate free speech, associational, and religious liberty rights. The interest of the Department in enforcing these material conditions is not and should not be totally dependent on the rights of students or RSOs to litigate their claims in state or federal court. Whether or not those students choose to do so, the Department maintains a separate and distinct interest in not funding these institutions.

The Department must consider the costs of rescinding §§ 75.500(d) and 76.500(d) on its ability to prevent billions of dollars in taxpayer funding for public colleges and universities that do not respect free inquiry and weigh these costs against any claimed benefits of the rescission. If it does not consider this cost of its rescission of the current regulations, then it is acting in an arbitrary and capricious manner.

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[89] *Id.* at 704–705 (Kennedy, J., concurring) (citations omitted).
[90] 2020 Rule, *supra*, at 59,916 (footnotes omitted); *see id.* at 59,917 ("[I]nstitutions that participate in Federal programs under Title III and Title V of the HEA and their students should be able to freely exercise their religion in accordance with the First Amendment and RFRA." (footnote omitted)); *id.* at 59,917–59,918 ("These final regulations help ensure that religious institutions as well as their students fully retain their right to free exercise of religion with respect to the Department's programs under Title III and V of the HEA.").

The Department also must contend with its recognition in the 2020 Rule that §§ 75.500(d) and 76.500(d) may be necessary for the Department to enforce RFRA's prohibitions on institutions of higher education that burden the exercise of their students' right to the free exercise of their religion by discriminating against RSOs on their leadership or membership standards. If the Department follows through with rescinding these material conditions, then it must explain why it is not providing support to institutions to violate RFRA, thus contravening federal law. If it does not do so, then it is acting in an arbitrary and capricious manner.

Finally, the still effective EO 13864 binds the Department in ensuring that federal funding goes to institutions of higher education that promote free inquiry.[91] The Department must therefore explain how rescinding the protections of freedom of expression, freedom of association, and religious liberty contained in §§ 75.500(d) and 76.500(d) does not defy EO 13864's directive to enhance such protections. If it fails to do so, then it is acting in an arbitrary and capricious manner.

D. The Department's Contention that §§ 75.500(d) and 76.500(d) Have Caused Confusion Is Arbitrary and Capricious.

In support of its proposal to rescind the important protections for RSOs provided in §§ 75.500(d) and 76.500(d), the Department contends that these provisions have "engendered confusion and uncertainty about what institutions must do to avoid risking ineligibility for covered Department grants" and regarding their "interplay [with] other nondiscrimination requirements, including the longstanding requirements to comply with Federal civil rights laws and regulations."[92] The 2020 Rule clearly explains how those policies do not violate federal civil rights laws and regulations; the Department offers no reasoned explanation, evidence, or data to support an argument that the 2020 Rule engenders confusion for institutions.

There is no question that the text of §§ 75.500(d) and 76.500(d) requires no special exemptions for RSOs in the application of public colleges or universities' policies. As described above, the Department spelled out repeatedly in the preamble to the 2020 Rule that the current regulations prohibit only selective, discriminatory treatment of RSOs on the basis of policies, including leadership or membership standards, and do not affect neutral, generally applicable nondiscrimination policies, such as all-comers policies. There is simply no reason why any conflict would arise between the enforcement of these regulations and federal law prohibiting discrimination by institutions of higher education, and the Department arbitrarily and capriciously fails to explain how such a conflict would arise.

In fact, as multiple public comments explained during the 2020 rulemaking, the current regulations have the benefit of *alleviating* the confusion experienced by college and university administrators

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[91] EO 13864, *supra*.
[92] 2023 NPRM, *supra*, at 10,860–10,861.

about their responsibilities in enforcing campus nondiscrimination policies in the wake of *CLS v. Martinez*.[93] The summarized examples offered by CLS during the 2020 rulemaking and listed in this comment show how institutions wrongfully weaponized their nondiscrimination policies against RSOs in the wake of *CLS v. Martinez*—tactics that resulted in expensive litigation and payment of attorneys' fees and costs for institutions. The 2020 Rule deflects this behavior and makes clear what is expected of public colleges and universities: neutral, generally applicable enforcement of nondiscrimination policies on public college and university campuses.

By proposing to rescind the easily understood mandates of the current regulations, the Department arbitrarily and capriciously exacerbates the problem it says it is attempting to remedy by sacrificing the predictability of the current regulations in favor of institutions that have shown a clear animus against RSOs in the past. The Department must explain how it could possibly benefit students *or* institutions to undo regulations that have been on the books for less than three years, particularly where, as here, a future administration will certainly undo them in the service of the First Amendment and fairness for RSOs. The Department does a disservice to all stakeholders of institutions of higher education by arbitrarily and capriciously rescinding these regulations so soon after their issuance.

The Department does not confront these costs head-on but seems to recognize them obliquely by stating that it "considered revising §§ 75.500(d) and 76.500(d) to clarify that neutral, generally-applicable policies would be permissible."[94] However, it decided not to do so due to the other bases of the rescission that it discusses in its 2023 NPRM, including the claimed burden on the Department.[95] This admission reduces the Department's "confusion" argument to nothing, as the Department could easily have amended the regulations rather than rescinding them or even have issued sub-regulatory enforcement guidance stating clearly to stakeholders that it would not investigate neutral, generally applicable policies as potential violations of the regulations. These actions are unnecessary because the Department has already clearly communicated that it interprets the current regulations in this manner.

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[93] *See, e.g.*, Paulsen 2020 Comment, *supra*, at 2 ("Because *Christian Legal Society* nonetheless continues to create confusion for college administrators, the proposed rule is helpful to accomplish the goal of fully protecting campus student religious groups from exclusion or discrimination attributable to such a group's doctrinal views, affiliations, self-understanding, or standards of conduct for its members or leaders. The language chosen is aptly suited for that purpose"); CLS 2020 Comment, *supra*, at 20 ("By clarifying that college administrators may not exclude religious student groups from campus, the proposed regulations should prevent costly litigation, with its wasteful expenditure of taxpayers' money. Unnecessary confusion has arisen on many college campuses as a result of some college administrators denying recognition to religious student groups if, as often happens, the administrators mistakenly believe the college has a policy that it does not have, or they fail to apply their policy evenhandedly.").

[94] 2023 NPRM, *supra*, at 10,863.

[95] *Id.*

The Department's rejection of these alternatives and proposal to rescind §§ 75.500(d) and 76.500(d) on the basis that it confuses stakeholders is arbitrary and capricious.

E. The Department's Argument that Enforcing §§ 75.500(d) and 76.500(d) Imposes Undue Burdens on the Department Is Arbitrary and Capricious.

The 2023 NPRM argues that it is "concerned that enforcement [of §§ 75.500(d) and 76.500(d)] would be overly burdensome for the Department."[96] It bases this assertion on the fact that "[c]losely contested cases, such as those in which there is some uncertainty about whether a public institution's policy is neutral and generally-applicable or about whether the institution has applied such policies without discriminating on the basis of a religious organization's beliefs or character, are typically very fact-intensive, and litigated thoroughly through the courts."[97] It points to the fact that, outside of the specific issue of protecting the First Amendment expressive and associational rights of RSOs at public colleges and universities, the 2020 Rule relies only on final, non-default judgments of state and federal courts when determining whether institutions have violated their obligations to respect free speech and academic freedom.[98]

Less than three years ago, the Department held the opposite view and, unlike in the 2023 NPRM, clearly fleshed out its reasoning:

> The Department has the resources and expertise to determine the narrow issue as to whether a public university has violated the regulation's requirement to not deny a religious student organization any of the rights, benefits, and privileges afforded to other student organizations. Whether religious student organizations are denied the rights, benefits, and privileges as other student organizations is a discrete issue that the Department may easily investigate. This issue does not involve the full panoply of First Amendment issues that the other regulations in §§ 75.500(b)–(c) and 76.500(b)–(c) present. The Department would only determine whether other student organizations indeed received the right, benefit, or privilege that the religious student organization was allegedly denied because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.[99]

The Department effectively differentiated the "discrete" issue of determining whether an RSO suffered discriminatory treatment based on its "beliefs, practices, policies, speech, membership

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[96] *Id.* at 10,861.
[97] *Id.*
[98] *Id.*
[99] 2020 Rule, *supra*, at 59,944–59,945.

standards, or leadership standards" from other, more complex First Amendment cases that could arise, finding that the former would not overly burden the Department. The Department has no new evidence or data that could justify its acceptance of the view that it roundly rejected in 2020, especially given its admission that it has not had to take any steps to enforce the RSO-related regulations at issue. The only new condition that seems to inform the Department's total abdication of the reasoning on which it relied in 2020 is its change in political leadership in 2021. This is not a basis for reasoned rulemaking; it is arbitrary and capricious.

The Department admits, albeit only in a separate discussion in the 2023 NPRM of costs and benefits under the new rule, that it has to date received *no complaints* under the current rule,[100] thus simultaneously pointing to the powerful deterrent effects of the current regulations and casting even more doubt on its argument that the presence of the rule is unduly burdensome to the Department. In light of the many instances of First Amendment violations against RSOs described above between the Supreme Court's decision in *CLS v. Martinez* and the Department's issuance of the current regulations in 2020, along with the voluminous evidence of such violations exposed during the 2020 rulemaking process, this fact demonstrates that the current regulations have effectively deterred unconstitutional conduct by public colleges and universities *without* the need by RSOs or their affiliated students to resort to filing complaints with the Department.

The Department must explain why it believes this evidence does not support the natural conclusion that the current regulations are a net benefit to college and university administrators by clarifying their constitutional responsibilities and a net benefit to RSOs and affiliated students in deterring unconstitutional conduct without the need for *any* intervention by the Department. If it does not do so, then it is acting in an arbitrary and capricious manner.

Separately, the Department must recognize that the passage of time between the publication of the current regulations in 2020 and its publication of the 2023 NPRM effectively negates its ability to measure the true burdens, if any, the rule might impose on the Department in the future. The Department lacks this evidence and data because it has not had sufficient time to enforce the current RSO regulations and conclude that enforcement of §§ 75.500(d) and 76.500(d) will unduly burden the Department. In fact, as discussed above, the Department has contrary evidence that supports the opposite conclusion—the uncontested fact that it has received no complaints under the current regulations and that they are not burdensome to the Department.

In light of the lack of any evidence to support its rejection of the reasoning in its 2020 rulemaking that it will not be overly burdened by complaints under §§ 75.500(d) and 76.500(d), the Department must explain how it can support its argument that it must rescind the current

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[100] 2023 NPRM, *supra*, at 10,863 ("The Department has not received any complaints regarding alleged violations of §§ 75.500(d) and 76.500(d) at the time of publishing this document.").

regulations because they are burdensome. If it fails to do so, then it is acting in an arbitrary and capricious manner.

The Department would clearly benefit from allowing more time to pass and considering any burdens that develop in investigating complaints under §§ 75.500(d) and 76.500(d) in the coming years before it so abruptly removes an effective protection of RSOs' rights on public college and university campuses across the country. The Department must explain why taking more time to observe the impacts of the current regulations, especially due to the benefits they will give to institutions and students in reducing uncertainty about their rights and responsibilities, is not the appropriate course of action to support its conclusion about their claimed burdens. If it does not do so, then it is acting in an arbitrary and capricious manner.

III. The Department Should Maintain the Material Conditions on Free Inquiry that Are Outside the Scope of the Current NPRM.

DFI supports the Department's decision not to rescind the portions of the 2020 Rule recognizing as material conditions of federal direct and state-administered grant funding the respect by public colleges and universities for free speech and academic freedom and respect by private colleges and universities for their stated institutional policies relating to free speech and academic freedom. We urge the Department not to revise or rescind these critical protections.

IV. Conclusion

In 2020, on the basis of reasoned consideration of more than 17,000 public comments and substantial evidence of widespread violations of the First Amendment rights of students in their efforts to form campus groups reflecting their deeply held faiths, the Department issued vital protections for such organizations that benefited students (by deterring college and university administrators from violating the rights of students and allowing for the vindication of those rights without resorting to costly litigation), public colleges and universities (by clarifying their responsibilities to respect students' constitutional rights), and taxpayers (by making federal funding contingent upon respecting foundational constitutional principles at institutions of higher education).

In 2023, with less than three years of experience and no new information contradicting the Department's previous conclusion that the regulations are vital to protect the First Amendment rights of students, the Department proposes to rescind them. It does so on the utterly unsupported grounds that the regulations are not necessary to support a student's First Amendment rights (despite the overwhelming evidence to the contrary that the Department considered in issuing the current regulations); that the regulations have caused confusion among institutions (despite clear regulatory terms about what is prohibited and the confusion the Department will create by rescinding regulations so soon after their promulgation); and that the regulations are burdensome

for the Department to enforce (despite a total lack of evidence that they have been burdensome to enforce or, for that matter, of any enforcement by the agency).

The Department's lack of evidence to support its proposal and abrupt "about-face" on its conclusions so soon after the issuance of the previous rule, without any effort to study its effects, is deeply troubling and points to little more than an anti-religion animus by the Department's leadership in what should be a reasoned and evidence-based rulemaking process. In short, the Department's rescission of the rule is arbitrary and capricious, in violation of federal law.

The Department should withdraw its proposal to rescind §§ 75.500(d) and 76.500(d) and enforce their vital protections for students at every public college and university and of every religion to speak, worship, and associate freely with those who share their faith.

Sincerely,

/s/ *Paul F. Zimmerman*
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