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January 10, 2020

Mr. Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave., S.W.
Mail Stop 294-20
Washington, D.C. 20202

Submitted via: Federal eRulemaking Portal

Re: Comment Letter regarding Notice of Proposed Rulemaking for the Federal Student Aid Programs under Title IV of the Higher Education Act of 1965
Docket ID ED-2019-OPE-0081
RIN 1840-AD40, 1840-AD44

Dear Mr. Gaina:

Christian Legal Society ("CLS") is a national association of attorneys, law students, and law professors headquartered in Springfield, Virginia. For forty years, through advocacy in the courts and legislatures, CLS has worked to protect equal access to the public square for religious Americans of all faiths. In particular, its work has focused on protecting students and organizations from discriminatory treatment on their school or college campuses because of their religious speech and beliefs.

Drawing on its four decades of work to protect religious exercise and expression in educational institutions, CLS submits this comment letter to commend the Department for the rulemaking proposed in the NPRM of December 11, 2019, 84 Fed. Reg. 67778 (Dec. 11, 2019), and to respond to the Department's request for comments on a few specific issues. Specifically, CLS commends the Department for its faithful implementation of both the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and the October 6, 2017, Memorandum for All Executive Departments and Agencies issued by the Attorney General of the United States ("Attorney General's Memorandum"), 82 Fed. Reg. 49668 (Oct. 26, 2017), pursuant to Executive Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017).

CLS submits this comment letter to emphasize that even had *Trinity Lutheran* not been decided, or the Attorney General's Memorandum not been issued, the Department's proposed changes would be necessary in order to bring the Department's regulations into compliance with four decades of Supreme Court jurisprudence. The Department's proposed changes are anchored in thirty-eight years of Supreme Court precedent that repeatedly has interpreted the Establishment Clause to treat religious individuals and institutions in a neutral manner that respects their right to participate in generally available benefit programs without discrimination because of their religious speech or exercise. In tandem with its Establishment Clause rulings,

the Court has often held that religious individuals and institutions enjoy an affirmative free speech or free exercise right to participate in a generally available benefit program.

Separately, but equally important, Congress enacted the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000 bb, et seq. ("RFRA"), twenty-six years ago. Just as the Department's proposed changes are needed to bring its regulations into compliance with the Supreme Court's constitutional jurisprudence, so too the changes are needed to bring them into compliance with Congress's statutory command in RFRA that no department of the federal government may substantially burden a person's religious exercise unless it can demonstrate a compelling interest unachievable by less restrictive means.

This letter will briefly situate the NPRM's proposed changes within the Supreme Court's jurisprudence of the past four decades. It will also succinctly discuss why the proposed changes are necessary in order to come into compliance with RFRA. Within these discussions, it will respond to the Department's request for comments on a few specific points in the NPRM.

I. The proposed changes are necessary in order to bring the Department's regulations into compliance with the past four decades of Supreme Court precedent.

In a handful of cases in the 1970s, the Supreme Court sometimes interpreted the Establishment Clause to countenance, if not require, discrimination against religious individuals and institutions because of their religious expression or exercise. Beginning in 1981, however, the Supreme Court consistently interpreted the Establishment Clause to permit religious persons' and institutions' participation in generally available benefit programs so long as the funding criteria were religion-neutral.

Many of the troubling 1970s rulings have been subsequently overruled, or significantly narrowed, by the Supreme Court in the four decades since they were handed down. The Court has solidly rejected the rationale underpinning those decisions. Unfortunately, the misguided interpretation of the Establishment Clause found its way into many federal regulations drafted during the 1970s and early 1980s. More recent regulations sometimes have drawn upon these older regulations for language, not realizing it is no longer constitutionally required--let alone that it is now likely to be unconstitutional. Regulations that include language based on the 1970s interpretation of the Establishment Clause often require discriminatory treatment of religious individuals and institutions at odds with our country's history of respecting religious exercise and expression.

Because some Department regulations reflect an antiquated interpretation of the federal Establishment Clause, revision has been sorely needed to bring them into compliance with the Court's modern jurisprudence at the intersection of the Establishment, Free Speech, and Free Exercise Clauses. A cursory review of the Court's jurisprudence in these three critical areas illustrates the need for the Department's proposed revisions.

A. For nearly forty years, the Supreme Court has interpreted the federal Establishment Clause to require neutral, not discriminatory, treatment of religious individuals and institutions.

In 1981, the Supreme Court issued its landmark decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), in which the Court rejected the use of the Establishment Clause to exclude religious individuals from a generally available benefits program. In *Widmar*, a public university wrongly concluded--seemingly as a result of the Supreme Court's decision in *Tilton v. Richardson*, 403 U.S. 672 (1971)--that the federal Establishment Clause required it to exclude a religious student group from the university's program that allowed over a hundred student groups to meet in its facilities as officially recognized student organizations. The university believed that it had to exclude the religious students because their speech included religious teaching and worship. *Widmar*, 454 U.S. at 265-266 (policy "prohibit[ed] the use of University buildings or grounds 'for purposes of religious worship or religious teaching'"); *id.* at 272 n.12 (distinguishing *Tilton*).

In an 8-1 decision, the Supreme Court rejected the university's misunderstanding of the Establishment Clause. To begin, the Court held that the university violated the religious student organizations' speech and association rights by "discriminat[ing] against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion" because "[t]hese are forms of speech and association protected by the First Amendment." *Id.* at 269. In other words, religious student groups have free speech and expressive association rights to meet on public university campuses for religious speech and association.

The Court then turned to the question of whether the Establishment Clause was violated by allowing religious student organizations to access the university's program of generally available benefits for student organizations. *Id.* at 270-276. The Court held that the Establishment Clause was not violated because "the forum is available to a broad class of nonreligious as well as religious speakers," *id.* at 274, even if "[i]t is possible—perhaps even foreseeable—that religious groups will benefit from access to" the program. *Id.*

Interestingly, the Court explained that excluding religious students because their speech included religious teaching and worship created the *greater risk* of violating the Establishment Clause. *First*, "the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech'" because "determin[ing] which words and activities fall within 'religious worship and religious teaching'. . . alone could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" *Id.* at 272 n.11 (citation omitted); *see id.* at 269 n.6 (courts lack "competence to administer" such a line because "[m]erely to draw the distinction would require . . . the courts to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith," which "would tend inevitably to entangle the State with religion in a manner forbidden by our cases"). Writing over a decade later, the Court reaffirmed its concern:

> The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

Rosenberger v. University of Virginia, 515 U.S. 819, 845- 46 (1995).

Second, the Court deemed the distinction between "religious speech" and "religious worship" to be "judicially unmanageable" and "lack[ing] a foundation in either the Constitution or in our cases." 454 U.S. at 271 n.9. *Third*, the Court dismissed a distinction between "religious speech" and "religious worship" as fraught with difficulties because "[t]here is no indication when 'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, teaching, and reading'—all apparently forms of 'speech,' despite their religious subject matter—and become unprotected 'worship.'" *Id.* at 269 n.6. Moreover, the Court assumed that it was clear that "religious speech designed to win religious converts" was constitutionally protected, so "religious worship by persons already converted" should not receive less protection. *Id.*

Five years after *Widmar*, the Court unanimously held that the Establishment Clause was not violated if a blind student used funding that he received through a state vocational rehabilitation assistance program in order to study for the ministry. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). Writing for the Court, Justice Marshall explained that the Establishment Clause was not violated because "[a]ny aid provided under [the] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488. Because "[a]id recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian[,] . . . the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Id.*

In a long line of cases since *Widmar* and *Witters*, the Court has consistently applied these principles to hold that the Establishment Clause does not justify exclusion, or other discriminatory treatment, of religious individuals or organizations from participating in generally available benefit programs. The Court has emphasized that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." *Good News Club v. Milford Central School*, 533 U.S. 98, 114 (2001) (*quoting Rosenberger*, 515 U.S. at 839 (emphasis added)).

Specifically, the Court has held that the Establishment Clause is not violated by--

- a state program allowing parents to take a tax deduction for education-related expenses even if some beneficiaries' children attended religious schools (*Mueller v. Allen*, 463 U.S. 388 (1983));

- religious counseling centers participating in a generally available grant program administered under the Adolescent Family Life Act (*Bowen v. Kendrick*, 487 U.S. 589 (1988));
- a public employee providing services under the Individuals with Disabilities Act as an interpreter for a deaf student attending a religious high school (*Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993));
- a religious community group showing a religious film series in a school auditorium in the evenings on the same basis as other community groups (*Lamb's Chapel v. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993));
- a religious student publication at a public university receiving student activity fee funding available to other student publications (*Rosenberger v. University of Virginia*, 515 U.S. 819 (1995));
- religious school students receiving remedial reading instruction at their schools taught by public school teachers paid with Title I funds (*Agostini v. Felton*, 521 U.S. 203 (1997));
- religious schools being lent educational materials and equipment bought with Title I funds (*Mitchell v. Helms*, 530 U.S. 793 (2000));
- religious community groups meeting with children immediately after school on the same basis as nonreligious community groups (*Good News Club v. Milford Central School*, 533 U.S. 98 (2001)); and
- religious school students receiving tuition aid through a state program (*Zelman v. Simmon-Harris*, 536 U.S. 639 (2002)).

This principle that the Establishment Clause is not violated by religious individuals and institutions participating in generally available benefit programs is so well-established that a federal Establishment Clause claim was not even before the Court in *Trinity Lutheran*. 137 S. Ct. at 2019 ("The parties agree that the Establishment Clause . . . does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program."). The Court ruled that an otherwise eligible church had a free exercise right not to be categorically excluded from a state program that provided funding for making playgrounds safer.

B. The Supreme Court has consistently ruled that the Free Speech Clause and the Free Exercise Clause protect the right of religious individuals and organizations not to be discriminatorily excluded from a generally available benefit program.

1. The Free Speech Clause protects religious individuals and organizations from government officials' viewpoint discrimination based on the religious content of their speech.

As discussed above, in *Widmar*, the Supreme Court held that the government may not exclude religious individuals from a generally available benefit program because their speech includes religious teaching and worship. In several subsequent cases, the Court similarly prohibited exclusion of otherwise eligible religious speakers from a government speech forum. The Court has required equal access for religious speakers when—

- a school district allowed community groups to use school facilities in the evenings to discuss family values (*Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 393 (1993));
- a university allocated student activity fees to pay the printing costs for student publications (*Rosenberger v.University of Virginia*, 515 U.S. 819 (1995)); and
- a school district allowed community groups to meet with students before and after the school day to teach moral values (*Good News Club v. Milford Central School*, 533 U.S. 98 (2001)).

The Court has found such exclusions of religious speakers to be viewpoint discrimination that can only be justified if the government demonstrates a compelling interest. In none of these cases did the Court find the Establishment Clause to be a compelling government interest sufficient to justify the exclusion of religious speakers.

In *Widmar*, the Court was adamant that private individuals' worship and religious teaching are protected forms of speech under the Free Speech Clause. 454 U.S. at 269 n.6, 271 n.9, & 272 n.11. Likewise, in *Good News Club*, a public school excluded a religious community group from using its facilities after-school because its meetings would include "religious worship" combined with the "teaching of moral values." 533 U.S. at 112 n.4. But the Court saw "no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys." *Id.* And in *Rosenberger*, the Court made clear that speech that "primarily promote[s] or manifest[s] a particular belief in or about a deity or an ultimate reality" was religious speech protected by the First Amendment. 515 U.S. at 836 (original brackets omitted). *See also*, *Good News Club*, 533 U.S. at 121 (Scalia, J., concurring) ("What is at play here is not coercion, but the compulsion of ideas—and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses.") (*citing Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Murdock v. Pennsylvania*, 319 U.S. 105, 108–109 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 307–310 (1940)).

2. The Free Exercise Clause prohibits the government from imposing "special disabilities" on religious individuals and organizations because of their religious status or religious beliefs.

The Supreme Court has repeatedly ruled that the government cannot impose "special disabilities" on individuals or institutions based on their "religious views or religious status." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990); *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) ("The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.") "The Free Exercise Clause 'protects religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (*quoting Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 533, 542 (1993)).

Specifically, the Supreme Court has held the Free Exercise Clause to be violated when –

- a state refused to allow a church to participate in a state-funded grant program to make playgrounds safer for children (*Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017));
- a state refused to allow individuals to run for office because they were clergy (*McDaniel v. Paty*, 435 U.S. 618 (1978)); and
- a municipality targeted religious conduct for penalty while permitting analogous secular conduct (*Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993)).

C. The Religious Freedom Restoration Act is grafted onto every federal statute, including the Higher Education Act, requiring religious exercise to be given the highest level of protection.

In 1993, Congress passed the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"), by overwhelmingly bipartisan votes – 97-3 in the Senate and a unanimous voice vote in the House. President Clinton signed RFRA into law, citing "a shared desire here to protect perhaps the most precious of all American liberties, religious freedom." Administration of President William J. Clinton, *Remarks on Signing the Religious Freedom Restoration Act of 1993*, Nov. 16, 1993, at 2377-78, https://www.govinfo.gov/content/pkg/WCPD-1993-1122/pdf/WCPD-1993-11-22-Pg2377.pdf.

When it passed RFRA, Congress effectively amended every federal statute or regulation, whether enacted before or after 1993, to include its strong protection of religious freedom. Every federal statue and regulation must be implemented in a way that complies with RFRA's stringent safeguards.

What does RFRA require? If an individual or institution shows that its religious exercise is substantially burdened, then the federal government must demonstrate two things: 1) that it has a compelling interest that justifies burdening the specific individual's or institution's religious exercise; and 2) that its compelling interest is being furthered by the least restrictive means possible. This is a very high standard for the government to meet.

As a result, any regulation promulgated by the federal government must comply with RFRA. A department cannot impose a substantial burden on religious exercise unless it demonstrates a compelling interest unachievable by a less restrictive means. Any regulation that does not comply with RFRA should be amended to bring it into compliance. For regulations adopted before 1993, or containing language borrowed from older regulations, the Attorney General's Memorandum to the departments is particularly necessary to bring outdated regulations into compliance with RFRA and the First Amendment rights it reinforces.

Furthermore, because the Establishment Clause is not violated when religious individuals or organizations are given access to generally available benefit programs, the Establishment Clause does not provide a compelling interest for discriminating against religious individuals and

institutions and their religious expression and exercise. Indeed it would seem hard to show a rational basis, let alone a compelling interest, for a regulation that burdens religious exercise or expression when no Establishment Clause violation exists. Even if it were a close call, and there were arguably compelling Establishment Clause concerns, the government still must use "the least restrictive means" before a restriction on religious exercise is permissible. Categorical exclusion from a program because of religious exercise or expression will almost never be "the least restrictive means" of avoiding an Establishment Clause violation, even if one exists.

D. The Department's proposed changes are necessary to bring its regulations into compliance with the Supreme Court's modern jurisprudence involving the Establishment, Free Speech, and Free Exercise Clauses and Congress's command in RFRA.

As the discussion above is intended to show, some Department regulations are out of alignment with the Court's jurisprudence, and also fall short of RFRA's requirements. The Court's jurisprudence at the intersection of the Establishment, Free Speech, and Free Exercise Clauses has been remarkably stable for many years now. The regulations under review, however, reflect a jurisprudence that the Court held but for a short time—basically the 1970s—and that too frequently lent itself to a hostility toward religious individuals and institutions.

1. The Department's proposed regulatory changes regarding members of religious orders are necessary to conform to the Supreme Court's constitutional precedent and to Congress's command in RFRA.

The Department is to be commended for its proposal to amend 34 CFR §§ 674.9 (Pell Grant Program), 675.9 (Federal Perkins Loan Program), 676.9 (Federal Work Study Programs), 682.301(Federal Supplemental Educational Opportunity Grant Program), 685.200 (Federal Family Education Loan Program), and 690.75 (Direct Loan Program) to remove language that creates an irrebuttable presumption that a member of a religious order has no financial need when determining eligibility for various loan programs.

This categorical exclusion of members of a religious order is not based on any statutory requirement. Nor does the federal Establishment Clause require categorical exclusion of religious individuals or organizations from generally available benefit programs. *See, e.g., Witters*, 474 U.S. at 482; *supra*, pp. 4-5 (listing cases). Indeed a categorical exclusion creates a disincentive for student borrowers who wish to enter a religious order, impermissibly "skewing" private individuals' religious choices in a way that violates the government neutrality required by the Establishment Clause. *See Rosenberger*, 515 U.S. at 831-32.

Instead the Free Exercise Clause requires removal of language that singles out religious individuals for special disabilities and unequal treatment because of their religious status as members of a religious order. To start, "the minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. The language must be removed because it fails this minimal requirement.

But the Free Exercise Clause does more. It also "subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran,* 137 S. Ct. at 2019 (*quoting Lukumi,* 508 U.S. at 533, 542). *See also, McDaniel,* 435 U.S. at 641 (Brennan, J., concurring); *Employment Div.,* 494 U.S. at 877. The language further singles out members of a religious order because the organization to which they belong "has as its primary objective the promotion of ideals and beliefs regarding a Supreme Being" – a "special disability" imposed on persons because of their religious beliefs that is prohibited by the Free Exercise Clause.

The language also discriminates on the basis of "religious status," also a Free Exercise violation. The members of a religious order are excluded solely because they belong to a religious order holding particular beliefs and practices. As the Court emphasized in *Trinity Lutheran,* "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order." 137 S. Ct. at 2019 (quotation and citation omitted).

The Free Exercise Clause is further violated when religiously-motivated conduct is penalized but analogous secularly-motivated conduct is not. *See Lukumi,* 508 U.S. at 542-46. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533. Here the regulation's arbitrary exclusion penalizes members of a religious order because they are presumed (rightly or wrongly) to be receiving food and shelter from their religious organization, while not penalizing dependent students who live with their families or in other communal situations in which their food and shelter are also provided.

Paralleling these constitutional commands, RFRA also is violated by the categorical exclusion of members of a religious order. First, such an exclusion imposes a substantial economic burden on individuals because they are members of a religious order, as well as experiencing the stigma created by the discriminatory treatment. Second, the Establishment Clause is not violated; therefore, the government lacks a compelling interest (and probably even a rational basis) for its discriminatory treatment of members of a religious order. Third, less restrictive means exist for achieving whatever government interest the regulation is attempting to further. Even if the Establishment Clause were violated (which it is not), nondiscriminatory means are available for determining a student's cost of attendance when a third party is providing food and shelter to the student, regardless of whether the third party is a religious order or a secular communal living situation.

For these many reasons, removal of the language that deems a member of a religious order to have no financial need when determining eligibility for various loan programs is necessary. The Department's proposals should be adopted.

2. The Department's proposed regulatory changes regarding borrowers' eligibility to obtain deferment of their loans as the result of full-time volunteer work that includes religious instruction, conducting religious

services, proselytizing, or engaging in fundraising to support religious activities do not go far enough to comply with the requirements of RFRA or the Supreme Court's First Amendment jurisprudence.

The Department is to be commended for its proposal to delete entirely the language in 34 CFR §§ 674.35 (Federal Perkins Loan Program) and 674.36 (National Defense Student Loans), that excludes otherwise eligible student borrowers from deferment of their loan repayment if they are full-time volunteers for a public service organization where their job duties include "giv[ing] religious instruction, conduct[ing] worship service, engag[ing] in religious proselytizing, or engag[ing] in fundraising to support religious activities." Such language is not required by the statute.

Furthermore, for the reasons explained below, the Department should entirely delete such language from 34 CFR § 682.210(m)(1)(iv) (Federal Family Education Loan Program), rather than adopting the language modification developed during the negotiated rulemaking. The proposed language would deny deferment of repayment of FFEL loans for the portion of the volunteer's time that was "spent participating in religious instruction, worship services, or any form of proselytizing." Not only is the proposed language inconsistent with the total deletion of similar language for Perkins and NDSL borrowers, but it also violates RFRA, the Free Speech Clause, and the Free Exercise Clause.

Likewise, the proposal for the Public Service Loan Forgiveness Program would delete language that excludes otherwise eligible borrowers from receiving forgiveness because they are working for "an organization engaged in religious activities, unless the qualifying activities are unrelated to religious instruction, worship services, or any form of proselytizing." 34 CFR § 685.219(b). Unfortunately, the proposal would also add new language that would prohibit borrowers from including "[t]ime spent participating in religious instruction, worship services, or any form of proselytizing while employed" by a tax-exempt nonprofit organization as time that counts toward the requirement that they work full-time for ten years in order to qualify for the generally available benefit program.

The proposed new language would violate RFRA, the Free Speech Clause, and the Free Exercise Clause. Excluding individuals from generally available benefit programs, like the loan deferment or loan forgiveness programs, because they engage in religious speech is unalloyed viewpoint discrimination, "an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829; *Good News Club*, 533 U.S. at 107-112. As explained *supra* at p. 6, religious instruction, worship, proselytizing, and fundraising are all forms of religious speech protected by the First Amendment. *See Widmar,* 454 U.S. at 269 & n.6, 271 n.9, & 272 n.11 (religious worship, discussion, and instruction); *Rosenberger*, 515 U.S. at 836 (speech "promoting" religious belief); *Heffron*, 452 U.S. at 647 (proselytizing); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (religious fundraising).

Of course, including religious individuals and organizations in a generally available benefit program does not violate the Establishment Clause, as explained *supra* at pp. 3-6. The case that highlights both that the borrowers' free speech is protected, and the Establishment

Clause is not violated, is *Rosenberger.* There the Court ruled that a public university violated a student organization's freedom of speech when it denied the organization access to student activity fee funding because the organization wanted to use the funding (over $5000) to print a magazine dedicated to promoting evangelical Christian viewpoints.

The Court then rejected the university's defense that the Establishment Clause would be violated by funding the printing of a magazine with evangelical Christian viewpoints. The university was not endorsing any religious messages simply by providing funds for their printing. Instead, the university was simply treating the religious speech in a neutral, evenhanded manner because it provided funding to several student publications expressing a variety of viewpoints. As the Court noted in *Rosenberger,* "[m]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." 515 U.S. at 839 (*citing Lamb's Chapel,* 508 U.S., at 393–394; *Board of Education v. Mergens,* 496 U.S. 226, 248, 252 (1990); *Widmar,* 454 U.S. at 274–275).

The Court went so far as to warn that the Establishment Clause was more likely to be violated if government officials tried to separate out religious viewpoints from nonreligious viewpoints because "[t]hat course of action . . . would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." 515 U.S. at 845-46. Nor is the exclusion of all religious speech an acceptable defense. As the Court explained:

> It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

Id. at 831-32.

Under the Court's analysis in *Rosenberger,* the current Department regulations violate the freedom of speech of borrowers whose job duties include protected forms of religious speech – instruction, worship, proselytizing, and fundraising. Their nonprofit employers' freedom of speech is likewise infringed. There is no constitutionally acceptable justification for this free speech violation because the Establishment Clause is not violated when religious individuals and organizations participate in generally available benefit programs. *See supra* at pp. 3-6. The Court's decision in *Witters,* in particular, reinforces this fact. There the Court easily held that the Establishment Clause was not violated by a student using the financial aid received through a generally available benefit program to pay his tuition to study to be a minister. *Cf., McDaniel,* 435 U.S. 618 (state constitutional provision prohibiting clergy from holding certain elected offices violated the First Amendment).

The parallel analysis under RFRA separately arrives at the same conclusion. The borrowers' free exercise is substantially burdened by the denial of loan deferment or loan

forgiveness because their job duties include religious speech. Because the Establishment Clause is not violated, there is no compelling interest that justifies the discriminatory exclusion of the borrowers based on their religious speech or the nonprofit employers based on their religious activities.

Unsurprisingly, the Free Exercise Clause produces the same result as RFRA. The exclusion of borrowers based on the fact that their job duties include religious speech, or that their nonprofit employers engage in certain religious activities, imposes special disabilities on them in violation of the Free Exercise Clause. *See Trinity Lutheran,* 137 S. Ct. at 2019. Compounding the violation is the fact that the regulation penalizes religiously-motivated conduct while rewarding analogous secularly-motivated conduct. *See Lukumi,* 508 U.S. at 542-46.

For these constitutional and statutory reasons, the Department's proposed deletion of the current discriminatory language is correct; however, the proposals to add language to 34 CFR §§ 682.210(m)(1)(iv) and 685.219(c)(4) that continues to discriminate against borrowers and their nonprofit employers should not be adopted because it violates constitutional rights and RFRA.

3. Discrimination based on the "pervasively sectarian" nature of an institution is outdated and unconstitutional.

The Department's proposal to delete the "pervasively sectarian" language from the fiscal agent requirement in 34 CFR § 694.10 correctly reflects modern Establishment Clause jurisprudence. In the 1970s, Establishment Clause jurisprudence sometimes discriminated against institutions because they were "pervasively sectarian." But that changed in the 1980s as the Court increasingly realized that excluding "pervasively sectarian" institutions from generally available benefit programs resulted in discrimination against those institutions based on their religious nature. It also risked violating the Establishment Clause by encouraging government officials to inquire into an institution's religious nature in order to determine whether it was "pervasively sectarian." *See, e.g., Mitchell v. Helms,* 530 U.S. 793, 845 (2000) (O'Connor, J., concurring); *Zelman v. Simmons–Harris,* 536 U.S. 639, 652 (2002); *Agostini v. Felton,* 521 U.S. 203, 225, 232–34 (1997); *Witters v. Washington Dep't of Services for the Blind,* 474 U.S. 481, 488–89 (1986).

The Tenth Circuit struck down as unconstitutional a state program that provided scholarships to college students but prohibited their use at a "pervasively sectarian" college. The court presumed that the unconstitutional requirement had its origins in the abandoned jurisprudence of the 1970s, explaining:

> [U]nder the doctrine applicable at the time, "pervasively sectarian" institutions had to be excluded from direct funding programs in order to fund private education at all. Since that time, the Supreme Court has substantially modified its interpretation of the Establishment Clause. The parties agree that under current interpretation, the Establishment Clause poses no bar to inclusion

> of [Colorado Christian University] in the Colorado scholarship programs.

Colorado Christian Univ. v. Weaver, 534 F.3d 1245, 1251–52 (10th Cir. 2008) (McConnell, J.) (citations omitted).

The Tenth Circuit was clear that excluding "pervasively sectarian" institutions and their students from a generally available benefit program was discriminatory. Determining whether an institution is "pervasively sectarian" violates the Establishment Clause because it is not neutral among religions. *Colorado Christian*, 534 F.3d at 1257-1261. It also creates excessive entanglement by licensing government officials to determine whether a religious institution is "pervasively sectarian," that is, "too religious" to participate in a generally available benefit program, or whether it is not "too religious" to participate. Of course, government officials are prohibited by the Establishment Clause from drawing such lines and determining the acceptable religiosity of religious institutions. *Id.* at 1261-1266.

In addition, exclusion of "pervasively sectarian" institutions violates the Free Exercise Clause and its prohibition on unequal treatment of institutions based on their religious status. *Trinity Lutheran*, 137 S. Ct. at 2019. And the categorical exclusion of an institution from serving as a fiscal agent in the GEAR-UP program simply because it is pervasively sectarian also violates RFRA. It substantially burdens a religious institution because of its religious exercise – because it is "pervasively sectarian" or "too religious" – without any compelling government interest to justify such discriminatory treatment.

As to other GEAR-UP provisions, we also commend the Department's proposal that 34 CFR § 694.6(b) be modified by deleting the word "religious" before the word "organization" and inserting "other" to clarify that employment must be independent of organizations that are affiliated with the school regardless of whether those organizations are religious in nature. We also support the Department's proposal to delete 34 CFR § 694.6(c) because of its redundancy with broader prohibitions regarding the comingling of federal and non-Federal funds.

4. Students performing work-study requirements should have clarity as to the degree to which they can be involved in the construction, operation, or maintenance of a facility used for sectarian instruction or as a place for religious worship.

The Department correctly proposes to conform regulatory provisions in 34 CFR §§ 675.20 and 692.30 to make the regulatory language precisely mirror the statutory language. It is hard to understand how a student cleaning an empty room in order to fulfill her work-study hours presents even the slightest risk of violating the Establishment Clause; but the regulation must comply with the statute, which is what the proposed language would do. It also has the practical benefit of providing clearer guidance to college administrators who simply want to follow the law but find the language difference between the regulation and the statute to be confusing.

Thank you for considering our comments.

Yours truly,

/s/ David Nammo

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