



Docket ID ED-2022-OPE-0157

March 24, 2023

The Honorable Miguel A. Cardona
Secretary of Education
Dr. Nasser Paydar
Assistant Secretary for Postsecondary Education
U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Submitted electronically to www.regulations.gov

Re: Written Comment re Direct Grant Programs, State-Administered Formula Grant Programs, NPRM 88 Fed. Reg. 10857 (Feb. 22, 2023); Docket ID ED-2022-OPE-0157; RIN 1840-AD72

Dear Secretary Cardona and Assistant Secretary Paydar:

Christian Legal Society opposes the Department of Education's proposal to rescind 34 C.F.R. §§ 75.500 (d) and 76.500 (d). By protecting religious student organizations on public college campuses, these regulations benefit all Americans: students of all faiths, all college students, public institutions of higher education, college administrators, taxpayers, and, ultimately, all Americans who desire to live in a free, respectful, and diverse society. As this comment will explain, 34 C.F.R. §§ 75.500 (d) and 76.500 (d) create the ultimate win-win environment on college and university campuses.

There is no more basic right for any American student than the right to attend a public educational institution without being penalized for his or her religious beliefs. But for 50 years, religious students have been denied this right on numerous public university and college campuses nationwide.

Far too often, religious students are subjected to intimidation, harassment, or discrimination by college administrators or student governments simply because their organizations seek access to the same benefits that other student organizations enjoy. Religious student organizations do not seek "preferential" treatment: They just want respectful treatment and their fair share of the benefits that they pay for through their student activity fees and tuition. Religious student groups simply ask that other student groups "share the campus."

And the American public agrees. In a 2022 poll, 73% of Americans "agree[d] that a religious student group should not be kicked off campus for requiring its leadership to be members in

good standing of its faith community.”¹ The American public supports the common sense view that religious students should be welcome at public college campuses, not excluded because of their religious identities or their requirement that their leaders “be members in good standing of [their] faith community.”²

Some college administrators’ failure to comprehend that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) advance their best interest merely reinforces the need for the regulations’ preservation. These regulations prevent litigation by students against their colleges by providing clear guidance as to how administrators should treat religious student groups. These regulations help colleges avoid the significant costs incurred in litigation. For example, in 2021, the University of Iowa was ordered to pay \$1.9 million in attorney’s fees for revoking religious student groups’ recognition in two separate cases.³ Equally importantly, 34 C.F.R. §§ 75.500 (d) and 76.500 (d) help college administrators themselves avoid *personal* liability for money damages.⁴

CLS has nearly five decades of hands-on experience working to protect its law student chapters and other religious student groups on public campuses nationwide. Based on its expertise on this issue, CLS submitted comments in 2020 urging adoption of 34 C.F.R. §§ 75.500 (d) and 76.500 (d).⁵ CLS law student chapters have directly benefited from the existence of 34 C.F.R. §§ 75.500 (d) and 76.500 (d), as the examples in Part III *infra* show. CLS has informed the Department in letters to the Secretary and meetings with Department officials in 2021 and 2022 of the importance of preserving 34 C.F.R. §§ 75.500 (d) and 76.500 (d) to protect religious student groups on public college campuses. Nearly 40 other religious organizations have joined CLS in ensuring that the Secretary and other Department officials know that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) directly benefit religious student groups by protecting their ability to access the same benefits otherwise available to other student groups.

¹ Becket Fund for Religious Liberty, *2022 Religious Freedom Index: American Perspectives on the First Amendment*, 4th ed. (Dec. 2022), at 34 (finding 73% support in the university setting), at 34-35, <https://becketnewsite.s3.amazonaws.com/20221207155617/Religious-Freedom-Index-2022.pdf> (last visited Mar. 21, 2023).

² *Id.*

³ The University of Iowa was ordered to pay \$1,373,206.51 to a religious student group for revoking its recognition because of its religious leadership requirements. *Business Leaders in Christ, et al., v. The University of Iowa, et al.*, Case No. 3:17-cv-00080 (S.D. Iowa Nov. 10, 2021) (Order). In a second case, the University of Iowa was ordered to pay \$533,508 to another religious student group for threatening to revoke its recognition because of its religious leadership requirements. *See IntersVarsity Christian Fellowship, et al. v. The University of Iowa, et al.*, Case No. 3:18-cv-00080 (S.D. Iowa, Nov. 18, 2021) (Order).

⁴ *See IntersVarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021) (holding that university officials forfeited qualified immunity by derecognizing a religious student group because of its religious leadership requirements); *Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021) (same); *IntersVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F.Supp. 3d 785 (E.D. Mich. 2021) (same).

⁵ Christian Legal Society Comment Letter from Kimberlee Wood Colby to Ms. Lynn Mahaffie, Deputy Assistant Secretary for Policy, Planning, and Innovation, Office of Postsecondary Education, Department of Education, Re: Docket ID ED-2019-OPE-0080 (Feb. 18, 2020) (“2020 CLS Comment”) at 7-19, <https://www.regulations.gov/comment/ED-2019-OPE-0080-16196>.

I. Because Rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) Would Be Arbitrary and Capricious, the Department Should Preserve 34 C.F.R. §§ 75.500 (d) and 76.500 (d) Without Modification to Continue Their Protection of Religious Student Groups.

A. The Department’s claim that it “has not observed that [34 C.F.R. §§ 75.500 (d) and 76.500 (d)] have meaningfully increased protections of First Amendment rights for religious student organizations or campus administrators since the rule went into effect” is implausible.

34 C.F.R. §§ 75.500 (d) and 76.500 (d) benefit hundreds of thousands of religious students on public college campuses annually, by incentivizing campus administrators to treat religious student groups fairly and provide them with benefits otherwise available to other student groups. The historical record of the past 50 years has been that too many public universities and colleges will threaten religious student groups with exclusion because of their beliefs, speech, policies, practices, and leadership or membership standards.

Just as CLS and other religious campus organizations provided numerous examples of religious student groups being denied benefits otherwise available to other student groups in their 2020 comments in support of the adoption of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) as final rules, CLS will provide in this comment concrete examples of how 34 C.F.R. §§ 75.500 (d) and 76.500 (d) have benefited CLS chapters and other religious student groups in the short time that they have been in effect.

As detailed in Part II *infra*, throughout 2021 and 2022, CLS staff and representatives of other religious organizations, including religious campus organizations, communicated by letter and meetings with Department of Education and OIRA officials to discuss the protections that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) have provided religious student groups, as well as the historical record supporting the need for their protections. CLS signed onto letters sent to Secretary Cardona and other high-ranking officials in the Department of Education to explain the importance of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) and to urge preservation of these vital protections for religious student groups. CLS staff and representatives of other religious organizations, including religious campus organizations, held several meetings with Department of Education officials in 2021 to stress the importance of 34 C.F.R. §§ 75.500 (d) and 76.500 (d). CLS staff attended a 12866 meeting in which OIRA and Department of Education officials were provided with evidence that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) have benefited religious student groups. Other representatives of religious student groups similarly attended two other 12866 meetings with OIRA and Department of Education officials to provide evidence that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) provide essential protections to religious student groups on public campuses.

Despite CLS’s and other religious organizations’ outreach to the Department and OIRA, the Department claims that it “has not observed that [34 C.F.R. §§ 75.500 (d) and 76.500 (d)] have meaningfully increased protections of First Amendment rights for religious student organizations

or campus administrators since the rule went into effect.”⁶ *This claim is implausible.* The fact, as detailed in Part II *infra*, is that the Department has been told multiple times by several dozen organizations having specific, direct knowledge regarding religious student groups on public college campuses that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) have meaningfully increased protections of First Amendment rights for religious student organizations.

Furthermore, the Department anchored its adoption of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) on numerous comments that demonstrated that religious student groups often are denied benefits otherwise available to other student groups because of the groups’ religious beliefs and speech.⁷ The Department now tries to ignore this record evidence. But the Department’s feigned ignorance cannot expunge the 2020 record. Nor can the Department erase the examples of religious student groups benefiting from 34 C.F.R. §§ 75.500 (d) and 76.500 (d) that were provided to it in 2021 and 2022. Department officials were made aware of these examples and the continued need for the protections of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) through letters, 12866 meetings, and other meetings with Department officials that were attended by numerous representatives of religious organizations with knowledge of religious student groups on public college campuses.

The Department’s unwillingness to acknowledge the factual record of the past 50 years, including 2021 and 2022, which demonstrates that religious groups are often threatened with exclusion from their campuses because of their religious beliefs, speech, policies, practices, and leadership or membership standards, renders the Department’s proposed rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) arbitrary and capricious.

B. Rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) would be arbitrary and capricious given that the Department ignored the obvious steps of issuing a Request for Information or a Supplemental Notice of Proposed Rulemaking in order to obtain the substantive information the NPRM claims the Department lacks.

CLS respectfully requests that the Department issue a Supplemental Notice of Proposed Rulemaking in order to remedy its obvious deficiencies in the February 22, 2023, NPRM. This would allow the Department to do its due diligence and work with representatives of the religious student organizations of all faiths to gather the facts about the continued need for the protections that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) provide for those groups. The Department’s failure to perform its due diligence before issuing the NPRM on February 22, 2023, renders arbitrary and capricious any future rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d).

CLS would further note that the Department acted arbitrarily and capriciously when it failed to publish a Request for Information (RFI) regarding the benefits of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) for religious student groups. The Department’s arbitrariness and capriciousness are driven home by the fact that the Department issued an RFI⁸ seeking information about the

⁶ 88 Fed. Reg. 10857, 10861 (Feb. 22, 2023).

⁷ 85 Fed. Reg. 59,916, 59,928-37 (Sept. 23, 2020).

⁸ 88 Fed. Reg. 10,857, 10,881 (Feb. 22, 2023).

benefits of 34 C.F.R. §§ 75.500 (b) & (c) and 76.500 (b) & (c) on the same day that it issued its NPRM proposing to rescind 34 C.F.R. §§ 75.500 (d) and 76.500 (d). Note that 34 C.F.R. §§ 75.500 (b) & (c) and 76.500 (b) & (c) and 34 C.F.R. §§ 75.500 (d) and 76.500 (d) were all issued in 2020 as part of the same rule, the Religious Liberty and Free Inquiry Rule.⁹ On February 22, 2023, the RFI—requesting more information about the benefits of 34 C.F.R. §§ 75.500 (b) & (c) and 76.500 (b) & (c)—was issued simultaneously with the NPRM proposing to rescind 34 C.F.R. §§ 75.500 (d) and 76.500 (d). This timing of the RFI and NPRM compound the arbitrariness and capriciousness of the proposed rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) based on the Department’s unfounded claim that it “has not observed that [34 C.F.R. §§ 75.500 (d) and 76.500 (d)] have meaningfully increased protections of First Amendment rights for religious student organizations or campus administrators since the rule went into effect.”¹⁰ The RFI published by the Department on February 22, 2023, offered the most effective avenue for obtaining the information that the Department claims it lacks if it were trying to understand the benefits to religious student organizations or campus administrators. Yet the Department utterly failed to avail itself of the RFI, which addressed other parts of the Religious Liberty and Free Inquiry Rule, to obtain the information it purported to lack about the part of the Rule protecting religious student groups.

The Department’s callous disregard for the religious beneficiaries of the Religious Liberty and Free Inquiry Rule while being solicitous for the Rule’s other beneficiaries exemplifies the unequal treatment that the Supreme Court has subjected to strict scrutiny under the Free Exercise Clause.¹¹ Strict scrutiny of government action is triggered “under the Free Exercise Clause, whenever [government regulations] treat *any* comparable activity more favorably than religious exercise.”¹²

The Department’s failure to include 34 C.F.R. §§ 75.500 (d) and 76.500 (d) in the RFI is clear evidence that the Department does not actually want to find evidence regarding their benefits to religious student groups and college administrators. The Department’s failure to include 34 C.F.R. §§ 75.500 (d) and 76.500 (d) in the RFI is itself arbitrary and capricious conduct on the part of the Department. At a bare minimum, the Department should withdraw its NPRM and publish instead a Request for Information seeking information about the benefits of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) for religious student groups and public college administrators.

⁹ 85 Fed. Reg. 59,916.

¹⁰ 88 Fed. Reg. 10857, 10861.

¹¹ See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (public gathering restrictions were non-neutral toward religion “because they single out houses of worship for especially harsh treatment” compared with other comparable gatherings).

¹² *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (emphasis in original) (citing *Roman Catholic Diocese*, 141 S. Ct. at 67-68).

II. Contrary to the Department’s Claim that It Does not Know if Anyone Benefits from 34 C.F.R. §§ 75.500 (d) and 76.500 (d), the Department has been Informed Numerous Times by a Diverse Array of Knowledgeable Organizations of the Ways in Which These Protections Benefit Religious Student Organizations.

The Department claims that it “has not observed that [the regulations] have meaningfully increased protections of First Amendment rights for religious student organizations or campus administrators since the rule went into effect.”¹³ This claim is factually incorrect. The Department has been informed numerous times by a diverse variety of organizations of the importance of the regulation to protect religious student organizations on public college campuses. The Department has been provided with specific examples of the usefulness of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) in protecting religious student groups from being excluded from campuses in the 2021-2022 and 2022-2023 academic years.

Should it proceed to rescind 34 C.F.R. §§ 75.500 (d) and 76.500 (d), the Department will act arbitrarily and capriciously because it necessarily will have ignored the evidence that has been presented to it multiple times by stakeholders familiar with the plight of religious student organizations on many public campuses. In addition, the Department will have ignored the evidence presented in this comment and other comments submitted by March 24, 2023, documenting how 34 C.F.R. §§ 75.500 (d) and 76.500 (d) have provided meaningful protection for religious student organizations on public college campuses.

A. In response to the Department’s 2020 NPRM, CLS submitted a comment letter detailing numerous examples of religious student groups who had been denied benefits otherwise available to other student groups on public campuses and demonstrating the need for the protections offered by 34 C.F.R. §§ 75.500 (d) & 76.500 (d).

On January 17, 2020, the Department of Education published a Notice of Proposed Rulemaking¹⁴ that, among many proposed rules, would add, as 34 C.F.R. §§ 75.500 (d) and 76.500 (d), the following language: “A public institution shall not deny to a religious student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including full access to the facilities of the public institution and official recognition of the organization by the public institution) because of the beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization.”¹⁵

¹³ 88 Fed. Reg. 10857, 10861.

¹⁴ *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program*, RIN 1840-AD45, Docket ID ED-2019-OPE-0080, 85 Fed. Reg. 3190 (Jan. 17, 2020).

¹⁵ This was the proposed language for § 75.500 (d). 85 Fed. Reg. 3190, 3223 (Jan. 17, 2020). The proposed language for § 76.500 (d) was essentially the same. *Id.* at 3226.

In response to the NPRM, on February 18, 2020, CLS submitted a lengthy comment letter (“2020 CLS Comment”), accompanied by three attachments containing supporting documentation, to the Department of Education.

The CLS 2020 Comment detailed the need for a regulation to protect religious student groups on public college campuses and their ability to access the same benefits that were available to other student groups.¹⁶ The CLS 2020 Comment explained that “[f]or nearly four decades, religious student groups have been threatened with exclusion from college campuses across the country.”¹⁷

The CLS 2020 Comment further explained that “[f]rom the 1970s to the mid-1990s, the Establishment Clause was used by some university administrators to justify discriminatory treatment of religious student groups.” But it then examined how the United States Supreme Court had removed the Establishment Clause as a justification for denying recognition and student activity fee funding to religious student groups in *Widmar v. Vincent*,¹⁸ and *Rosenberger v. Rector & Visitors of the University of Virginia*.¹⁹ In those cases, the Court held that religious student groups had free speech and expressive association rights to be recognized and obtain access to student activity fee funding on public university campuses. In both cases, the Supreme Court had further held that the Establishment Clause was not violated by religious student groups’ access to recognition and funding.

The CLS 2020 Comment then explained:

After the Supreme Court removed the Establishment Clause as a credible justification for excluding religious groups, some college administrators began to use college policies, including nondiscrimination policies, as their justification for excluding religious groups. Beginning in the mid-1990s, religious student groups, including CLS student chapters, began to encounter this *misuse* of college policies to exclude religious student groups from campus simply because they required their leaders to agree with their religious beliefs. Religious student groups are told they must remove from their governing documents any requirement that their leaders agree with the groups’ basic religious beliefs if they want to remain on campus as a recognized student group.

Religious student groups that have been recognized on a campus for decades with governing documents that require their leaders to agree

¹⁶ Christian Legal Society Comment Letter from Kimberlee Wood Colby to Ms. Lynn Mahaffie, Deputy Assistant Secretary for Policy, Planning, and Innovation, Office of Postsecondary Education, Department of Education, Re: Docket ID ED-2019-OPE-0080 (Feb. 18, 2020) (“2020 CLS Comment”) at 7-19, <https://www.regulations.gov/comment/ED-2019-OPE-0080-16196>.

¹⁷ *Id.* at 1.

¹⁸ 454 U.S. 263 (1981).

¹⁹ 515 U.S. 819 (1995). CLS 2020 Comment at 3-6.

with the groups' religious beliefs are abruptly told that they may no longer have such requirements. Basic religious freedom, however, requires that religious groups be free to choose leaders who agree with their religious beliefs and teachings. Indeed, it should be common ground—particularly for those who advocate a strict separation of church and state—that government officials, including public university administrators, should not interfere with religious groups' choice of their student leaders.²⁰

The CLS 2020 Comment then provided numerous examples of public colleges and universities that had denied religious student groups recognition and other benefits otherwise available to student groups. The examples detailed in the CLS 2020 Comment include the following public universities and colleges: California State University; Texas A&M University; Ohio State University; Temple University School of Medicine; Boise State University; University of South Carolina School of Law; Indiana University-Bloomington; University of Iowa; Wayne State University; Southeast Missouri State University; University of West Georgia; and University of North Texas Dallas College of Law.²¹

The CLS 2020 Comment contained supporting documentation for these examples.²² It also included a document listing scores of colleges and universities, public and private, where religious student organizations had been threatened with exclusion because of their beliefs, speech, practices, policies, or leadership or membership standards.²³ That list, which is a representative listing and not comprehensive, has been updated and included with this comment.²⁴

The University of Iowa example perfectly illustrates the need for 34 C.F.R. §§ 75.500 (d) and 76.500 (d) and their retention. A CLS student chapter has been recognized at the University of Iowa College of Law since the 1980s. The CLS student chapter's constitution has consistently required that its leaders agree with its religious beliefs. Beginning in 1999, on at least 4 occasions, the university threatened to deny recognition if the CLS student chapter did not remove its religious leadership requirement from its constitution.

Often the university was responding to pressure from the student government to exclude CLS, relying on the university's nondiscrimination policy, its Human Rights Policy, as its justification. But in 2004, in response to CLS's potential legal action, the university sent CLS a

²⁰ *Id.* at 6 (footnotes omitted; emphasis in original).

²¹ *Id.* at 7-19.

²² Attachments to Christian Legal Society Comment Letter from Kimberlee Wood Colby to Ms. Lynn Mahaffie, Deputy Assistant Secretary for Policy, Planning, and Innovation, Office of Postsecondary Education, Department of Education, Re: Docket ID ED-2019-OPE-0080 (Feb. 18, 2020) ("CLS 2020 Comment") at 7-19, <https://www.regulations.gov/comment/ED-2019-OPE-0080-16196>.

²³ *Id.* at 89-103.

²⁴ Christian Legal Society, "When Colleges and Universities Exclude Religious Groups: A Serious Problem," Mar. 2023 (listing examples of campuses where religious student groups have experienced problems). The list is at <https://bit.ly/3Td9Q1O> and is Attachment 2023-A.

letter confirming that its religious leadership standards did not violate university policies. This did not end the episodic threats to the CLS student chapter's recognition, but it prevented litigation.

In 2017 and 2018, however, the University derecognized two religious student groups because they required their leaders to agree with their religious beliefs. The groups brought lawsuits in federal district court, before a judge appointed by President Obama. She twice ruled that university officials had misapplied its Human Rights Policy and engaged in viewpoint discrimination against the religious student groups.²⁵ Both cases were appealed to the Eighth Circuit, which affirmed that the university had engaged in unconstitutional viewpoint discrimination. The Eighth Circuit further held that the university officials had forfeited their qualified immunity and were, therefore, personally liable for money damages.²⁶ Eventually, the district court cumulatively awarded over \$1.9 million in attorney's fees to the student groups.²⁷

Remarkably, in the course of litigation, the university submitted a document to the district court listing the student groups that would be derecognized if the court ruled in favor of the university.²⁸ The 32 student groups on the chopping block were only religious groups and included Jewish, Muslim, Sikh, Baha'i, and Christian student groups.²⁹ The groups' offense was that they required their leaders to agree with the groups' religious beliefs.

The University of Iowa case shows that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) protect not only religious students *of all faiths*, but also college administrators. The regulations provide college administrators with clarity, protecting them from costly litigation that may result in their personal liability. Sadly, some college administrators' antagonism to religious student groups blinds them to the fact that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) is in their best interest.

²⁵ See *InterVarsity Christian Fellowship/USA v. University of Iowa*, 408 F.Supp. 3d 960 (S.D. Iowa 2019) (university officials' derecognition of a religious student group because of its religious leadership requirements unconstitutional); *Business Leaders in Christ v. University of Iowa*, 360 F.Supp. 3d 885 (S.D. Iowa 2019) (same).

²⁶ See *InterVarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021) holding that university officials forfeited qualified immunity by derecognizing a religious student group because of its religious leadership requirements); *Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021) (same).

²⁷ See note 3 *supra*.

²⁸ The court document is at https://becketnewsite.s3.amazonaws.com/2019-02-01_UI-Notice_and_RSO-Registration-List.pdf and is Attachment 2023-B.

²⁹ The 32 religious groups targeted for exclusion were: Agape Chinese Student Fellowship; Athletes in Action; Bridges International (UI Chapter); Business Leaders in Christ; Campus Bible Fellowship; Campus Christian Fellowship; Chabad Jewish Student Association; Chi Alpha Christian Fellowship; Chinese Student Christian Fellowship; Christian Legal Society; Christian Medical Association; Christian Pharmacy Fellowship; Cru; Geneva Campus Ministry; Hillel (University of Iowa); Imam Mahdi Organization; International Neighbors at Iowa; InterVarsity Graduate Christian Fellowship; J. Reuben Clark Law Society; Latter-day Saint Student Association; Lutheran Campus Ministry; Multiethnic Undergrad Hawkeye InterVarsity; Muslim Students Association; Newman Catholic Student Center; Orthodox Christian Fellowship; Ratio Christi; The Salt Company; Sikh Awareness Club; St. Paul's University Center; Tau Omega Catholic Service Fraternity; Twenty Four Seven; and Young Life.

B. In adopting the final rule, the Department relied on numerous comments regarding real-life examples of religious student groups on public campuses being denied benefits otherwise available to other student groups because of their religious beliefs, speech, practices, policies, leadership, or membership standards.

When the Department adopted 34 C.F.R. §§ 75.500 (d) and 76.500 (d) as final rules on September 23, 2020, it relied on numerous comments regarding real-life examples of religious student groups on public campuses being denied benefits otherwise available to other student groups because of their religious beliefs, speech, practices, policies, and leadership or membership standards.³⁰ One comment cited by the Department was from someone “who worked with a Catholic student group on more than 100 campuses across the U.S.”³¹ The commenter described “how [the Catholic student groups] have encountered resistance while bringing viewpoint diversity to college campuses.”³² The Catholic student groups “had often been deprived from accessing campus facilities, funding, free speech, and even approval from the university based on their orthodox beliefs.”³³

Another of the many examples relied on by the Department was from a commenter who described how, for a year, a public law school delayed recognizing a religious student group because of its religious leadership requirements. The commenter continued:

The organization felt [its religious leadership requirement] was necessary because many of its board members’ duties outlined in the by-laws involved leading the group in prayer, worship, Bible studies, and fostering members’ spiritual growth.³⁴

Only two years ago, the Department understood the problems religious student groups faced and was moved to act to protect both students and administrators by adopting as final rules 34 C.F.R. §§ 75.500 (d) and 76.500 (d), which became effective November 23, 2020.

C. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) had been in effect for only 5 months when the Department indicated in court documents that they were likely to be rescinded.

34 C.F.R. §§ 75.500 (d) and 76.500 (d) had barely gone into effect when the Department informed a federal district court that it was considering “regulatory options related to the Rule that [might] moot or limit the issues” in a legal challenge to the regulations on constitutional and statutory grounds.³⁵ Notably, 34 C.F.R. §§ 75.500 (d) and 76.500 (d) had not yet even been in effect at the beginning of a single academic year, when recognition problems are most likely to

³⁰ 85 Fed. Reg. 59,916, 59,931-33.

³¹ *Id.* at 59932.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Joint Motion to Stay at 1, *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, No. 1:21-cv-00169 (D.D.C. Mar. 3, 2021), ECF No. 21.

arise for religious student organizations. Essentially, the Department made public its intention to rescind the rules without affording them a fair trial.

Less than 3 months after 34 C.F.R. §§ 75.500 (d) and 76.500 (d) became effective, on January 19, 2021, Americans United for Separation of Church and State and American Atheists Legal Center filed suit in federal district court on behalf of the Secular Student Alliance and one student. The complaint challenged 34 C.F.R. §§ 75.500 (d) and 76.500 (d) on constitutional and statutory grounds.³⁶

On February 18, 2021, a national religious student group, Ratio Christi, moved to intervene as defendant in the case. Ratio Christi's motion explained that Ratio Christi "is a religious group with student chapters on 123 college campuses across the country and *is a direct beneficiary of the challenged federal rule.*"³⁷ Ratio Christi asserted that "the outcome of this case may impair its interests, because Ratio Christi stands to lose the campus protections that the federal rule guarantees."³⁸

In its supporting memorandum and supporting declarations, Ratio Christi reiterated numerous times that it "is a *direct beneficiary* of the Department's rule."³⁹ Ratio Christi explained the importance of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) to itself and other religious student groups to the court and the Department:

Any student can attend Ratio Christi's events and join the organization. Miller Decl. ¶¶ 5, 41. But Ratio Christi requires that those who lead the Christian organization share its religious beliefs. Miller Decl. ¶¶ 22-30. As a result, several universities have denied its student chapters registered status, limiting or eliminating their access to funding, meeting and event space, administrative support, and the ability to advertise their meetings and events on campus. Miller Decl. ¶¶ 54-66. Sometimes these disputes are resolved after negotiations, but not always. In recent years, Ratio Christi was able to resolve a dispute with the university over campus access at least 30 times without litigation.

³⁶ *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, 1:21-cv-00169 (D.D.C. Jan. 19, 2021), ECF No.1.

³⁷ Ratio Christi's Motion to Intervene as Defendant at 1, *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, 1:21-cv-00169 (D.D.C. Feb. 18, 2021), ECF No. 6 (emphasis supplied). The court has yet to rule on the motion.

³⁸ *Id.* at 1-2.

³⁹ Memorandum in Support of Ratio Christi's Motion to Intervene as Defendant at 1, *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, 1:21-cv-00169 (D.D.C. Feb. 18, 2021), ECF No.6-1 (emphasis supplied). *See also, id.* at 4 ("This case thus directly concerns the rights of religious groups like Ratio Christi, who directly benefit from the challenged rule."); *id.* at 5 ("Ratio Christi has a legally protected interest as the direct beneficiary of the Department's rule."); *id.* at 6 ("Because Ratio Christi is among the beneficiaries of the challenged rule, and thus would be harmed if the rule were eliminated, it has a substantial and specific interest in seeing it upheld."); *id.* at 7 ("This action seeks to negate a regulatory protection that benefits Ratio Christi in its particular situation of wishing to select its leaders according to its religious beliefs.").

Miller Decl. ¶¶ 60-61. But only through litigation were two of its student chapters able to access campus resources on equal terms. Miller Decl. ¶¶ 55-59.⁴⁰

Ratio Christi expressed its fears that if 34 C.F.R. §§ 75.500 (d) and 76.500 (d) are “negated,” colleges “would be more cavalier about disregarding [religious students’ First Amendment rights], especially when facing pressure from opposing voices.”⁴¹ “The inevitable result” will be “that groups like Ratio Christi will continue to face rules that exclude them from campus, which would require Ratio Christi to undergo negotiations or pursue litigation for campus access, in a way that other secular groups need not.”⁴² Ratio Christi’s reply on March 11, 2021, reasserted multiple times that it “is a direct beneficiary of the rule.”⁴³

As Ratio Christi noted, the lawsuit itself indirectly “concede[s] that negating the rule would take away real protections from Ratio Christi.”⁴⁴ Otherwise, why the lawsuit?

Ratio Christi President Dr. Corey Miller’s declaration in support of its motion to intervene provided the Department with further evidence that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) directly benefit Ratio Christi and other religious groups. Dr. Miller declared that “[b]ecause of the Department’s rule [34 C.F.R. §§ 75.500 (d) and 76.500 (d)], public colleges and universities . . . are now required on condition of federal funding to respect religious student clubs and not implement policies that would exclude them from the benefits available to all other student clubs.”⁴⁵ Dr. Miller stated that without 34 C.F.R. §§ 75.500 (d) and 76.500 (d), “significant harms on Ratio Christi students who seek to continue to start new student chapters” will occur, and rescinding the regulations “would marginalize religious students and exclude religious student groups from campus benefits available to other students” and create a “disrespectful stigma[.]”⁴⁶ He explained that this would cause a “disproportionate harm to Ratio Christi members because many Christian students come from historically disadvantaged backgrounds,

⁴⁰ *Id.* at 3 (citing Declaration of Corey Miller, President of Ratio Christi, ECF No. 6- 2).

⁴¹ *Id.*

⁴² *Id.* at 7 (citations to Miller Declaration omitted).

⁴³ Ratio Christi’s Reply in Support of Its Motion to Intervene as Defendant, *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, 1:21-cv-00169 (filed Mar. 11, 2021), Dkt. No. 17, at 1; *id.* at 1 (“Ratio Christi is an intended beneficiary of the challenged regulation. If the regulation is voided as Plaintiffs request, then Ratio Christi will lose the protections afforded by the regulation and will likely encounter more policies that exclude it from equal access to campus resources.”); (“Ratio Christi is an intended beneficiary of the challenged regulation”); *id.* at 2 (“[a]s a direct beneficiary of the Rule”); (“Ratio Christi directly benefits from the challenged rule and thus has important, legally protected interests at stake in this case.”); (“Ratio Christi has an interest because it is a direct beneficiary of the Rule.”); *id.* at 3 (“Ratio Christi has a direct interest in this litigation as a beneficiary of the Rule.”); *id.* at 6 (“This action seeks to negate a regulatory protection that benefits Ratio Christi in its particular situation— seeking to access the same campus resources as other student groups.”); (“Removing the regulation, as Plaintiffs request, would remove this protection that clearly and directly benefits Ratio Christi.”).

⁴⁴ *Id.* at 8. *See also, id.* at 11 (“Removing the protections of the challenged rule would remove the federal financial incentive for universities to promptly respect Ratio Christi’s First Amendment right to be on campus, returning Ratio Christi to a situation where it likely would need to have regular recourse to legal counsel, negotiations, or litigation to secure its rights.”).

⁴⁵ Declaration of Corey Miller at 17, *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, 1:21-cv-00169 (D.D.C. Feb. 18, 2021), ECF No. 6- 2. Dr. Miller’s Declaration is Attachment 2023-C.

⁴⁶ *Id.*

especially immigrant, poor, and rural backgrounds.”⁴⁷ He concluded that “repealing the rule . . . will mean that universities will be more likely to violate Ratio Christi students’ First Amendment rights by denying them viewpoint-neutral access to campus resources and by affording preferential access to all other groups.”⁴⁸

The Department filed its opposition to Ratio Christi’s motion to intervene on March 18, 2021. As of that date, if not earlier, the Department was aware of at least one direct beneficiary of 34 C.F.R. §§ 75.500 (d) and 76.500 (d), Ratio Christi. Indeed, the Department told the court, “Ratio Christi, a religious student organization, seeks to intervene as a defendant in this case, claiming that invalidation of the Rule would necessarily result in denied access to campus benefits at public colleges and universities across the country.”⁴⁹ And Ratio Christi’s reply on March 25, 2021, to the Department’s opposition asserted yet again that it is “an explicit beneficiary of the Rule.”⁵⁰

On April 20, 2021, in a Joint Motion to Stay, the Department informed the court that “[o]n January 20, 2021, new leadership assumed responsibility for ED” and “ED . . . is considering regulatory options related to the Rule that may moor or limit the issues in this litigation.”⁵¹ The case was stayed on April 21, 2021.

On August 20, 2021, in their Joint Status Report to the court, the parties stated, “[o]n August 19, 2021, ED published a blog post entitled ‘Update on the Free Inquiry Rule.’ <https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/>. Therein, the Department stated that, ‘[f]ollowing completion of [its] review’ of the aspects of the Rule codified in 34 CFR parts 75 and 76, it ‘anticipate[s] publishing a notice of proposed rulemaking in the Federal Register to propose rescinding parts of the Free Inquiry Rule.’”⁵² Thereafter, the parties filed joint status reports periodically, tracking the events leading up to the NPRM’s publication on February 22, 2023.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Memorandum of Points and Authorities in Opposition to Ratio Christi’s Motion to Intervene as Defendant at 1, *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, 1:21-cv-00169 (D.D.C. Mar. 18, 2021), ECF No. 18.

⁵⁰ Ratio Christi’s Reply to Defendants and in Support of Motion to Intervene as Defendant at 1, *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, 1:21-cv-00169 (D.D.C. Mar. 18, 2021), ECF No. 19. *See also, id.* at 1 (“Rule . . . explicitly protects Ratio Christi”); (“beneficiaries of a rule like Ratio Christi”); *id.* at 2 (“Ratio Christi is a direct beneficiary of the Rule, and it has presented ample evidence that it will suffer substantial harm if the Rule is vacated.”); (“Ratio Christi has a legally protected interest because it is among the entities explicitly protected by the Rule.”); (“Ratio Christi’s chapters are intended beneficiaries of the Rule. That makes Ratio Christi’s case for intervention by right a simple one, because granting Plaintiffs the relief they request removes a direct benefit to Ratio Christi.”); *id.* at 3 (“Ratio Christi’s chapters are direct beneficiaries explicitly given protection in the Rule: ‘religious student organization[s].’”); *id.* at 4 (“Ratio Christi directly ‘benefits from agency action’”).

⁵¹ Joint Motion to Stay at 1, *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, 1:21-cv-00169 (D.D.C. Mar. 3, 2021), ECF No. 21.

⁵² Joint Status Report at 2, *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, 1:21-cv-00169 (D.D.C. Aug. 20, 2021), ECF No. 24.

D. As part of his confirmation proceedings, Secretary Cardona was asked to assure that he would implement 34 C.F.R. §§ 75.500 (d) and 76.500 (d).

In a question for the record in the HELP Committee confirmation hearing for Secretary Cardona, Senator Tim Scott identified 34 C.F.R. §§ 75.500 (d) and 76.500 (d) as rules to protect religious student groups from “public college administrators’ . . . discriminat[ion] against student groups because of their sincerely held religious beliefs, speech, and leadership standards.”⁵³ Senator Scott asked Secretary Cardona to “assure [him] that the Department will work to implement these regulations and ensure that religious students feel welcome and respected on the campuses of public colleges that receive federal grants.”⁵⁴

The Secretary responded that he would “consult with staff at the Department to learn more about these specific regulations *and gather the necessary information prior to determining the appropriate regulatory stance.*”⁵⁵ The Secretary further stated his belief that “we must ensure that learning environments, including college campuses, are places free of discrimination and harassment for all students, including those of all religious faiths.”⁵⁶ 34 C.F.R. §§ 75.500 (d) and 76.500 (d) are necessary to ensure that all public college campuses are free of discrimination and harassment for students of all religious faiths.

Contrary to the Secretary’s record response, by proposing rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d)—while simultaneously admitting in the NPRM that the Department lacks basic information about whether they have benefited students—the Department decidedly has not “gather[ed] the necessary information prior to determining the appropriate regulatory stance.”

In response to the Department’s court filing indicating that it was considering regulatory action related to 34 C.F.R. §§ 75.500 (d) and 76.500 (d), Senator Roy Blunt, Senator James Lankford, and Senator Tim Scott sent a letter on May 20, 2021, advising Secretary Cardona that “[i]t was imperative that the Department of Education uphold regulatory protections for faith-based student groups, particularly for groups that maintain leadership requirements based on sincerely held religious beliefs.”⁵⁷ The letter quoted the Secretary’s response to Senator Scott’s question for the record at his confirmation hearing and observed that “incidents in more than 30 states over the past decade show that faith-based student groups in particular have suffered unequal access to campus resources because of the sincerely held religious beliefs that inspire their association.”⁵⁸

⁵³ *Hearing on the Nomination of Dr. Miguel Cardona for Secretary of Department of Education Before the S. Comm. on Health, Education, Labor, and Pensions*, 117th Cong., 1st Sess. (Feb. 3, 2021) (Questions for the Record at 29). Senator Scott’s QFRs and the Secretary’s responses are at <https://bit.ly/3JzAf5u> and in Attachment 2023-D.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Letter from Senators Blunt, Lankford, and T. Scott to Secretary Cardona 1 (May 20, 2021), <https://bit.ly/40zCGfo>. The letter is Attachment 2023-E.

⁵⁸ *Id.*

E. Within weeks of the new Administration, various organizations began communicating to the Department leadership that C.F.R. §§ 75.500 (d) and 76.500 (d) were needed to protect religious student groups on public college campuses.

On March 3, 2021, representatives of CLS and the Southern Baptists' Ethics & Religious Liberty Commission met with officials in the White House Office of Faith-based and Neighborhood Partnerships. CLS provided the officials with information about issues that religious groups had encountered at the University of Iowa, Indiana University, California State University, Texas A&M, Boise State University, and Wayne State University, as well as a list of over 60 colleges where problems had arisen. CLS and ERLC were recommended to seek meetings with Suzanne Goldberg, Acting Assistant Secretary for the Office of Civil Rights at the Department of Education.

On March 25, 2021, representatives of CLS, the United States Conference of Catholic Bishops, InterVarsity Christian Fellowship/USA, and Ethics and Religious Liberty Commission of the Southern Baptist Convention met with Department of Education officials in the Office of Civil Rights, including Acting Assistant Secretary Suzanne Goldberg. The representatives of religious student groups informed Department officials of the continued need for 34 C.F.R. §§ 75.500 (d) and 76.500 (d) and their usefulness in protecting religious student groups who are of concern to their organizations.

On June 1, 2021, 21 representatives of a diverse spectrum of religious organizations sent a letter to Secretary Cardona to ask him “to preserve the legal protections provided in 34 C.F.R. §§ 75.500 (d) and 76.500 (d) for individual students and religious student organizations so that students of all faiths will continue to feel welcome on their public college campuses.”⁵⁹ The letter stressed that “in spite of these constitutional protections, student groups on some college and university campuses are denied the right to require that their leadership affirm the religious convictions of the organizations.”⁶⁰ The 20 signatories were: Christian Legal Society; United States Conference of Catholic Bishops; Southern Baptists' Ethics & Religious Liberty Commission; Agudath Israel of America; Islam and Religious Freedom Action Team of the Religious Freedom Institute; National Association of Evangelicals; Queens Federation of Churches; The Church of Jesus Christ of Latter-Day Saints; Center for Public Justice; Institutional Religious Freedom Alliance; The Lutheran Church—Missouri Synod; Seventh-day Adventist Church—North American Division; The Wesleyan Church; 1st Amendment Partnership; World Assemblies of God Fellowship; Assemblies of God USA; Council for Christian Colleges & Universities; Asma T. Uddin; Jewish Coalition for Religious Liberty; and a former Executive Director of the U.S. Commission on International Religious Freedom.

⁵⁹ Letter from 21 Religious Organizations and Individuals to Secretary Cardona (June 1, 2021), <https://bit.ly/3JJ7naR>. The letter is Attachment 2023-F. Copied on the letter were the Acting Assistant Secretary for the Office of Postsecondary Education, the Acting Assistant Secretary of the Office for Civil Rights, the Principal Deputy General Counsel and Acting General Counsel of the Department of Education, and the Senior Advisor to the President and Director of the White House Office of Faith-based and Neighborhood Partnerships.

⁶⁰ *Id.*

On June 3, 2021, representatives of 22 religious campus organizations wrote Secretary Cardona to ask that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) be preserved.⁶¹ The letter explained that the regulations “help[] ensure that faith-based student organizations will be treated like other student organizations. It is necessary because colleges often discriminate against religious clubs, including those of many minority faiths, just because they have religious expectations for leaders.”⁶² The letter described the fact that “[t]he regulations address a problem that has existed for four decades on too many public college and university campuses: Religious student groups too frequently are subjected to discriminatory treatment because of their religious beliefs, speech, and leadership standards.”⁶³ The religious campus organizations signing the letter were: Cru; Illinois Muslim Civic Coalition; The Church of Jesus Christ of Latter-day Saints; InterVarsity Christian Fellowship/USA; Fellowship of Catholic University Students; Asian American Christian Fellowship; The Navigators; Coptic Medical Association of North America; Beta Upsilon Chi; Christian Legal Society; Church of the Nazarene; ReJOYce in Jesus Campus Fellowship; CCO (Coalition for Christian Outreach); Christian Medical & Dental Associations; Fellowship of Christian University Students; 1st Amendment Partnership; Ratio Christi; Sigma Alpha Omega Christian Sorority; Reformed University Fellowship; Young Life College & University; and Fellowship of Christian Athletes.

On June 21, 2021, representatives from numerous religious organizations met with Department officials, including Dr. Michelle Asha Cooper, Acting Assistant Secretary for Postsecondary Education, and Suzanne Goldberg, Acting Assistant Secretary for the Office of Civil Rights, regarding the continued need to preserve 34 C.F.R. §§ 75.500 (d) and 76.500 (d) and its vital importance for religious student groups on public campuses. Representatives of the following 14 religious organizations were present at the meeting to urge the regulations’ preservation: Christian Legal Society; United States Conference of Catholic Bishops; Jewish Coalition for Religious Liberty; Islam and Religious Freedom Action Team of the Religious Freedom Institute; National Association of Evangelicals; The Church of Jesus Christ of Latter-day Saints; Institutional Religious Freedom Alliance; 1st Amendment Partnership; World Assemblies of God Fellowship; Assemblies of God USA; General Conference of Seventh-day Adventists; Council for Christian Colleges & Universities; Agudath Israel of America; and Southern Baptists’ Ethics & Religious Liberty Commission.

On June 30, 2021, representatives of several religious campus organizations met with Dr. Michelle Asha Cooper, Acting Assistant Secretary of the Office of Postsecondary Education, to explain the importance of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) and their benefit to religious student organizations. Representatives from the following campus organizations attended: Cru;

⁶¹ Letter from 22 Religious Campus Organizations to Secretary Cardona (June 3, 2021), <https://bit.ly/42wMmch>. The letter is Attachment 2023-G. Copied on the letter were the Acting Assistant Secretary of the Office of Postsecondary Education, Acting Assistant Secretary of the Office for Civil Rights, Principal Deputy General Counsel and Acting General Counsel, Senior Advisor to the President and Director of the White House Office of Faith-based and Neighborhood Partnerships, White House Senior Advisor for Public Engagement and Deputy Director of the White House Office of Faith-based and Neighborhood Partnerships, and a Program Specialist at the U.S. Department of Health and Human Services Partnership Office.

⁶² *Id.* at 1.

⁶³ *Id.* at 3.

InterVarsity Christian Fellowship/USA; The Impact Movement; Christian Medical and Dental Associations; ReJOYce in Jesus Campus Fellowship; and The Navigators. A Cru student leader who graduated from University of California Davis in 2021 also appeared to give a recent graduate's perspective on the need to preserve the regulations.

The representatives provided specific examples of the need for C.F.R. §§ 75.500 (d) and 76.500 (d), as well as specific examples of how the regulations had helped religious student groups in the short time they had been in effect. The representatives stressed that they would be happy to continue to be a resource on the need for continued preservation of the regulations. The representatives explained why the regulations are important to religious student groups, particularly noting the significant challenges to, and negative impact on, students' college experiences when their religious student organizations are prevented from fully participating in student life merely because they, as religious organizations, have faith-based leadership expectations. The representatives noted their desire to allow anyone to explore the faith that the groups represent and that religious student organizations have no desire to exclude other students and no interest in being at the center of a polarizing debate. They merely wish to have an authentic presence on campus, serving and caring for their fellow students while fulfilling their faith-based purposes and missions. Religious student organizations seek to have a meaningful presence on public campuses and to be treated with the same dignity and respect accorded other student organizations.

F. In response to the Department's blogpost announcing it was conducting a review of the Religious Liberty and Free Inquiry regulations, religious organizations continued to ask the Department to preserve 34 C.F.R. §§ 75.500 (d) and 76.500 (d).

On August 19, 2021, the Department posted on its blog⁶⁴ the announcement that it was "currently conducting a review" and "anticipate[d] publishing a notice of proposed rulemaking . . . to propose rescinding parts of the Free Inquiry Rule."⁶⁵

In response, religious organizations continued to communicate the need for preservation of 34 C.F.R. §§ 75.500 (d) and 76.500 (d). In a letter to Secretary Cardona dated September 23, 2021, representatives of religious organizations "respectfully repeat[ed] [their] request that the Department preserve the important legal protections provided in 34 C.F.R. §§ 75.500 (d) and 76.500 (d) for individual students and religious student organizations so that students of all faiths will feel welcome on their public college campuses."⁶⁶ The 19 signatories warned that

⁶⁴ Dr. Michelle Asha Cooper, Acting Assistant Secretary for Office of Postsecondary Education, Deputy Assistant Secretary for Higher Education Programs, Department of Education, *Update on the Free Inquiry Rule*, Aug. 19, 2021, at <https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/>.

⁶⁵ Interestingly, the actual title of the rule is "*Religious Liberty and Free Inquiry Rule*." 34 C.F.R. §§ 75.500 (d) and 76.500 (d) were not specifically mentioned in the blog post, which did not specify which parts of the [Religious Liberty and] Free Inquiry Rule it proposed to rescind.

⁶⁶ Letter from 19 Religious Organizations to Secretary Cardona 1 (Sept. 23, 2021), <https://bit.ly/42DMtCF>. The letter is Attachment 2023-H. Copied on the letter were the Acting Assistant Secretary of the Office of Postsecondary Education, the Acting Assistant Secretary of the Office of Civil Rights, the Principal Deputy General Counsel and

“[r]evision of these regulations would send a message to religious student groups that they are not welcome on public campuses.”⁶⁷

The letter was signed by representatives of the following: Christian Legal Society; United States Conference of Catholic Bishops; Southern Baptists’ Ethics & Religious Liberty Commission; Agudath Israel of America; Islam and Religious Freedom Action Team of the Religious Freedom Institute; National Association of Evangelicals; Queens Federation of Churches; Jewish Coalition for Religious Liberty; The Church of Jesus Christ of Latter-Day Saints; Center for Public Justice; Institutional Religious Freedom Alliance; The Lutheran Church—Missouri Synod; Seventh-day Adventist Church—North American Division; 1st Amendment Partnership; World Assemblies of God Fellowship; Assemblies of God USA; Council for Christian Colleges & Universities; and a former Executive Director of the U.S. Commission on International Religious Freedom.

Again in response to the August 19 blogpost, religious campus organizations added their voices to urge the preservation of 34 C.F.R. §§ 75.500 (d) and 76.500 (d). In a letter to Secretary Cardona dated September 29, 2021, representatives of 19 religious campus organizations “respectfully ask[ed]—as you continue to review this rule, especially 34 C.F.R. §§ 75.500 (d) and 76.500 (d)—that you commit to uphold protections in the Rule that ensure religious student organizations’ ability to have an authentic religious presence on public college and university campuses free from discrimination.”⁶⁸

The organizations explained that “[t]he current rule is necessary and ensures that religious organizations have the same opportunities given to other groups.”⁶⁹ According to the organizations, “Unfortunately, these First Amendment Freedoms have not adequately been ‘worked out’ by universities, students and the courts, making the rule all the more critical. A number of universities continue to misapply First Amendment principles related to religion. In fact, many religious groups continue to be targeted and singled out for different treatment. Some are singled out for derecognition simply because of their leadership requirements that leaders agree with and model the faith and beliefs of the group, a commonsense expectation that ensures a consistent religious identity from year to year.”⁷⁰ The organizations pointed to the University of Iowa and Wayne State University situations as examples where, after years of litigation,

Acting General Counsel, and the Senior Advisor to the President and Director of the White House Office of Faith-based and Neighborhood Partnerships.

⁶⁷ *Id.*

⁶⁸ Letter from 19 Religious Campus Organizations to Secretary Cardona 1 (Sept. 29, 2021), <https://bit.ly/40xpYh3>. The letter is Attachment 2023-I. Copied on the letter were the Acting Assistant Secretary of the Office of Postsecondary Education, the Acting Assistant Secretary of the Office of Civil Rights, the Principal Deputy General Counsel and Acting General Counsel, the Senior Advisor to the President and Director of the White House Office of Faith-based and Neighborhood Partnerships, the White House Senior Advisor for Public Engagement and Deputy Director of the White house Office of Faith-Based and Neighborhood Partnerships, and the Program Specialist at the U.S. Department of Health and Human Services Partnership Office.

⁶⁹ *Id.* at 2.

⁷⁰ *Id.*

courts have found that universities have targeted and singled out religious student groups for exclusion.⁷¹

The letter also articulated the crux of the issue:

A [nondiscrimination] policy is not ‘neutral’ just because it has the same words applying to every group, if those words by definition uniquely impact one group differently and result in disparate treatment. This is true when the word ‘religion’ in a nondiscrimination statement is unreasonably applied to religious organizations’ selection of their leaders. *That term means, applied to nonreligious groups, that they may not distinguish based on religious identity, but they may expect their leaders or members to agree with their groups’ non-religious purposes and beliefs. Yet applied to a religious group, it means that they may neither distinguish based on religious identity nor expect their leaders or members to agree with their purposes and beliefs, because those beliefs are religious.* In the enumerated statuses, religion is the only one that results in this unequal treatment, because it is the only listed category where status and belief are intertwined and inseparable.⁷²

The 19 religious campus organizations signing the letter were: Cru; The Church of Jesus Christ of Latter-day Saints; InterVarsity Christian Fellowship/USA; Asian American Christian Fellowship; The Navigators; Coptic Medical Association of North America; Christian Legal Society; Church of the Nazarene; ReJOYce in Jesus Campus Fellowship; CCO (Coalition for Christian Outreach); Christian Medical & Dental Associations; Fellowship of Christian University Students; 1st Amendment Partnership; Ratio Christi; Sigma Alpha Omega Christian Sorority; Reformed University Fellowship; Young Life College & University; Fellowship of Christian Athletes; and Chi Alpha Campus Ministries, U.S.A.

G. Organizations representing religious student groups met with Department and OIRA officials in several 12866 meetings to explain how 34 C.F.R. §§ 75.500 (d) and 76.500 (d) provide meaningful protection for religious student groups on public college campuses.

Religious campus organizations met with Department of Education and OIRA officials in three meetings on March 1, 2022, March 10, 2022, and April 4, 2022. At each of these meetings, the organizations continued to provide Department and OIRA officials with empirical evidence of the importance of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) to the protection of vulnerable religious student groups.⁷³

⁷¹ *Id.*

⁷² *Id.* (emphasis supplied).

⁷³ A list of the four 12866 meetings, their participants, and the documents provided is Attachment 2023-J.

1. March 1, 2022, 12866 Meeting

On March 1, 2022, the President and CEO of Ratio Christi and its legal counsel, Alliance Defending Freedom, had a 12866 meeting with Department and OIRA officials to discuss proposed rulemaking regarding the Religious Liberty and Free Inquiry Rule.⁷⁴ As already discussed, Ratio Christi “is a religious group with student chapters on 123 college campuses across the country and *is a direct beneficiary of the challenged federal rule.*”⁷⁵ In its memorandum in support of its motion to intervene in the lawsuit challenging 34 C.F.R. §§ 75.500 (d) and 76.500 (d), Ratio Christi explained that “the outcome of this case may impair its interests, because Ratio Christi stands to lose the campus protections that the federal rule guarantees.”⁷⁶

In conjunction with the 12866 meeting, Ratio Christi and Alliance Defending Freedom submitted written comments (“Ratio Christi’s 12866 Comment”) as part of the public record during the OIRA process.⁷⁷

Ratio Christi’s 12866 Comment noted that “[r]eligious discrimination is on the rise on college campuses, with 1 in 4 students experiencing either discrimination or intolerance because of their religious beliefs”⁷⁸ and that “[t]he current regulation assists in eliminating religious discrimination and intolerance on college campuses.”⁷⁹

Ratio Christi’s 12866 Comment urged the Department to calculate the cost of losing the numerous benefits of 34 C.F.R. §§ 75.500 (d) and 76.500 (d). The Department failed to do so in the February 22, 2023, NPRM. The Department’s failure to calculate the cost of losing the numerous benefits of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) for religious student groups, other students, colleges, college administrators, taxpayers, and American civil society renders rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) arbitrary and capricious.

Ratio Christi’s 12866 Comment specifically asked the Department to calculate the cost of losing the following benefits of 34 C.F.R. §§ 75.500 (d) and 76.500 (d):

⁷⁴ Office of Information and Regulatory Affairs, Office of Management and Budget, “View E.O. 12866 Meeting—1840-AD70,” <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-AD72&meetingId=121424&acronym=1840-ED/OPE> (last visited Mar. 20, 2023).

⁷⁵ Ratio Christi’s Motion to Intervene as Defendant at 1, *Secular Student Alliance, et al. v. U.S. Department of Education, et al.*, 1:21-cv-00169 (D.D.C. Feb. 18, 2021), ECF No. 6 (emphasis supplied).

⁷⁶ *Id.* at 1-2.

⁷⁷ Matthew S. Bowman and Mallory Rechtenbach, Alliance Defending Freedom and Corey Miller, President/CEO Ratio Christi, E.O. 12866 Meeting Religious Liberty and Free Inquiry Rule, Rulemaking RIN: 1840-AD72, “ADF-Ratio Christi Comment Free Inquiry Rule—1840-AD72,” Mar. 1, 2022, <https://mobile.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-AD72&meetingId=121424&acronym=1840-ED/OPE> (last visited Mar. 20, 2023). Ratio Christi’s 12866 Comment is Attachment 2023-K.

⁷⁸ *Id.* at 1 (citing Kevin Fosnacht & Cindy Broderick, *The Role of Religion and Institution Type in Seniors’ Perceptions of the Religious and Spiritual Campus Climate*, 19 J. of Coll. & Character 244 (Feb. 2018)).

⁷⁹ *Id.* at 2.

1. “the benefit of student free speech, intellectual diversity, and religious nondiscrimination”;
2. “the degree to which repealing this regulation would lead to further discrimination, intolerance, and marginalization of religious students on campus, particularly those who are members of minority religions”;
3. “the financial impact on national religious student organizations, chapters of organizations on individual campuses, and individual student members”;
4. “the economic prospects of the national organization through a substantial loss of dues and members” if the regulation’s repeal leads to their chapters being “decertified by universities”;
5. the cost to religious student groups if they are decertified and denied access to the mandatory student activity fees which their student members are required to pay but cannot access, which will lead to religious student groups’ loss of reimbursement for expenses and lost speech opportunities, as well as “a disparate negative impact on those organizations’ ability to gather and speak in comparison to other student organizations”; and
6. the cost to religious student groups if, as a result of decertification, “they would have to pay anywhere from \$200-\$1000 to rent space for each meeting.”⁸⁰

The Department’s failure to include even these cost calculations in its decision to propose rescinding 34 C.F.R. §§ 75.500 (d) and 76.500 (d) is arbitrary and capricious. Ratio Christi’s 12866 Comment asked the Department to consider the burdens and costs resulting from repeal of 34 C.F.R. §§ 75.500 (d) and 76.500 (d).⁸¹ The Department’s failure to do so is arbitrary and capricious.

Ratio Christi’s 12866 Comment further asked the Department to assess “the number of religious student organizations likely to be expelled from campuses or student group resources that currently have protection under [34 C.F.R. §§ 75.500 (d) and 76.500 (d)].”⁸² The Department’s failure to do so is arbitrary and capricious.

Ratio Christi’s 12866 Comment observed that “[r]epealing [34 C.F.R. §§ 75.500 (d) and 76.500 (d)] would open up religious students to further marginalization and discrimination.”⁸³ Ratio Christi noted that at the University of Iowa only religious groups were threatened with exclusion, even though 356 student groups were not in compliance with the university’s policy. Understandably, some religious students “reported feeling ‘intimidated’ by what the university’s accusations and deregistration of their organization meant for their education and future job prospects, particularly because the university was also the employer for some of these students.”⁸⁴ Ratio Christi’s 12866 Comment provided other support for the negative impact that

⁸⁰ *Id.* at 2-3.

⁸¹ *Id.* at 3.

⁸² *Id.*

⁸³ *Id.* at 4.

⁸⁴ *Id.* (citing Eboo Patel, *Should Colleges De-Register Student Groups*, Inside Higher Ed, Sept. 28, 2018, <https://www.insidehighered.com/blogs/conversations-diversity/should-colleges-de-register-student-groups>).

the religious discrimination likely will have on religious students if 34 C.F.R. §§ 75.500 (d) and 76.500 (d) is repealed. *Id.* at 3. The Department’s failure to measure the costs of marginalization, harassment, intimidation, and discrimination on religious students and on religious student groups on public college campuses is arbitrary and capricious.

Ratio Christi’s 12866 Comment also observed that “[f]orming and joining student organizations has a significant positive impact on student outcomes and mental health” and asked the Department to “consider the negative impact on students’ development and mental health if religious organizations are removed from campus.”⁸⁵ Ratio Christi’s 12866 Comment pointed to several studies confirming that participation in student organizations is an important factor in students’ well-being and academic motivation, which is especially important after the pandemic during which students’ mental and emotional health suffered.⁸⁶ The Comment specifically quoted one study that observed, “Religious participation on campus is itself a form of social integration. Faith communities are instrumental in the formation of friendships and intimacy with other people, and these supportive networks, in turn, provide a wide range of psychological and spiritual benefits.”⁸⁷ The Comment noted, “Stanford researchers have found that ‘good academic performance is also driven by habits learned through religious adherence,’ because they cultivate conscientiousness and cooperation.”⁸⁸ Additionally, the Comment noted that “Studies have shown that first generation college students most frequently utilized two programs to aid in success: departmental organizations and religious organizations.”⁸⁹ These are reinforced by the findings of Professor Ilana Horwitz and her 2022 book, *God, Grades, and Graduation: Religion’s Surprising Impact on Academic Success*.⁹⁰

The Department’s failure to measure the benefits that religious student groups provide their participants, including first-generation students, on public college campuses is arbitrary and capricious. The Department’s failure to measure the benefits that religious student groups provide to public institutions of higher education by providing a sense of belonging and encouraging various character qualities, as well as mental and emotion health, that contribute to their participants’ academic success is arbitrary and capricious.

Ratio Christi’s 12866 Comment asked the Department “to provide a sufficient analysis to assess and certify the impact on religious organizations—both parent organizations of student groups, and the student groups themselves—on removing the current regulatory protections for those organizations.” The Department’s failure to measure the cost of rescission of 34 C.F.R. §§

⁸⁵ *Id.* at 5.

⁸⁶ *Id.* & notes 16-25.

⁸⁷ *Id.* note 19, citing Alyssa N. Bryant, *The Effects of Involvement in Campus religious Communities on College Student Adjustment and Development*, 8 J. of College & Character 1 (2007).

⁸⁸ *Id.* note 24 (citing Carrie Spector, *Religiously engaged adolescents demonstrate habits that help them get better grades*, *Stanford scholar finds*, Stanford Research Stories, Apr. 15, 2018. Spector was reporting on findings by Professor Ilana Horwitz, who has since published her findings in her book, *God, Grades, and Graduation: Religion’s Surprising Impact on Academic Success*, Oxford University Press (2022).

⁸⁹ *Id.* note 25 (citing Erica Irlbeck et al., *First Generation College Students: Motivations and Support Systems*, 55 J. of Ag. Ed. 154 (2014), <https://files.eric.ed.gov/fulltext/EJ1122313.pdf>).

⁹⁰ Ilana M. Horwitz, *God, Grades, and Graduation: Religion’s Surprising Impact on Academic Success*, Oxford University Press (2022).

75.500 (d) and 76.500 (d) on religious organizations—both parent organizations of student groups and the student groups themselves—under the rubric of small businesses as defined in the Regulatory Flexibility Act is arbitrary and capricious.

In summary, Ratio Christi’s 12866 Comment asked the Department to assess the benefits of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) in several specific ways, as well as the costs of rescinding 34 C.F.R. §§ 75.500 (d) and 76.500 (d) in several specific ways. The Department’s failure to calculate these specific costs and benefits in its NPRM on February 22, 2023, proposing to rescind 34 C.F.R. §§ 75.500 (d) and 76.500 (d), is arbitrary and capricious.

2. March 10, 2022, 12866 Meeting

Representatives of several of the largest national religious campus organizations had a 12866 meeting on March 10, 2022, with Department and OIRA officials.⁹¹ The national religious campus organizations explained the importance of the protections provided by 34 C.F.R. §§ 75.500 (d) and 76.500 (d) to their thousands of religious student chapters. Representatives of Cru, InterVarsity Christian Fellowship/USA, The Navigators, Christian Medical & Dental Association, and Impact Movement explained the positive benefits that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) have had on their student chapters.

InterVarsity informed the officials of the importance of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) protecting its student chapter at the University of New Mexico in 2020. Cru informed the officials of the importance of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) in protecting its student chapters in 2021.

All five representatives affirmed that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) protect their chapters on public college campuses nationwide. The five representatives also provided the officials with specific examples of threatened exclusion of their chapters before 2020, which would have been resolved more easily had 34 C.F.R. §§ 75.500 (d) and 76.500 (d) been on the books.

Specifically, the InterVarsity representative informed the officials of the cost to students, minority religious student groups, and university administrators when litigation is necessary to protect religious student groups’ access to public college campuses, such as occurred when the University of Iowa targeted an InterVarsity student chapter for exclusion from campus. InterVarsity was forced to turn to litigation to remain on campus despite its students’ reluctance to sue their university. The students endured years of litigation which consumed the majority of their college years and cast a somber tone over their college experience. During the litigation, the university threatened to derecognize 32 other religious student groups, including Jewish, Muslim, Sikh, Baha’i, and Christian student groups. The InterVarsity representative provided the Department and OMB officials with the court document listing the 32 religious groups that the

⁹¹Office of Information and Regulatory Affairs, Office of Management and Budget, “View E.O. 12866 Meeting—1840-AD70,” March 10, 2022,

<https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-AD72&meetingId=122473&acronym=1840-ED/OPE> (last visited Mar. 20, 2023).

university had produced during litigation.⁹² The list attests to the extremism religious student groups encounter: A major public university was willing to decimate the religious student groups on its campus simply because they required their leaders to agree with their faith.⁹³

After years of litigation, the federal district court found that the university was liable for over \$1.9 million in legal fees. A federal appellate court found that university administrators had lost their qualified immunity and were personally liable for the student organizations' money damages. Had 34 C.F.R. §§ 75.500 (d) and 76.500 (d) been in effect in 2017 when the litigation began, it is reasonable to expect that the cost (at a conservative estimate of \$2.5 million) to students, religious student groups, university administrators, and the university itself would have been avoided.

Cru informed the Department and OIRA officials of Indiana University's threat in 2015-2016 to exclude religious student organizations that had religious leadership standards from campus. Cru provided a letter to the university from 19 religious student organizations at Indiana University opposing the university's threatened exclusion.⁹⁴ The 19 groups included students from the Jewish, Christian, and Muslim faiths.

The organizations also provided the Department and OIRA officials with two letters to Secretary Cardona explaining the importance of preserving 34 C.F.R. §§ 75.500 (d) and 76.500 (d) to protect religious student groups on campus. The letters, dated June 3, 2021, and September 29, 2021, were signed by 22 religious campus organizations and 19 religious campus organizations, respectively.⁹⁵

Cru also conveyed two booklets to the Department and OIRA officials. Interfaith Youth Core's booklet reviewed student survey information from 2020 addressing how public and private institutions of higher education can better facilitate college students' knowledge and willingness to work with persons of other faiths.⁹⁶ The authors asserted that colleges and universities have long made concerted efforts to advance diversity in the areas of race, gender,

⁹² The 32 groups are listed at note 29 *supra* and Attachment 2023-B.

⁹³ Office of Information and Regulatory Affairs, Office of Management and Budget, "University of Iowa Religious Group Watchlist 2019," Office of Information and Regulatory Affairs, Office of Management and Budget, "View E.O. 12866 Meeting—1840-AD70," March 10, 2022, <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-AD72&meetingId=122473&acronym=1840-ED/OPE> (last visited Mar. 20, 2023).

⁹⁴ The letter was signed by representatives of 19 religious student organizations at Indiana University: The Navigators; Adventist Christian Fellowship; Baptist Collegiate Ministry; Bridges International; Campus Outreach; Chabad House; Chi Alpha; Christian Legal Society Chapter at IU; Christian Life Fellowship; Christian Student Fellowship; Clearnote; Connexion; Cru; Hoosier Catholic Students; InterVarsity Christian Fellowship; University Lutheran Church (Lutheran Church—Missouri Synod; Muslim Student Association; Redeemer at IU; Reformed University Fellowship. The letter is Attachment 2023-L.

⁹⁵ These letters are Attachments 2023-F and 2023-H *supra*.

⁹⁶ Alyssa N. Rockenbach, Matthew J. Mayhew, Mary Ellen Giess, Shauna M. Morin, B. Ashley Staples, Benjamin P. Correia-Harker, & Associates, *IDEALS (Interfaith Diversity Experiences & Attitudes Longitudinal Survey): Bridging Religious Divides through Higher Education*, Interfaith Youth Core (2020), <https://www.interfaithamerica.org/research/bridging-religious-divides-through-higher-education/> (last visited March 22, 2023).

and sexual orientation; however, religion has been continuously de-prioritized as an aspect of diversity work on most campuses.”⁹⁷ One suggestion was to encourage the formation of religious student groups on campus.⁹⁸ Particularly pertinent was the finding that “half of all Christian students did not believe their campuses were receptive to religious diversity overall. Perhaps surprisingly, evangelical (23%) and Catholic (22%) students felt pressured to limit expression of their religious beliefs almost as often as their Jewish and Muslim peers did.”⁹⁹

The Cru booklet is replete with examples of the good works that religious student groups perform on their campuses, in surrounding communities, and on national and international on trips. It elucidates the valuable contributions that religious student organizations bring to their campuses:

Student organizations provide safe spaces for students to find support and to flourish as they enter adulthood, explore their identity, and formulate their values. Students need community to develop into healthy, responsible citizens. Religious community in particular, by caring for the emotional and spiritual aspects of life, provides that support as students deal with the stresses of college, such as pressure to succeed or relational stress, which can lead to isolation and despair. The spiritual side of life is especially important for many — they either desire to explore new faith perspectives or want to find a faith community similar to the one they were raised in. They should have the opportunity to do so, right on campus.¹⁰⁰

The booklet discussed a sampling of the campuses where religious student groups have been threatened with exclusion, including Indiana University, California State University, University of Northern Colorado, Minnesota State University—Mankato, and Southeast Missouri State University.¹⁰¹ A map showed that the problem has occurred on numerous campuses nationwide.¹⁰²

The Department’s failure to engage with the benefits that religious student groups bring to their campuses makes the proposed rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) arbitrary and capricious. The Department’s failure to engage with the numerous examples presented by these national religious campus organizations of the threatened exclusion of

⁹⁷ *Id.* at 5.

⁹⁸ *Id.* at 27.

⁹⁹ *Id.* at 15.

¹⁰⁰ Cru, *Protecting the Presence of Religious Student Organizations* (2018), at 6, Office of Information and Regulatory Affairs, Office of Management and Budget, “University of Iowa Religious Group Watchlist 2019,” Office of Information and Regulatory Affairs, Office of Management and Budget, “View E.O. 12866 Meeting—1840-AD70,” March 10, 2022,

[https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-](https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-AD72&meetingId=122473&acronym=1840-ED/OPE)

[AD72&meetingId=122473&acronym=1840-ED/OPE](https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-AD72&meetingId=122473&acronym=1840-ED/OPE) (last visited Mar. 20, 2023) (last visited Mar. 22, 2023).

¹⁰¹ *Id.* at 10-21.

¹⁰² *Id.* at 14-15.

religious student groups makes the proposed rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) arbitrary and capricious. The Department's failure to engage with these national campus religious organizations to learn the scope and depth of the problems their student chapters have encountered, and continue to encounter, makes the proposed rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) arbitrary and capricious. The Department's failure to calculate the cost of losing the numerous benefits of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) makes the proposed rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d), as addressed by these representatives of national religious campus organizations, arbitrary and capricious.

3. April 4, 2022, 12866 Meeting

Representatives of three national religious organizations attended a 12866 meeting on April 4, 2022, with Department and OIRA officials. The national religious organizations' representatives explained the importance of the protections provided by 34 C.F.R. §§ 75.500 (d) and 76.500 (d) to their student chapters, churches, and state legislators.¹⁰³ The representatives were from the National Association of Evangelicals, Christian Legal Society, and 1st Amendment Partnership. The National Association of Evangelicals represents 40 denominations and over 40,000 churches. CLS has law student chapters on 140 law school campuses. CLS's Center for Law & Religious Freedom has 50 years of experience in working to protect religious student groups on public college campuses. 1st Amendment Partnership works in the states to protect religious freedom, including protecting religious student groups on public college campuses.

CLS submitted to the Department and OIRA officials two documents regarding a situation at the University of Virginia in August 2021. The University of Virginia Student Council conditioned access to the Fall Activities Fairs for student organizations, on their completion of a novel "Identity Inclusion Disclosure Form."¹⁰⁴ The form required that a student group's leader indicate whether the group was "a religious or political organization." If so, the student leader must indicate whether it "restricted its membership, leadership, programs, or activities on the basis of" 15 different classifications. The form stated that a student group could be derecognized for "misrepresentation" on the form. The form also required that a student leader answer the questions "[o]n your honor," which meant that the leader could be charged with a violation of the University Honor Code if the Student Council determined there was "misrepresentation." This could be understood to mean that a student leader could be dismissed from the university if she provided an answer that the Student Council deemed to be a "misrepresentation."

Motivated by this harassing threat to religious groups' student leaders, CLS sent a letter to the university referencing Regulations 34 C.F.R. §§ 75.500(d) & 76.500(d).¹⁰⁵ Within days, the student government withdrew its form as a condition for participation in the Fall Activities Fairs.

¹⁰³Office of Information and Regulatory Affairs, Office of Management and Budget, "View E.O. 12866 Meeting—1840-AD70," April 4, 2022, <https://mobile.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1840-AD72&meetingId=128374&acronym=1840-ED/OPE> (last visited Mar. 22, 2023).

¹⁰⁴ Office of Information and Regulatory Affairs, Office of Management and Budget, "View E.O. 12866 Meeting—1840-AD70," "Student Council Identity Inclusion Disclosure Form," April 4, 2022, <https://bit.ly/3lzwxgZ> (last visited Mar. 20, 2023). The form is Attachment 2023-M.

¹⁰⁵ Office of Information and Regulatory Affairs, Office of Management and Budget, "View E.O. 12866 Meeting—1840-AD70," Letter from Kim Colby, Center for Law & Religious Freedom, Christian Legal Society, to President

The representative from 1st Amendment Partnership shared with the Department and OIRA officials the fact that since 2010, 17 states have enacted laws that protect religious student groups.¹⁰⁶ Often these laws were passed in response to religious student groups being threatened with exclusion from public university campuses in those states.

The Department's failure to engage with the examples that these representatives of national religious campus organizations provided of the continued need for 34 C.F.R. §§ 75.500 (d) and 76.500 (d) makes their rescission arbitrary and capricious. The Department's failure to engage with these national campus religious organizations to ascertain the scope and depth of the problems their student chapters have encountered, and continue to encounter, makes the proposed rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) arbitrary and capricious. The Department's failure to calculate the cost to religious student groups and national religious campus organizations of losing the benefits of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) make rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) arbitrary and capricious.

Throughout 2021 and 2022, national religious organizations and national religious campus organizations consistently told the Department of the continued need for the protections and benefits provided by 34 C.F.R. §§ 75.500 (d) and 76.500 (d), and the costs that their rescission would impose on religious students, all students, colleges, college administrators, taxpayers, and American civil society. But the Department refused to perform its due diligence and refused to objectively evaluate the evidence offered it by the organizations most familiar with the continued threats to deny religious student groups access to the same benefits afforded to other student groups. If the Department rescinds 34 C.F.R. §§ 75.500 (d) and 76.500 (d), its action would be arbitrary and capricious.

III. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) have meaningfully increased protections for religious student organizations.

A. In the past two years, 34 C.F.R. §§ 75.500 (d) and 76.500 (d) have positively benefited religious student groups on numerous public university and college campuses.

Jim Ryan, University of Virginia (Aug. 12, 2021), <https://bit.ly/3LOMwFT> (last visited Mar. 20, 2023). The letter is Attachment 2023-N.

¹⁰⁶ Ala. Code 1975 § 1-68-3(a)(8) (all student groups); Ariz. Rev. Stat. § 15-1863 (religious and political student groups); Ark. Code Ann. § 6-60-1006 (all student groups); Idaho Code § 33-107D (religious student groups); Ind. Code 21-39-8-1 et seq. (religious, political, and ideological student groups); Iowa Code § 261H.3(3) (all student groups); Kan. Stat. Ann. §§ 60-5311-5313 (religious student groups); Ky. Rev. Stat. Ann. § 164.348(2)(h) (religious and political student groups); La. Stat. Ann.-Rev. Stat. § 17.:3399.33 (belief-based student groups); Mont. Code Ann. § 20-25-518 (religious, political, or ideological); N.C. Gen. Stat. Ann. § 116-40.12 (religious and political student groups); N.D. § 15-10.4-02(h) (student organizations' beliefs); Ohio Rev. Code § 3345.023 (religious student groups); Okla. St. Ann. § 70-2119.1 (religious student groups); S.D. Ch. § 13-53-52 (ideological, political, and religious student groups); Tenn. Code Ann. § 49-7-156 (religious student groups); Va. Code Ann. § 23.1-400 (religious and political student groups).

In the NPRM, the Department said that it “welcomes evidence from the public regarding whether maintaining a condition specifically for institutions that receive Department grants has provided any additional protections of the First Amendment rights of religious student organizations at public institutions.” Part II *supra* demonstrates that the Department was given such evidence repeatedly in 2021 and 2022 by over 40 national religious organizations, including national religious campus organizations, through letters to the Secretary, meetings with various Department officials, and 12866 meetings with Department officials. Senators have also advised the Department of the importance of these regulations to religious student organizations.

In Part III, CLS will highlight some of the campus situations in which 34 C.F.R. §§ 75.500 (d) and 76.500 (d) have protected religious student organizations on major university campuses in 2021 and 2022. This part also reviews the four decades of situations that the Department considered in adopting 34 C.F.R. §§ 75.500 (d) and 76.500 (d). The Department would be acting arbitrarily and capriciously if it ignored this evidence of the historical, as well as the current, need for 34 C.F.R. §§ 75.500 (d) and 76.500 (d) and instead rescinded the regulations.

To begin, it is, of course, reasonable to presume that federal regulations affect the behavior of institutions of higher education and their administrators. It would be unreasonable to ignore the fact that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) incentivize institutions of higher education and their administrators to provide religious student groups with the benefits that the institutions otherwise make available to other student groups.

As an empirical matter, we know that several public universities that threatened to derecognize religious student groups refrained from doing so after receiving letters citing 34 C.F.R. §§ 75.500 (d) and 76.500 (d). These examples represent only the situations of which CLS staff are aware. It is reasonable to assume that many administrators who might have denied religious student organizations recognition and its benefits did not do so because of the regulations’ existence. Good regulations preempt problems, often merely by their existence. And from decades of practical experience, we know that individual religious student organizations often never report to the national organizations with which they are affiliated the actual problems they encounter.

CLS knows that CLS student chapters on the following campuses were recognized, without resort to litigation, after university administrators received correspondence from our office that relied on 34 C.F.R. §§ 75.500 (d) and 76.500 (d). The Department should note that the University of Wisconsin situation, described below, by itself demonstrates the continued need for the regulations because the university provided only “provisional” registration of the CLS chapter, thereby reserving the right to withdraw the CLS chapter’s registration in the future. The university’s insistence that registration of the CLS chapter is “provisional” provides concrete evidence of the continued need for 34 C.F.R. §§ 75.500 (d) and 76.500 (d).

1. University of Wisconsin-Madison—Fall 2022

The CLS law student chapter at the University of Wisconsin-Madison (“CLS-UW”) has been a registered student organization since at least 1991. For the 2022-2023 academic year, the

university lists 982 registered student groups,¹⁰⁷ and the law school lists 42 student organizations.¹⁰⁸

In summer 2022, the CLS students submitted their chapter's application for re-registration for the 2022-2023 academic year, using the same constitution it had used since 2010. But on August 24, 2022, the university's Center for Leadership & Involvement denied CLS-UW's application for re-registration.¹⁰⁹ University staff claimed that CLS-UW's "leadership requirements are in conflict with the UW-System non-discrimination policy."¹¹⁰ Explaining the basis for its refusal, the Center wrote the CLS students: "You may require leaders or members of your organization to agree with the beliefs of the national organization, but you may not require leaders or members of your organization to identify with any particular faith or religion."¹¹¹

As this sentence demonstrates, university members are not confused by 34 C.F.R. §§ 75.500 (d) and 76.500 (d); *they are confused by their own university policies*. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) provide university administrators with clear guidance regarding how they should treat religious student groups. Contrary to the Department's claim that the regulations create confusion for university administrators, the reality is that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) clarify administrators' confusion and help them avoid litigation.

In 2006, the University of Wisconsin Board of Regents adopted Regent Policy 30-6, which allows student organizations to "select their members or officers on the basis of commitment to a set of beliefs (e.g., religious or political beliefs)[.]"¹¹² The Board of Regents adopted Policy 30-6 as part of the settlement of a lawsuit filed by InterVarsity Christian Fellowship after the university threatened to deny it registration because of its religious leadership standards.

Sixteen years after Policy 30-6 was adopted, university staff re-interpreted the policy to prohibit a religious group's religious leadership standards. Remarkably, university staff re-interpreted its policy when dealing with the re-registration of a religious student group (CLS) that had been a registered group since 1991.

Legal counsel for CLS-UW sent two letters to the university administration explaining that the university would be in violation of 34 C.F.R. §§ 75.500(d) & 76.500(d) if CLS-UW was not

¹⁰⁷ Wisconsin Involvement Network, "Organizations," at <https://win.wisc.edu/organizations> (last visited Mar. 12, 2023).

¹⁰⁸ Law School University of Wisconsin, "Student Organizations," at <https://law.wisc.edu/current/orgs.html> (last visited Mar. 14, 2023).

¹⁰⁹ Letter from Kim Colby, Center for Law & Religious Freedom, Christian Legal Society, to Quinn Williams, General Counsel, University of Wisconsin System 8 (Sept. 9, 2022) (attaching email from University of Wisconsin's Center for Leadership & Involvement to CLS-UW), <https://bit.ly/42gMk7Y>. The letter is Attachment 2023-O.

¹¹⁰ *Id.* at 9.

¹¹¹ *Id.*

¹¹² University of Wisconsin System, Board of Regents, Regents Policies, Policy 30-6, "Recognition of Student Organizations," at <https://www.wisconsin.edu/regents/policies/recognition-of-student-organizations/> (last visited Mar. 12, 2023).

re-registered.¹¹³ Eventually, the university agreed to restore recognition to CLS-UW for the 2022-2023 academic year, *but it characterized CLS-UW's registration as "provisional."*¹¹⁴ The university's insistence that CLS-UW's registration is "provisional" is concrete evidence that CLS-UW students would be harmed if 34 C.F.R. §§ 75.500(d) & 76.500(d) were rescinded.

In summary, the University of Wisconsin's threatened exclusion of CLS-UW demonstrates that:

- a. C.F.R. §§ 75.500 (d) and 76.500 (d) are needed to protect CLS-UW and other religious student organizations. The university re-registered CLS-UW only after it received two letters from legal counsel, which cited the regulations.
- b. C.F.R. §§ 75.500 (d) and 76.500 (d) are needed to continue to provide vital protection to CLS-UW students because the university emphasized that its re-registration was "provisional."
- c. Litigation is not a long-term solution to the problem religious student groups face because university staff re-interpreted the Board of Regents' policy *sixteen years* after the policy had been adopted (as part of a settlement agreement in a lawsuit brought by another religious student organization that had been denied recognition because of its religious leadership standards). Typically, staff and students are not aware of litigation that occurred in previous years.
- d. The source of the university administrators' confusion is not the federal regulations but ambiguous university policies, whereas C.F.R. §§ 75.500 (d) and 76.500 (d) are plainly written, straightforward, and succinct.
- e. If a complaint is filed, the Department's investigation will not be burdensome because the university's original denial was explicit that it was denying CLS-UW recognition because of its leadership standards and that the university considered CLS-UW's recognition to be "provisional."
- f. Because C.F.R. §§ 75.500 (d) and 76.500 (d) exist, the CLS-UW student chapter did not need to file litigation in order to obtain registration, a benefit to the students, university administrators, and taxpayers.
- g. The economic cost to the CLS-UW students is reflected in the fact that the CLS-UW leaders spent 7 weeks, from August 24, 2022, until October 13, 2022, working to achieve re-registration, which took significant time away from their legal studies and jobs.

¹¹³ Letter from Kim Colby, Center for Law & Religious Freedom, Christian Legal Society, to Quinn Williams, General Counsel, University of Wisconsin System (Sept. 9, 2022), <https://bit.ly/42gMk7Y>; Letter from Kim Colby, Center for Law & Religious Freedom, Christian Legal Society, to Quinn Williams, General Counsel, University of Wisconsin System (Sept. 26, 2022), <https://bit.ly/3TfjAIR>. The letters are Attachments 2023-O and 2023-P, respectively.

¹¹⁴ An email on September 28, 2022, from the University of Wisconsin to CLS stated that CLS was being registered as a UW-Madison registered student organization (RSO) "on a provisional basis" for the 2022-2023 academic year.

2. University of New Hampshire Franklin Pierce School of Law—Fall 2022

In fall 2022, the CLS law student chapter at University of New Hampshire Franklin Pierce School of Law (“CLS-UNH”) filed the necessary documents to be affiliated as an officially recognized student organization. The University of New Hampshire lists over 300 student organizations,¹¹⁵ and the law school lists 29 student organizations.¹¹⁶

Instead of treating the CLS students fairly and with respect, the Student Body Association (SBA) at the law school delayed recognizing CLS-UNH. At a public meeting on October 12, 2022, the SBA Board subjected CLS’s student leader to an interrogation regarding the group’s religious beliefs, particularly its religious leadership requirements. Many SBA Board members made clear that they opposed CLS-UNH’s recognition because of its religious beliefs. Some expressed the view that the CLS religious leadership requirements violated the law school’s and SBA’s diversity, equity, and inclusion policies. Evidently, the SBA failed to see the irony in *excluding* CLS students in the name of *inclusion*.

At least one SBA member urged the law school to explore adopting an “all-comers” policy in order to exclude the CLS student chapter. The SBA twice tabled a vote on granting affiliation to the CLS student chapter.

Legal counsel for CLS-UNH sent two letters, dated October 24 and October 25, to the law school administration, explaining that the law school would be in violation of 34 C.F.R. §§ 75.500(d) and 76.500(d) if the SBA failed to recognize the CLS chapter.¹¹⁷ Finally, at its meeting on October 25, 2022, the SBA recognized CLS-UNH.

In November 2022, a separate student organization, Free Exercise Coalition, sought affiliation as a recognized student group at the law school. Like CLS, the Free Exercise Coalition was subjected to an inquisition by the SBA that led its faculty advisor to withdraw from serving as advisor to the student group.¹¹⁸ The SBA also delayed recognition of the Free Exercise Coalition. Legal counsel for the Free Exercise Coalition sent a letter to university administrators. On January 24, 2023, the university administration recognized the Free Exercise Coalition.¹¹⁹

¹¹⁵ University of New Hampshire, Wildcat Link, Memorial Union & Student Activities, Organizations, at <https://wildcatlink.unh.edu/organizations> (last visited Mar. 12, 2023).

¹¹⁶ University of New Hampshire Franklin Pierce School of Law, Student Life, Student Organizations, at <https://law.unh.edu/student-life/student-organizations> (last visited Mar. 12, 2023). The 29 recognized student organizations at the law school include: Asian Pacific American Law Association; Black Law Student Association; Diversity Coalition; Environmental Law Society; Federalist Society; Hispanic and Latinx Student Association; Lambda; Secular Student Alliance; UNH Law Democrats; Veteran’s Law Society; and Women’s Law Student Association.

¹¹⁷ Letter from Laura Nammo, Center for Law & Religious Freedom, Christian Legal Society, to Dean Shane Cooper, University of New Hampshire Franklin Pierce School of Law (Oct. 24, 2022), <https://bit.ly/3mTkPkW>. The letter is Attachment 2023-Q. Letter from Laura Nammo, Center for Law & Religious Freedom, Christian Legal Society, to Dean Shane Cooper, University of New Hampshire Franklin Pierce School of Law (Oct. 24, 2022), <https://bit.ly/3FlvQlp>. The letter is Attachment 2023-R.

¹¹⁸ Free Exercise Coalition, at <https://www.freeexercisecoalition.com/> (last visited Mar. 12, 2023)..

¹¹⁹ Letter from Jeremy Dys, Senior Counsel, First Liberty, to Dean Shane Cooper, University of New Hampshire Franklin Pierce School of Law (Dec. 12, 2022), <https://bit.ly/3TDMTFe>. The letter is Attachment 2023-S.

While CLS-UNH is relieved that C.F.R. §§ 75.500 (d) and 76.500 (d) helped it achieve recognition, it is concerned by the university counsel's subsequent testimony before the House Education Committee of the New Hampshire General Court. At a February 24, 2022, hearing, the university opposed state legislation that protected a range of student expression on campus, including protection for religious student groups.

The University of New Hampshire Franklin Pierce School of Law SBA's inquisition of the CLS-UNH student leader and its delay in granting affiliation to the CLS student chapter demonstrates that:

- a. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) are needed to protect religious student organizations. The SBA recognized CLS-UNH only after university counsel received two letters from legal counsel for CLS, citing 34 C.F.R. §§ 75.500 (d) and 76.500 (d).
- b. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) continue to provide vital protection to CLS-UNH students that is necessary, in part, because university counsel testified in opposition to state legislation that would protect student expression, including religious student groups, in a hearing before the New Hampshire General Court House Education Committee on February 24, 2023.
- c. The source of the university administrators' confusion is not 34 C.F.R. §§ 75.500 (d) and 76.500 (d) but the student government's actions and ambiguous policies.
- d. Opponents of religious groups often attempt to adopt a so-called "all-comers" policy in order to exclude religious student groups even though such policies are impossible to enforce uniformly.
- e. Because 34 C.F.R. §§ 75.500 (d) and 76.500 (d) are straightforward, this situation was resolved without the need for a complaint to be filed with the Department.
- f. Even if a complaint were filed, the Department's investigation would not be burdensome because the student government was explicit that it was denying two religious student groups recognition because of their religious leadership standards.
- g. Because the regulations exist, the students did not need to file a lawsuit in order to obtain recognition, which benefits the students, university administrators, and taxpayers.
- h. The CLS-UNH student leader incurred economic costs because he spent significant time on gaining recognition that could have been spent on his legal studies. In addition, the emotional toll on the student leader as a result of being interrogated by the student government was significant.

3. University of Idaho School of Law—Fall 2021 & Spring 2022

In fall 2021, the CLS chapter at the University of Idaho School of Law ("CLS-Idaho") applied for recognition. The law school's Student Board Association (SBA) delayed recognizing the CLS chapter and instead interrogated the CLS leaders about their religious beliefs at two public meetings of the SBA. The questions that SBA Board members asked the CLS student

leaders made clear that CLS’s religious beliefs were unpopular with many SBA Board members and also with some administrators.

On November 8, 2021, legal counsel for CLS-Idaho sent a letter to the university president, explaining that the university would be in violation of 34 C.F.R. §§ 75.500(d) & 76.500(d) if CLS-Idaho was not recognized.¹²⁰ A few days later, CLS-Idaho was recognized.

Unfortunately, the hostility toward CLS students’ religious beliefs and speech continued the following semester. On April 1, 2022, the law school “held a ‘moment of community’ in response to an anti-LGBTQ+ slur that had been left anonymously on a whiteboard in one of its classrooms in Boise, Idaho. Students, faculty, and staff from the law school gathered in front of the Moscow, Idaho, campus to express support for all students.”¹²¹ CLS students “gathered in prayer . . . in a showing of support for the LGBTQ+ community.”¹²² A law student came up to the CLS students and asked about CLS’s religious beliefs. The CLS students respectfully answered her question. Later, the CLS president left her a note inviting her to talk further if she wished.¹²³ At an event regarding the ABA’s accreditation of the law school, some law students “raised concerns about CLS and its members” and their religious beliefs. A CLS member who was present “defended CLS and stated that the biggest instance of discrimination he had seen on campus was actually against CLS and the administration’s failure to timely recognize and register it as a group.”¹²⁴ On April 7, the university’s Office of Civil Rights & Investigations issued no-contact letters against three CLS members. Eventually, the university also issued a limited contact letter against the law professor who was CLS’s advisor.¹²⁵ One of the CLS members had to report that he had received a no-contact letter as part of his application to be admitted to the bar.¹²⁶

On June 30, 2022, a federal district court granted the CLS students’ motion for a preliminary injunction, finding that they had shown a likelihood of success on the merits for violations of their freedom of speech, free exercise of religion, and due process rights. The court concluded its opinion by explaining: “Some may disagree with [the CLS students’] religious beliefs. Such is each person’s prerogative and right. But none should disagree that [the students] have a right to express their religious beliefs without fear of retribution. The Constitution makes that clear.”¹²⁷

The *Perlot* case exemplifies the hostility that many religious students face on public university campuses solely due to their religious beliefs and demonstrates the need for the protections that 34 C.F.R. §§ 75.500(d) and 76.500(d) provide. No students at an American public university should be subject to harassment for their religious beliefs. Yet the CLS students

¹²⁰ Letter from Kim Colby, Center for Law & Religious Freedom, Christian Legal Society, to President C. Scott Green, University of Idaho (Nov. 8, 2021), <https://bit.ly/3yFrPEX>. The letter is Attachment 2023-T.

¹²¹ *Perlot v. Green*, 609 F. Supp.3d 1106, 1113 (D. Idaho 2022).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 1114.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1124.

¹²⁷ *Id.* at 1126.

suffered such harassment at the University of Idaho School of Law in 2021-2022 from both their fellow students and the administration.

The threatened exclusion of the CLS student chapter and subsequent harassment of CLS students for holding traditional religious beliefs at the University of Idaho School of Law demonstrates that:

- a. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) are needed to protect religious student organizations. The university recognized CLS-Idaho only after it received a letter from legal counsel for CLS-Idaho.
- b. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) continue to provide vital protection to CLS-Idaho students because of the demonstrated hostile educational environment surrounding CLS students' religious beliefs even after it was a recognized student organization, as documented in the federal district court's decision in *Perlot v. Green*.¹²⁸ In the events of Spring 2022, it was clear that the administrators issued no-action letters based solely on the CLS students' religious beliefs and speech, demonstrating the continued need for 34 C.F.R. §§ 75.500 (d) and 76.500 (d).
- c. The source of university administrators' confusion is not 34 C.F.R. §§ 75.500 (d) and 76.500 (d), but the student government's hostility toward fellow students' religious beliefs, as well as many university administrators' unwillingness to enforce nondiscrimination policies that are intended to protect religious students from exclusion, penalization, and harassment because of their religious beliefs and speech.
- d. Because 34 C.F.R. §§ 75.500 (d) and 76.500 (d) are plainly written and straightforward, CLS-Idaho obtained recognition without filing a complaint with the Department in the Fall 2021. However, the events of the following semester suggest that the SBA may again harass the CLS student chapter in the future and, therefore, filing a complaint in the future may be a prudent course of action.
- e. Even if a complaint had been filed, the Department's investigation would not have been burdensome because the SBA was explicit that it was denying CLS recognition because of its religious beliefs. In the events of Spring 2022, it was clear that the administrators issued no-action letters based solely on the content and viewpoint of the CLS students' religious beliefs and speech.
- f. Because 34 C.F.R. §§ 75.500 (d) and 76.500 (d) exist, the students did not need to file litigation in order to obtain recognition, which benefits the students, university administrators, and taxpayers. The administrators' subsequent actions led to litigation that the university lost. The university paid \$90,000 as a result of the litigation.¹²⁹

¹²⁸ 609 F. Supp.3d 1106, 1113 (D. Idaho 2022).

¹²⁹ See Alliance Defending Freedom, Media Statement, *Perlot v Green*, <https://adfmedia.org/case/perlot-v-green> (last visited Mar. 14, 2023).

- g. The economic cost to the CLS-Idaho students is reflected in the fact that the CLS-Idaho leaders spent weeks in Fall 2021 working to achieve recognition, which took significant time away from their legal studies and jobs. In addition, the students suffered an emotional cost from being interrogated and stigmatized by the student government for their religious beliefs.

4. University of Virginia—Fall 2021

At the University of Virginia, the Fall Activities Fairs are key events at which student organizations make incoming students aware of their existence and activities. They are a primary means of recruiting new members.

In August 2021, the University of Virginia Student Council conditioned access to the Fall Activities Fairs on completion of a novel “Identity Inclusion Disclosure Form.”¹³⁰ The form required that a student group’s leader indicate whether the group was “a religious or political organization.” If so, the student leader must indicate whether it “restricted its membership, leadership, programs, or activities on the basis of” 15 different classifications. Failure to complete the form meant the student group could not participate in the Fall Activities Fairs. Participation in the 2021 fairs was particularly important for all student organizations who needed to rebuild after the pandemic.

The form stated that a student group could be derecognized for a “misrepresentation” on the form. The form also required that a student leader answer the questions “[o]n your honor,” which raised the specter of the student leader being charged with a violation of the University Honor Code if the Council determined there was a “misrepresentation” on the form she had signed. This could result in a student leader being dismissed from the university for a “wrong” answer on the form.

A letter was sent to the university referencing Regulations 34 C.F.R. §§ 75.500(d) & 76.500(d) and their protection of religious student groups.¹³¹ A few days later, the student government withdrew its requirement that the form be completed in order to participate in the Fall Activities Fairs.

The student government’s harassment of religious student groups and their student leaders for holding traditional religious beliefs at the University of Virginia demonstrates that:

- a. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) are needed to protect religious student organizations. The student government dropped its requirement that religious and political student groups complete the form in order to participate in the Fall

¹³⁰ Office of Information and Regulatory Affairs, Office of Management and Budget, “View E.O. 12866 Meeting—1840-AD70,” “Student Council Identity Inclusion Disclosure Form,” April 4, 2022. The form is Attachment 2023-M.

¹³¹ Office of Information and Regulatory Affairs, Office of Management and Budget, “View E.O. 12866 Meeting—1840-AD70,” Letter from Kim Colby, Center for Law & Religious Freedom, Christian Legal Society, to President Jim Ryan, University of Virginia (Aug. 12, 2021). The letter is Attachment 2023-N.

Activities Fairs immediately after the university received a letter that cited 34 C.F.R. §§ 75.500(d) & 76.500(d).

- b. The source of confusion is not 34 C.F.R. §§ 75.500 (d) and 76.500 (d), but the student government’s hostility toward fellow students’ religious beliefs. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) helped make clear for the university what the right thing to do would be.
- c. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) helped the university avoid mistreatment of religious student leaders by the student council and the potential of costly litigation.
- d. Had a complaint become necessary, the Department’s investigation would not have been burdensome because the student council’s form was explicitly aimed at religious and political groups and their leadership policies.
- e. Because 34 C.F.R. §§ 75.500 (d) and 76.500 (d) exist, the religious student groups did not need to file litigation, which benefits not only the students but also the university, university administrators, and taxpayers.

5. Arizona State University—Fall 2022

In 2022, the Christian Legal Society Student Chapter at Arizona State University (“CLS-ASU”) was initially denied re-registration because of its leadership and membership standards. CLS sent a letter to the university general counsel, citing 34 C.F.R. §§ 75.500 (d) and 76.500 (d).¹³² Within two weeks, CLS-ASU was re-registered.

The situation at Arizona State University College of Law illustrates yet another reason that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) protect religious student organizations in ways better than litigation. As the February 22, 2023, NPRM recognizes, a case determines the law between the parties based on the facts of the case at the time. For that reason, religious student groups that prevail in litigation against a university prevail as to the factual context at the time of the case. But if the facts change, even in relatively small ways, it becomes possible for the university to claim that the religious student groups no longer can rely on the court decision in their favor. Litigation imposes a strait jacket on the religious student groups, preventing them from making any material changes in their beliefs, speech, policies, practices, and leadership or membership standards, even should they wish to do so.

The situation at Arizona State University illustrates this dilemma. CLS-ASU has been a registered student organization at Arizona State University since at least 1991. In 2004-2005, CLS-ASU had to go to court to obtain the re-registration of CLS-ASU as a student organization. In the 2005 Settlement Agreement, CLS-ASU agreed to dismiss its lawsuit in exchange for the university: 1) adding language to a nondiscrimination policy to protect religious student organizations from denial of registration because they limited membership or leadership positions to students who share the groups’ religious beliefs; 2) providing a letter from its Vice

¹³² Letter from Kim Colby, Christian Legal Society, to Lisa S. Loo, Senior Vice President and General Counsel, Arizona State University, September 9, 2022, <https://bit.ly/3TE2owR>. The letter is Attachment U.

President for Student Affairs, confirming that religious student groups would not be denied registration because they limited membership or leadership positions to students who share the religious groups' religious beliefs and also confirming that certain beliefs and practices of CLS-ASU did not violate the nondiscrimination policy; and 3) agreeing to grant registration to CLS-ASU using the constitution that CLS-ASU submitted on May 6, 2005.

Three times recently, in 2018, 2020, and 2022, CLS-ASU's application for re-registration was initially denied by the Office for Student Affairs based on CLS-ASU's leadership and membership standards. Each time, a CLS staff lawyer wrote to the university general counsel on behalf of CLS-ASU to remind the university of the 2005 settlement agreement and to secure CLS-ASU's re-registration.

Each time, dealings between CLS and the university general counsel have been amicable. Each time, the general counsel has suggested that CLS-ASU update its 2005 constitution to reflect that CLS law student chapters no longer require student chapter members, only student leaders, to agree with the CLS statement of faith. But CLS-ASU is afraid that any change to its constitution would forfeit the protection of the 2005 Settlement Agreement. If it were certain that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) would not be rescinded, the concern about making changes to the 2005 constitution would be ameliorated. But as long as there is any question about the continued viability of 34 C.F.R. §§ 75.500 (d) and 76.500 (d), the risk is too great to make changes that both CLS and the university administration would like to be made.

The Arizona State University situation demonstrates that:

- a. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) are needed to protect religious student organizations.
- b. Even where a religious student group has had registration issues that resulted in a favorable litigation outcome, 34 C.F.R. §§ 75.500 (d) and 76.500 (d) affirm the protections available to the student group.
- c. The source of university administrators' confusion is not 34 C.F.R. §§ 75.500 (d) and 76.500 (d), but the fact that the staff in the Student Affairs Office who are tasked with registration of student organizations do not fully understand the university's policies and history. As a result of the 2005 settlement agreement, Arizona State University has a policy that protects religious student organizations from denial of registration because they limit membership or leadership positions to students who share the groups' religious beliefs. Nonetheless, the staff in the Student Affairs Office student often are unaware of the university's own policy regarding religious student groups. This may be due to staff turnover or oversight in training new staff. It may be due to staff disagreement with the policy. Whatever the source of the problem, 34 C.F.R. §§ 75.500 (d) and 76.500 (d) clarify the confusion in a way that is helpful to both the students and the university administrators.

- d. Because 34 C.F.R. §§ 75.500 (d) and 76.500 (d) are straightforward, situations can be resolved without the need for a complaint to be filed with the Department.
- e. Even if a complaint is necessary, the Department's investigation will not be burdensome because the Student Affairs Office's denial was explicitly based on the religious student groups' religious leadership standards.
- f. When religious student groups prevail in litigation with the university, they may be locked into policies and practices that they wish to change but cannot without risking the protection of a court order. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) allow the religious groups more flexibility than do court orders in their interactions with university administrators.

6. William & Mary College School of Law—Winter 2021

In February 2021, the CLS law student chapter at William & Mary Law School hosted a virtual meeting at which a guest speaker, a California lawyer, spoke about his work defending religious freedom.¹³³ The lawyer never stepped foot on the William & Mary Law School campus but instead spoke from California via Zoom. The meeting also was virtual for the CLS students at William & Mary. The chapter invited all law students to attend its virtual meeting.

The open invitation triggered a hostile response from other law students. A few days before the meeting, many William & Mary student groups published an open letter to the law school, urging the CLS student chapter to disinvite its speaker due to his work on religious freedom cases. CLS students also received disturbing and harassing comments from their fellow law students.

Fortunately, in an email to the law school community, the law school administration explained that student groups were allowed to invite speakers, even those speakers whose views other students disliked. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) had just gone into effect. CLS believes that the regulations helped William & Mary administrators resist the other student groups' strong pressure against the CLS student chapter. As a result, the virtual meeting was attended by a significant number of students, many of whom were opposed to the speaker, but who may have left the meeting better informed about the importance of religious freedom and the value of listening to those with whom they disagreed.

B. Regulations 34 C.F.R. §§ 75.500(d) & 76.500(d) Were Adopted to Redress Over Forty Years of Discrimination Against Religious Student Groups at Many Public Colleges.

Regulations 34 C.F.R. §§ 75.500(d) & 76.500(d) were based on empirical evidence that religious student groups had been targeted for discriminatory exclusion for over 40 years based

¹³³ William & Mary Featured Events, [Past Event] CLS Speaker Series: Kevin Snider, Religious Liberties Lawyer, Feb. 17, 2021, <https://events.wm.edu/event/view/wm/120812> (last visited Mar. 22, 2023).

on their religious beliefs, speech, policies, practices, and leadership and membership standards. This empirical evidence was found in numerous comments submitted in 2020 in support of adoption of 34 C.F.R. §§ 75.500(d) & 76.500(d). The empirical evidence remains unchanged in the short time since 2020; therefore, any changes to the regulations are arbitrary and capricious and not based on empirical evidence.

1. As documented in students' written statements that are part of a congressional subcommittee's hearing record, public colleges frequently threaten to exclude religious student groups because of their religious beliefs and leadership standards.

In 2015, many former college students submitted written statements to the United States House of Representatives Committee on the Judiciary's Subcommittee on the Constitution and Civil Justice. In these first-hand accounts, the former students document the stigma they felt and the harm to their organizations that occurred when their religious organizations were excluded, or threatened with exclusion, from campus.¹³⁴ Unfortunately, their experiences exemplify the experiences of too many other religious students on college campuses.

a. California State University: Should the Nation's Largest University System Teach Students to Censor Other Students?

With over 430,000 students on 23 campuses, Cal State is the largest 4-year university system in the country. In 2015, Cal State administrators implemented a new policy under which it withdrew recognition for religious organizations that had religious leadership requirements. Religious groups that had had religious leadership requirements for over 60 years were abruptly derecognized.

1) Religious groups must pay prohibitive rental fees for previously free space.

Religious student groups no longer had the same access to free meeting space and channels of communication that other student groups enjoyed. Without recognition, it became difficult, if not nearly impossible, for a student group to maintain its existence on campus. For example, the university told a predominantly Black religious group of about 20 students that it would no longer be allowed to reserve free meeting space.¹³⁵ Instead, the university would charge it the hourly rental rate that non-university groups paid to rent university facilities. Basically, the group would have to pay \$200 per week to use a previously free classroom for its weekly meetings.

¹³⁴ These letters were submitted in conjunction with CLS's testimony before the Subcommittee. *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary House of Representatives*, 114th Cong. 39-58 (June 2, 2015) (testimony of Kimberlee Wood Colby, Director, Center for Law & Religious Freedom, Christian Legal Society). The letters are found in the supplemental hearing record, <http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-20150602-SD003.pdf> (hereinafter "Supp. Hrg. Rec."), at 48-75.

¹³⁵ Letter from Patrick H. Bailey, Dir. Off. Student Involvement and Development, to Cinnamon McCellan (Jan. 20, 2015) is Attachment 2023-V.

This was prohibitively expensive for the modest-sized group of students. For a much larger religious group, which held weekly meetings in an auditorium, the rental rate jumped from free to over \$1000 each week.

In her letter, Ms. Cinnamon McCellen, who was student president of Rejoyce in Jesus Campus Fellowship (“RJCF”) at the California State University Northridge campus from 2013-2015, explained that when the university derecognized her group, it “reluctantly” left the campus because it “could not pay the weekly rental fee of \$200 that CSU said we would have to pay to keep meeting in the room that we had held our weekly meetings in for free.” On behalf of the religious student group, she concluded, “We feel that CSU is engaging in religious discrimination by excluding religious student groups from campus solely because they exercise their basic religious liberty to choose their leaders according to their religious beliefs.” She objected, “To call this discrimination is ridiculous.”¹³⁶

2) A double standard exempts fraternities and sororities while excluding religious student groups.

Applying a double standard, Cal State permitted fraternities and sororities to discriminate on the basis of sex in their selection of both their members and leaders but refused to permit religious groups to select their leaders on the basis of religion. Ms. Bianca Travis, student president of the Chi Alpha group at the California State University Stanislaus campus from 2014-2015, noted, “[F]or the first time in almost 40 years, our student group was kicked off campus by the university’s administrators, all because of our religious identity.” She concluded, “That continued discrimination makes the opportunity you are providing [i.e., receiving their letters] all the more important to us: it helps ensure we won’t be forgotten.”¹³⁷

3) Encouraging students to censor other students’ religious beliefs teaches both American and international students the wrong lesson.

Most troubling, the university actually trained students to censor other students. To process the constitutions of the thousands of student organizations on the 23 Cal State campuses, the university enlisted students to read the constitutions of student organizations and “edit” them to conform to the university’s new policy. The “edited” constitutions were then returned to the student organizations with a warning that they would not be recognized unless they made the changes.

What does this mean for a free society when our public universities are training students in censorship? What lesson do the students learn other than that censorship of other students’ speech is their prerogative—or at least the prerogative of the State? All Americans will reap a society that is intolerant of minority religious beliefs and practices if this lesson continues to be taught on public college campuses.

¹³⁶ Letter from Ms. Cinnamon McCellan to Chairman Trent Franks (June 10, 2015) (Supp. Hrg. Rec. at 48-49) and is Attachment 2023-W.

¹³⁷ Letter from Ms. Bianca Travis to Chairman Trent Franks (June 9, 2015) (Supp. Hrg. Rec. at 50) and is Attachment X.

And what of international students who come to observe American self-government and take home instead lessons in censorship? American colleges should exemplify the values of free speech and religious freedom with the hope that international students will return home inspired to improve protections for these most basic human rights. American universities should not teach international students that free speech and religious freedom are mere ideals to which only lip service is due.

Eventually, Cal State retreated from its position by claiming, in an ambiguously worded letter, that religious groups would be allowed, in certain circumstances, to question leadership candidates regarding their religious beliefs. But the official policy continues to prohibit religious leadership requirements, and the religious groups remain on campus solely at the discretion of university administrators. Furthermore, in the past two years, some religious groups have again experienced problems obtaining recognition on individual campuses within the Cal State system.

b. Texas A&M University: How much should religious students be required to pay to choose their leaders?

Dr. Ra'sheedah Richardson credits participation in the religious student group, ReJoyce in Jesus Campus Fellowship (RJCF) with "encourag[ing] me to pursue academic excellence and to develop character traits like integrity, wisdom, composure and faithfulness that have been essential for a successful professional career." She participated in RJCF during her undergraduate and graduate years at Texas A&M ("TAMU"). In 2011, university administrators placed pressure on RJCF to remove its religious requirements for its leaders and voting members if it wished to remain a recognized student organization. Dr. Richardson explained:

Without student group recognition, we would not have been able to continue to meet freely on campus to encourage each other in our growth both spiritually and academically. According to TAMU policy, non-recognized student groups are required to pay \$100 per instance for each room reservation. It would have cost our group up to \$7,000 per academic year to continue to operate on campus. This is far too great a hardship for a small student group like RJCF to maintain.¹³⁸

Only after legal counsel intervened on RJCF's behalf did the university allow it to retain recognition while maintaining its religious requirements.

c. The Ohio State University: Should religious students' free exercise of religion and free speech be put to a vote by other students?

¹³⁸ Letter from Dr. Ra'sheedah Richardson to Chairman Trent Franks (June 10, 2015) (Supp. Hrg. Rec. at 58-59) and is Attachment Y.

2003-2004: In 2003-2004, a law student demanded that the OSU Moritz College of Law derecognize the CLS student chapter because it had religious requirements for its leaders and voting members. Mr. Michael Berry, who was the student president of the CLS chapter, described the harm to CLS that derecognition would have caused:

The consequences of such action would have been devastating. Without the ability to meet on campus, to receive financial assistance, or to even exist as a recognized organization, I am certain CLS would have ceased to continue its ministry at The Ohio State University. Those of us for whom CLS provided a meaningful and important vehicle through which we could use our legal education for the greater good would be relegated to second-class citizens simply because of our sincerely held beliefs.¹³⁹

Mr. Berry then recounted the personal consequences that he experienced as a result of belonging to a religious organization that required its leaders to be religious. He found himself the subject of a hostile education environment in which he was “often the subject of name-calling, gossip, and rumor-mongering,” was “verbally admonished” by classmates for his religious beliefs, and was “warned by upperclassmen not to take courses by certain professors who were not likely to give [him] fair evaluations.”

Only after CLS sought protection in court did the university revise its policy to state explicitly that religious student organizations could have religious leadership and membership requirements. As a result, CLS met without incident from 2004 to 2010.

2010-2012: But in 2010, the university asked the student government whether the university should discard its policy and no longer allow religious student groups to have religious leadership and membership requirements. Sadly, the student government urged the university to drop its protection for religious student groups, declaring “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 prohibited public institutions of higher education from denying recognition to religious student organizations because of their religious leadership and membership requirements.¹⁴⁰

d. Vanderbilt University: Should a public university punish a religious student group because it expects the students who lead its Bible studies, prayer, and worship to “hold certain beliefs”?

34 C.F.R. §§ 75.500(d) and 76.500(d) apply to public institutions of higher education, not private, and therefore would not apply to Vanderbilt University. However, Vanderbilt’s

¹³⁹ Letter from Michael Berry to Chairman Trent Franks (June 5, 2015) (Supp. Hrg. Rec. at 62-64) and is Attachment Z.

¹⁴⁰ Ohio Rev. Code § 3345.023.

exclusion of 14 religious groups because of their religious leadership requirements is an apt illustration of the mindset that religious students face on many public university campuses.

In August 2011, Vanderbilt told the CLS student chapter that it was “religious discrimination” to state in its constitution that it expected its leaders to lead its Bible study, prayer, and worship. According to Vanderbilt, this was forbidden because it indicated that CLS expected its leaders to “hold certain beliefs.” Nor could CLS require that its leaders agree with its basic religious beliefs.¹⁴¹

Even more jaw-dropping, Vanderbilt told a small student group, which met for worship one night a week, that it must delete 5 words from its constitution’s leadership requirements in order to remain on campus: “personal commitment to Jesus Christ.”¹⁴² The group had worked with the university administrators to revise its constitution so that it could remain on campus and given in to all the administrators’ requests. But after the final demand was made to delete “personal commitment to Jesus Christ,” the group left campus rather than recant.

1) Vanderbilt applied a double standard favoring fraternities and sororities and disfavoring religious student groups.

Justin Gunter, student president of the CLS chapter at Vanderbilt in the 2011-2012 academic year, described the university’s treatment of the 14 religious groups:

In spring 2012, our chapter, along with thirteen other religious groups, were removed from Vanderbilt. Through this process, Vanderbilt once again redefined its policy as an “all-comers” policy – a policy purporting to require that any student group must allow anyone to be a leader regardless of whether they support (or are even hostile to) the group’s basic beliefs. Despite this sweeping policy, Vanderbilt only removed Christian student groups. In fact, Vanderbilt specifically exempted groups that discriminate on the basis of sex from its policy.

As Mr. Gunter observed, Vanderbilt’s policy “contradict[s] the American ideal of a pluralistic society – where individuals and associations may express their opinions and beliefs freely without being censored by a university administrator or government executive.”¹⁴³

2) “The Wrong Kind of Christian.”

Tish Harrison Warren is now a New York Times columnist. But in 2011-2012, she served as a staff member with InterVarsity Christian Fellowship at Vanderbilt and was a self-described “progressive evangelical.” Warren wrote a powerful essay to convey her disconcerting

¹⁴¹ The Vanderbilt emails are Attachment 2023-AA at 1.

¹⁴² The email is Attachment 2023-AA at 2.

¹⁴³ Letter from Mr. Justin Gunter to Chairman Trent Franks (Supp. Hrg. Rec. at 60-61). The letter is Attachment BB.

realization that “the student organization I worked for at Vanderbilt University got kicked off campus for being the wrong kind of Christians.” She explained:

In effect, the [university’s] new policy privileged certain belief groups and forbade all others. Religious organizations were welcome as long as they were malleable: as long as their leaders didn’t need to profess anything in particular; as long as they could be governed by sheer democracy and adjust to popular mores or trends; as long as they didn’t prioritize theological stability. Creedal statements were allowed, but as an accessory, a historic document, or a suggested guideline. They could not have binding authority to shape or govern the teaching and practices of a campus religious community.¹⁴⁴

In an attempt to find a compromise, Ms. Warren met several times with university administrators but to no avail, as she records:

The word *discrimination* began to be used—a lot—specifically in regard to creedal requirements. It was lobbed like a grenade to end all argument. Administrators compared Christian students to 1960s segregationists. I once mustered courage to ask them if they truly thought it was fair to equate racial prejudice with asking Bible study leaders to affirm the Resurrection. The vice chancellor replied, “Creedal discrimination is still discrimination.”

It didn’t matter to them if we were politically or racially diverse, if we cared about the environment or built Habitat homes. It didn’t matter if our students were top in their fields and some of the kindest, most thoughtful, most compassionate leaders on campus. There was a line in the sand, and we fell on the wrong side of it.¹⁴⁵

e. Temple University School of Medicine: Should a public university punish medical students for requiring their religious group’s leaders to agree “to live according to biblical morality”?

Ryan Finigan, a Second Lieutenant in the United States Air Force, was a third-year medical student and a leader in the Christian Medical and Dental Association (“CMDA”) chapter. The CMDA student chapter required its leaders to agree to live according to biblical morality. University administrators informed the group that it “would very likely have its official status

¹⁴⁴ Tish Harrison Warren, *The Wrong Kind of Christian*, Christianity Today 54, Vol. 58, No. 7 (Sept. 2014), <http://www.christianitytoday.com/ct/2014/september/wrong-kind-of-christian-vanderbilt-university.html?start=2>.

The article is Attachment 2023-CC.

¹⁴⁵ *Id.*

revoked because” CMDA was “discriminating in [its] selection of leader by having [its] leader contract to lead a life according to biblical morality.” Mr. Finigan explained that religious student groups should be protected “not only because we should be allowed to practice our faith on our school campus, but also because the CMDA has played a critical role in the training of American physicians.”¹⁴⁶

f. Boise State University: Should a student government be permitted to punish a Christian student group because it requires its leaders to “exhibit a lifestyle that is worthy of a Christian?”

2008-2009: In 2008, the Boise State University (“BSU”) student government derecognized several religious groups because they had religious leadership requirements. For example, the student government informed one religious group that its requirement that its leaders “be in good moral standing, exhibiting a lifestyle that is worthy of a Christian as outlined in the Bible” violated student government policy. The group’s constitution cited Matthew 18:15-17 (where Jesus instructs His disciples on internal dispute resolution), which the student government said also violated its policy.¹⁴⁷

The student president of Cornerstone Ministry at BSU at the time, Mr. Justin Ranger, explained:

Cornerstone Ministry could not withhold the statement of belief from our constitution since it is what determines our identity and the purpose of the club. Although, we were assured that it was unlikely that anyone who did not agree with our beliefs or the purposes of the club would attempt to run for an office in our club, it was a matter of honesty, integrity, and transparency to be upfront with the criteria by which officers would be considered. Since BSU would not accept our criteria for officers before the settlement agreement, we were forced to be de-recognized.¹⁴⁸

Mr. Jesse Barnum attempted to secure recognition for another religious student group, the Veritas Forum, which would invite speakers to “explore life’s hardest questions . . . like what is morality, and why is there suffering and pain in our lives and in the world” from a Christian perspective at events open to the entire campus. Despite the fact that the Veritas Forum’s first event drew 240 students and faculty, the university denied it recognition because it required its leaders to agree with its religious beliefs. He wrote:

Religious student organizations have a vital role in university life. Not only do they support those students who are part of a particular religion, they increase the cross-section of ideas present on

¹⁴⁶ Letter from Mr. Ryan Finigan to Chairman Trent Franks (Supp. Hrg. Rec. 65) and is Attachment DD.

¹⁴⁷ The emails are Attachment 2023-EE.

¹⁴⁸ Letter from Mr. Justin Ranger to Chairman Trent Franks (June 11, 2015) (Supp. Hrg. Rec. 70-71) and is Attachment FF.

campus. Without the presence and articulate expression of these ideas on campus, the quality and success of a university education diminishes.¹⁴⁹

2012-2013: In order to settle a court challenge brought by several religious student groups, the university agreed to allow religious organizations to maintain religious criteria for leaders. But in 2012, the university informed the religious organizations that it intended to adopt a new policy, which would have the effect of excluding religious organizations with religious leadership requirements from campus. In response, the Idaho Legislature enacted legislation to protect religious student groups at public universities.¹⁵⁰

g. University of South Carolina School of Law: Should public universities deny religious student groups access to student activity fee funding like nonreligious groups have?

In 2008, the CLS student chapter was denied access to student activity fee funding that was available to other student groups solely because it was religious. As the CLS student president at the time, Mr. Robert S. “Trey” Ingram III, explained to the Subcommittee, after the group challenged the policy in court, the university adopted a new policy that allowed all student groups to be funded on the same terms.¹⁵¹ Of course, this is the result required by the Supreme Court’s decision in *Rosenberger*.¹⁵²

2. Additional problems continue to surface on campuses nationwide.

After these letters were submitted in 2015, the problem continued to repeat itself on other campuses and provided further evidence of the need of 34 C.F.R. §§ 75.500 (d) and 76.500 (d). Also accompanying these comments is a list of scores of situations. The list is representative, not comprehensive.¹⁵³

a. Indiana University

In August 2015, the university announced that it intended to change its policy so that student groups could no longer require their leaders to agree with the groups’ beliefs. As at other campuses, this proposed change would deny recognition to religious groups, many of which had met for decades at IU while requiring their leaders to agree with their religious beliefs. Indiana University—Bloomington recognizes approximately 800 student organizations.¹⁵⁴

¹⁴⁹ Letter from Mr. Jesse Barnum to Chairman Trent Franks (June 11, 2015) (Supp. Hrg. Rec. 72-73) and is Attachment GG.

¹⁵⁰ Idaho Code § 33-107D.

¹⁵¹ Letter from Mr. Robert S. “Trey” Ingram III to Chairman Trent Franks (June 11, 2015) (Supp. Hrg. Rec. 74-75) and Attachment HH.

¹⁵² 515 U.S. 819 (1995).

¹⁵³ See Attachment 2023-A at note 24.

¹⁵⁴ Indiana University Bloomington, Hoosier Life, Student Organizations, <https://beinvolved.indiana.edu/organizations>.

1) While fraternities and sororities are exempted, religious groups are not.

In an FAQ explaining its new policy, the university forthrightly admitted that “a chapter of a religious student alliance would not be permitted to forbid someone of a different religion, or someone non-religious, from running for a leadership position within the SGSO.” (“SGSO,” the acronym for “self-governed student organization,” is the university’s term for recognized student organizations.) The FAQ asked, “May SGSOs require students seeking to serve in leadership positions to be members of a particular religion?” The FAQ answered, “No.” But, predictably, the FAQ stated that fraternities and sororities would be allowed to continue to discriminate on the basis of sex in their selection of members and leaders.¹⁵⁵

2) Christian, Jewish, and Muslim groups protest the policy change.

Nineteen religious student groups, including Catholic, Muslim, Jewish, and Christian student groups, sent a letter to the administration expressing their concerns about the proposed new policy and its impact on religious groups’ ability to choose their leaders according to their religious beliefs.¹⁵⁶

The student president of the CLS chapter at IU-Bloomington wrote about the unfairness of the burden that fell on religious, but not other, student groups: “The IU policy was what is sometimes referred to as a ‘laundry list policy,’ which prohibits discrimination only based on certain factors. In other words, the vegan group could turn away those who enjoyed hunting animals and the Republican students could turn away those who supported Democratic candidates, but the Christian group could not restrict its leadership to only those who shared their faith.”¹⁵⁷

She also described the toll that standing up to the university took on students: “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.”

After almost the entire academic year had passed with persistent communication from students, alumni, donors, and political leaders, the university announced that it would not revise its policy. As a result, religious student groups have continued to be recognized despite having religious leadership requirements; however, nothing prevents the university from announcing a revised policy at any time.

¹⁵⁵ Indiana University, “Frequently Asked Questions about SGSOs and Indiana University’s Non-Discrimination Policy, is Attachment 2023-II.

¹⁵⁶ The letter is Attachment 2023-L.

¹⁵⁷ Julia C. Payne, Answering God’s Call for Christian Leadership, *The Christian Lawyer*, Fall 2018, 25-26, https://christianlegalsociety.org/sites/default/files/2018-10/TCL%20Fall%202018_Updated_Web2.pdf.

If they had been in effect at the time, 34 C.F.R. § 75.500(d) and § 76.500(d) would have directly benefited the religious student groups and the college administrators. Administrators would have immediately known that they were required to respect religious student groups and provide them with the same benefits available to other student groups.

b. University of Iowa: The epitome of how 34 C.F.R. § 75.500(d) and § 76.500(d) benefit both religious student groups and college administrators.

CLS has had a chapter at the University of Iowa College of Law since at least 1991. Throughout that time, the CLS constitution has required that its leaders agree with its religious beliefs. On at least four occasions since 1999, often under pressure from the student government, the university has threatened to deny recognition if CLS did not remove its leadership requirement from its constitution. In 2005, however, the university sent CLS a letter confirming that its religious leadership standards did not violate university policies.¹⁵⁸

But in 2018, the university derecognized two religious groups because they required their leaders to agree with their religious beliefs. The groups turned to federal court. During the litigation, the university produced a court document in which it highlighted 32 religious student groups, including CLS, that it intended to derecognize because of their religious leadership standards.¹⁵⁹ The university listed groups from the Jewish, Muslim, Sikh, Baha'i and Christian faiths.

In 2019, the federal district court ruled that the university had unconstitutionally excluded the religious groups based on their religious viewpoints, which violated the Free Speech Clause of the First Amendment, as well as the Free Exercise Clause.¹⁶⁰

Both cases were appealed to the Eighth Circuit, which affirmed that the university had engaged in unconstitutional viewpoint discrimination. The Eighth Circuit further held that the university officials had forfeited their qualified immunity and were, therefore, personally liable for money damages.¹⁶¹ Eventually, the district court cumulatively awarded over \$1.9 million in attorney's fees to the student groups.¹⁶²

While the case was on appeal, the Iowa Legislature enacted Iowa Code § 261H.3(3), to protect religious student groups on public university campuses and to protect taxpayer funds

¹⁵⁸ CLS filed an *amicus* brief in the district court, describing the problems it experienced at the University of Iowa over the past 20 years. Proposed Brief of Proposed Amicus Curiae Christian Legal Society in Support of Plaintiff's Motion for Summary Judgment, *Business Leaders in Christ, et al. v. University of Iowa, et al.*, 3:17-cv-00080 (S.D. Iowa Nov. 26, 2018), ECF No. 93.

¹⁵⁹ The university's document is Attachment 2023-B. The 32 groups are listed in note 29.

¹⁶⁰ *Business Leaders in Christ v. University of Iowa*, 360 F. Supp.3d 885 (S.D. Iowa 2019); *InterVarsity Christian Fellowship v. University of Iowa*, 408 F. Supp.3d 960 (S.D. Iowa 2019).

¹⁶¹ See *InterVarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021) holding that university officials forfeited qualified immunity by derecognizing a religious student group because of its religious leadership requirements); *Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021) (same).

¹⁶² See note 3 *supra*.

from being wasted in the litigation that occurs when college administrators move to exclude religious student groups from campus.

The Eighth Circuit’s holdings that college administrators may be personally liable for damages when a public college revokes a religious student group’s recognition demonstrates that 34 C.F.R. § 75.500(d) and § 76.500(d) are necessary to protect college administrators as well as the religious student groups. The regulations provide college administrators with much needed clarity as to the fact that they cannot exclude religious student groups because they require their leaders to be religious.

c. Wayne State University

InterVarsity Christian Fellowship serves over 1000 student-led chapters on approximately 700 campuses. The majority of all InterVarsity students are non-white or international students. InterVarsity welcomes all students to participate in its activities and to join its groups as members. InterVarsity has served students at Wayne State University in Detroit, Michigan, since the early 1940s. Wayne State recognizes over 500 student groups.¹⁶³

In October 2017, Wayne State derecognized the InterVarsity chapter and cancelled its room reservations because it deemed InterVarsity’s leadership requirements to be “discriminatory.” InterVarsity requires its leaders to affirm a statement of core religious beliefs. After a lengthy attempt to get the University to reconsider its decision, InterVarsity sought court protection.¹⁶⁴

Four years later, the federal district court ruled that Wayne State University officials forfeited their qualified immunity when they threatened to derecognize a religious student group because of its religious leadership requirements.¹⁶⁵ The court held that the Dean of Students and the Coordinator of Student Life were “not entitled to qualified immunity because the rights [of a religious organization’s “internal management, free speech, free association, and free exercise” and under the Establishment Clause] violated were clearly established.”¹⁶⁶

If they had been in effect at the time, 34 C.F.R. § 75.500(d) and § 76.500(d) would have directly benefited the religious student groups and the college administrators. Administrators would have immediately known that they were required to respect religious student groups and provide them with the same benefits available to other student groups.

But four years equals the entirety of many students’ college careers, which is why 34 C.F.R. § 75.500(d) and § 76.500(d) are better than litigation for protecting students’ religious expression

¹⁶³ Dean of Student Office, 2022-2023 Registered Student Organizations, <https://getinvolved.wayne.edu/organizations?branches=195268> (last visited Mar. 23, 2023).

¹⁶⁴ Ingrid Jacques, *WSU Errs in Ousting Christian Group*, The Detroit News, Mar. 12, 2018, <https://www.detroitnews.com/story/opinion/columnists/ingrid-jacques/2018/03/12/editors-note-wsu-errs-ousting-christian-group/32875005/>. The article is Attachment JJ.

¹⁶⁵ *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp.3d 785 (E.D. Mich. 2021).

¹⁶⁶ *Id.* at 835.

on college campuses. The InterVarsity students at Wayne State operated under a cloud the entire time. For students, it is often true that justice delayed is justice denied.

d. Southeast Missouri State University

In the 2015-2016 academic year, the student government denied a religious student group recognition because it required its leaders to agree with its religious beliefs. The group worked hard to persuade the administration and the student government to adopt a policy that would respect religious groups' ability to choose their leaders. But in April 2016, the student government voted *against* adopting such a policy. Several more religious groups then sent a letter to the university stating that they would not be able to remain on campus if they could not require their leaders to agree with their religious beliefs. In October 2016, the university and student government agreed that religious student groups could keep their religious requirements for leaders.

If they had been in effect at the time, 34 C.F.R. § 75.500(d) and § 76.500(d) would have directly benefited the religious student groups and the college administrators. Administrators would have immediately known that they were required to respect religious student groups and provide them with the same benefits available to other student groups.

e. University of West Georgia

In 2014, a Christian women's religious student group sought recognition as an official student group at the University of West Georgia. Legal assistance was required for it to gain recognition because university administrators insisted that it submit "original documentation for [Title IX] exemption directly from the U.S. Department of Education." The university continued to insist on such a document even after regional Department of Education officials told the university that it never provides such documents. Eventually, the group was given recognition.

In August 2019, university officials revoked the group's recognition. After initially being approved for the 2019-2020 academic year, the students were told that their group would not be recognized because it consisted of Christian women. In discussions, an administrator indicated that she was "unsure why [the group] would limit itself to just Christians" even though religious belief is the core around which the group was formed. Once again, legal assistance was required to regain recognition. These constant legal battles distract the chapter and its members from doing the spiritual and charitable work that is their purpose in gathering.

If they had been in effect at the time, 34 C.F.R. § 75.500(d) and § 76.500(d) would have directly benefited the religious student groups and the college administrators. Administrators would have immediately known that they were required to respect religious student groups and provide them with the same benefits available to other student groups.

f. University of North Texas Dallas College of Law

The CLS student chapter at the University of North Texas Dallas College of Law sought recognition in Fall 2016. The Student Bar Association claimed that the CLS chapter's requirement

that its leaders agree with its religious beliefs violated the SBA's policy. The CLS officers spent much of the 2016-2017 academic year in discussions with the SBA and the law school administration as to whether it would be recognized, eventually gaining recognition in the second semester.

If they had been in effect at the time, 34 C.F.R. § 75.500(d) and § 76.500(d) would have directly benefited the religious student groups and the college administrators. Administrators would have immediately known that they were required to respect religious student groups and provide them with the same benefits available to other student groups.

3. The Department's claim that enforcing 34 C.F.R. §§ 75.500 (d) and 76.500 (d) is too burdensome is so flimsy as to render the proposed rescission of the regulations to be arbitrary and capricious.

The Department of Education's Office of Civil Rights budget request for fiscal year 2022 was for an annual budget of approximately \$ 130 million dollars and over 500 full-time employees.¹⁶⁷ The request estimated that in 2022 the Office would receive 10,500 complaints and resolve 13,500 complaints.¹⁶⁸

The Department itself admits it "has not received any complaints regarding alleged violations of" the regulations protecting religious student groups.¹⁶⁹ But that is because 34 C.F.R. §§ 75.500 (d) and 76.500 (d) have proven to be largely self-enforcing. During problems on several campuses in 2020 and 2021, college administrators have decided not to exclude a religious student organization when they are informed of the existence of 34 C.F.R. §§ 75.500 (d) and 76.500 (d). While there certainly may be a handful of investigations in future years, the evidence is that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) pre-empt problems before a complaint needs to be lodged with the Department. This further supports the need for 34 C.F.R. §§ 75.500 (d) and 76.500 (d) and that their rescission would be arbitrary and capricious.

IV. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) Have Meaningfully Increased Protections for College Administrators.

A. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) protect college administrators from being held personally liable for damages in litigation.

The benefits that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) provide college administrators have only become more obvious in the two years they have been in effect. Indeed, the failure of some college administrators' and organizations representing institutions of higher education to

¹⁶⁷ Department of Education, Office for Civil Rights, Fiscal Year 2022 Budget Request, at BB-1, BB-13, <https://www2.ed.gov/about/overview/budget/budget22/justifications/bb-ocr.pdf> (last visited Mar. 24, 2023).

¹⁶⁸ *Id.* at BB-21-22.

¹⁶⁹ 88 Fed. Reg. 10863.

perceive the regulations' benefits for their institutions and employees is disheartening and seems to indicate a complete disregard for, if not hostility to, the religious students on their campuses.

After 34 C.F.R. §§ 75.500 (d) and 76.500 (d) went into effect, three federal court decisions have held that college administrators forfeit their qualified immunity if they threaten to derecognize a religious student organization because it requires its leaders to agree with its religious beliefs. In 2021, the Eighth Circuit, in two separate cases, ruled that University of Iowa officials lost their qualified immunity when they violated the First Amendment by derecognizing two religious student groups because they had religious leadership requirements. Derecognition was unconstitutional viewpoint discrimination against the religious student groups.¹⁷⁰ In the *InterVarsity* case, the university's Vice President for Student Life, the Associate Dean of Student Organizations, and the Coordinator for Student Development forfeited their qualified immunity by derecognizing the religious student groups because of their religious leadership requirements.¹⁷¹ Similarly, in the *BLinC* case, the Eighth Circuit held that three university officials lost their qualified immunity on the religious student group's free-speech and expressive-association claims.¹⁷² The officials who lost qualified immunity were the Dean of Students, the Assistant Dean of Students, and the Executive Director of the Iowa Memorial Stadium.

Likewise, a Michigan federal district court found that Wayne State University officials forfeited their qualified immunity when they threatened to derecognize a religious student group because of its religious leadership requirements.¹⁷³ The court held that the Dean of Students and the Coordinator of Student Life were "not entitled to qualified immunity because the rights [of a religious organization's "internal management, free speech, free association, and free exercise" and under the Establishment Clause] violated were clearly established."¹⁷⁴

B. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) provide college administrators with clarity by relieving them of the need to determine which of various policies apply to their treatment of religious student groups.

As this comment has detailed, for fifty years, religious student groups have encountered challenges to their meeting on campuses. As this letter has shown, often the challenges arise because college administrators or their staff make mistakes in interpreting their universities' policies. The straightforward language of 34 C.F.R. §§ 75.500 (d) and 76.500 (d) provides clarity that would prevent such mistakes.

Sometimes, staff are not aware that they have a policy that permits religious student groups to have religious leadership requirements and deny recognition to a religious student group, as in

¹⁷⁰ *InterVarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021); *Business Leaders in Christ ("BLinC") v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021).

¹⁷¹ *InterVarsity*, 5 F.4th at 861.

¹⁷² *BLinC*, 991 F.3d at 972.

¹⁷³ *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp.3d 785 (E.D. Mich. 2021).

¹⁷⁴ *Id.* at 835.

the situation at Arizona State University. The University of Minnesota has also at times in the past forgotten that it has a policy that protects religious student groups.¹⁷⁵

Other times, a staff member decides to disregard those policies, or re-interpret existing policies, and refuse recognition to religious student groups that have been meeting peaceably at the university for decades. The University of Iowa cases are excellent examples of a nondiscrimination policy abruptly being re-interpreted to exclude 32 religious groups on campus.¹⁷⁶ Many had been recognized student groups with religious leadership requirements for decades. CLS had been a recognized student group with religious leadership standards since the 1980s, only to face derecognition, along with 31 other religious student groups, in 2018 because the university's longstanding nondiscrimination policy was re-interpreted. InterVarsity had been a recognized student group with religious leadership requirements at Wayne State University since the 1940s. Then in 2017, college administrators said it must lose its recognition because of its religious leadership requirements. Cru had been a recognized student group with a religious leadership requirement on most Cal State campuses since the 1950s. Then in 2014, Cal State re-interpreted its policy with the aim of derecognizing all religious student groups that require their leaders to agree with their religious beliefs.

And sometimes, university administrators decide to change their policies to exclude religious student groups from campus. Indiana University administrators considered this for an entire academic year in 2015-2016, but withdrew the proposed change when religious student groups of all faiths objected and worked against the change for most of the academic year.¹⁷⁷

In many situations, a student government decides to interpret the university's policy in a novel way without input from the administration. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) provide administrators with an easy explanation to provide to their student government as to why religious student groups must be treated respectfully and provided with the same benefits available to other student groups.

34 C.F.R. §§ 75.500 (d) and 76.500 (d) provide college administrators with a clear rule that saves them from the financial consequences of excluding religious student groups from campus and also relieves them of any need to worry about what policies to apply. To be clear, 34 C.F.R. §§ 75.500 (d) and 76.500 (d) does not dictate what policy a college must have. It only requires that whatever policy a college has must be applied so that religious student groups receive the same benefits available to other student groups. Not having 34 C.F.R. §§ 75.500 (d) and 76.500 (d) leads to confusion, which is why the Department's proposed rescission would be arbitrary and capricious.

¹⁷⁵ The University of Minnesota policy provides: "Religious student groups may require their voting members and officers to adhere to the organization's statement of faith and its rules of conduct." University of Minnesota, Student Unions and Activities, Student Engagement Activities, Student Groups, Policies, "Compliance," <https://sua.umn.edu/engage/student-groups/student-group-policies> (last visited Mar. 23, 2023).

¹⁷⁶ The 32 groups are listed in Attachment B and note 29.

¹⁷⁷ See Attachment L.

C. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) clarify some administrators’ confusion regarding the *Martinez* decision and are entirely consistent with it.

34 C.F.R. §§ 75.500(d) and 76.500(d) are completely consistent with the decision in *Christian Legal Society v. Martinez*¹⁷⁸ and clarify the confusion that many college administrators seem to have as to its scope. Often misunderstood and mischaracterized, *Martinez* was an extremely limited and narrow ruling that addressed only one specific type of policy, an “all-comers” policy, which essentially is nonexistent in the real world.

Professor Michael Paulsen is lead co-author of a major law school textbook on constitutional law,¹⁷⁹ as well as more than ninety published scholarly articles. He has characterized 34 C.F.R. §§ 75.500(d) and 76.500(d) as “a valuable clarification of religious and student group freedom of speech and freedom of expressive associational liberty under the First Amendment to the U.S. Constitution and, further, seeks faithfully to implement these constitutional principles in the context of certain federal grant programs.”¹⁸⁰

In his 2020 comment letter in support of the regulations, Professor Paulsen noted that the regulations “build[] upon earlier landmark Supreme Court decisions protecting First Amendment liberties,” including *Widmar v. Vincent*,¹⁸¹ *Rosenberger v. Rector and Visitors of University of Virginia*,¹⁸² and *Trinity Lutheran Church of Columbia, Inc. v. Comer*.¹⁸³

Professor Paulsen explained that 34 C.F.R. §§ 75.500(d) and 76.500(d) “in no way contradicts [*Martinez*]; it simply provides protection, by a proper federal rule, for rights that *Christian Legal Society v. Martinez* did not deem required as a constitutional matter.” And he observed that *Martinez* was decided before *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*,¹⁸⁴ which upheld a religious organization’s right to determine its leaders even when the leader claimed her rights under a federal nondiscrimination had been violated.

¹⁷⁸ 561 U.S. 661 (2010).

¹⁷⁹ Michael Stokes Paulsen, Michael W. McConnell, Samuel L. Bray, & William Baude, *The Constitution of the United States* (5th ed. 2023).

¹⁸⁰ Professor Michael Stokes Paulsen Comment, Docket ID ED-2019-OPE-0080 (Feb. 18, 2020). The letter is Attachment KK.

¹⁸¹ 454 U.S. 263 (1981). The Court held that religious student groups had free speech and expressive association rights to be a recognized student organization on public university campus (University of Missouri), and the Establishment Clause was not violated by recognition.

¹⁸² 515 U.S. 819 (1995). The Court held that recognized religious student groups had a free speech right to access student activity fees otherwise available to other student organizations on public university campus (University of Virginia), and the Establishment Clause was not violated by religious student group accessing several thousand dollars in student activity fees funding.

¹⁸³ 137 S. Ct. 2012 (2017). The Court ruled, yet again, that a religious organization cannot be denied access to a generally available benefit program because of its religious nature.

¹⁸⁴ 565 U.S. 171 (2012).

Professor Paulsen concluded:

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.¹⁸⁵

Of course, in *Hosanna-Tabor*, the unanimous Court declared:

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.¹⁸⁶

In their concurrence, Justices Alito and Kagan agreed that “[r]eligious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.”¹⁸⁷

Many college administrators mistakenly believe that *Martinez* held that a public law school could use a *nondiscrimination* policy to deny recognition to a religious student group because it required its leaders to agree with its religious beliefs. Not so. Indeed, all nine justices in the 5-4 decision agreed that the majority opinion had not ruled on nondiscrimination policies.¹⁸⁸ Instead, the Court decided only that a law school had the *discretion*, but was not *required*, to apply an *all-comers policy* to *all* student groups on its campus. The Court further ruled that only if a public college applied the all-comers policy to all student groups could it apply the policy to religious student groups.¹⁸⁹

34 C.F.R. §§ 75.500(d) and 76.500(d) are completely consistent with the *Martinez* decision. Nothing in the decision prohibits the federal government from conditioning federal funds on a public college agreeing not to enforce any policy that results in the denial to religious groups of benefits that are otherwise available to other student groups. That is just basic fairness. The regulations protect public college administrators by providing clear guidance regarding the fair way to treat religious student groups.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 196.

¹⁸⁷ *Id.* at 200-201 (Alito, J., concurring, joined by Kagan, J.).

¹⁸⁸ 561 U.S. at 678; *id.* at 698 (Stevens, J., concurring); *id.* at 704 (Kennedy, J., concurring); *id.* at 707 (Alito, J., dissenting).

¹⁸⁹ 561 U.S. at 694, 697-98; *id.* at 703-704 (Kennedy, J., concurring).

V. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) Directly Benefit Public Institutions of Higher Education.

A. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) respect and reinforce separation of church and state.

34 C.F.R. §§ 75.500 (d) and 76.500 (d) codify two landmark Supreme Court decisions, *Widmar* and *Rosenberger*. By protecting religious student organizations' right to be a recognized student group, to meet on public college campuses, and to be eligible for activity fee funding that is otherwise available to other student groups, 34 C.F.R. §§ 75.500 (d) and 76.500 (d) codify the free speech and expressive association holdings of those decisions.

But 34 C.F.R. §§ 75.500 (d) and 76.500 (d) also reinforce the holding in *Widmar* and *Rosenberger* that the Establishment Clause is not violated when religious student groups are officially recognized, meet on campus, and receive student activity fee funding. The regulations heed the Court's warnings in *Widmar* and *Rosenberger* that there is a greater risk of violating the Establishment Clause when college administrators interfere with religious groups than when they leave the groups alone to function according to their core religious beliefs.

It should be common ground with even the most ardent proponents of strict separation of church and state that government officials, including college administrators, should not penalize a religious group because of its beliefs, practices, speech, or mission. Nor should government officials be interfering in religious groups' internal governance, particularly their choice of their leaders. "According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."¹⁹⁰

B. Religious student groups promote students' academic success, as well as students' emotional and mental well-being.

Colleges are eager to find ways to help their students recover their emotional and mental well-being after the pandemic's severe impact. Excluding religious student groups from campus does not advance students' mental or emotional health or academic success.

Briefly, as to students' emotional and mental well-being, "extensive research focused on student involvement in college suggest[s] that quality involvement leads to higher levels of student learning and development."¹⁹¹ One study concluded that "[r]eligious participation on campus is itself a form of social integration. Faith communities are instrumental in the formation

¹⁹⁰ *Hosanna-Tabor*, 565 U.S. at 188-89.

¹⁹¹ Cindy A. Kilgo et. Al., *The Estimated Effects of College Student Involvement on Psychological Well-Being*, 57 J. of Coll. Student Dev. 1043 (Nov. 2016), <https://muse.jhu.edu/article/638565>.

of friendships and intimacy with other people, and these supportive networks, in turn, provide a wide range of psychological and spiritual benefits.”¹⁹²

Recent research also has shown that for many students, religious involvement improves their academic performance. Stanford researchers have found that “good academic performance is also driven by habits learned through religious adherence.”¹⁹³ Professor Ilana Horwitz expands on her findings in her 2022 book, *God, Grades, and Graduation: Religion’s Surprising Impact on Academic Success*.¹⁹⁴ Additionally, studies show that involvement in religious organizations benefits first generation college students.¹⁹⁵

34 C.F.R. §§ 75.500 (d) and 76.500 (d) are needed even more post-pandemic than when they were first adopted. To ignore their benefit to student well-being and instead rescind 34 C.F.R. §§ 75.500 (d) and 76.500 (d) is a giant step backward and arbitrary and capricious.

C. The exclusion of religious student groups impoverishes college campuses by decreasing their diversity of ideas, values, and viewpoints.

It is self-evident that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) contribute to the diversity of college campuses, which is always recognized as a benefit both to the student body and the institution itself. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) automatically increase campus diversity, which is something colleges work hard to cultivate.

34 C.F.R. §§ 75.500 (d) and 76.500 (d) allow religious student groups to thrive on public college campuses. In doing so, the regulations increase the likelihood that students will not only be able to explore their own spiritual ideas and values, but also will be exposed to students of other faiths. Such exposure grows students in new ways and prepares them to work with persons of other cultures and faiths.¹⁹⁶ According to the authors of one study, “colleges and universities have long made concerted efforts to advance diversity in the areas of race, gender, and sexual orientation; however, religion has been continuously de-prioritized as an aspect of diversity work

¹⁹² Alyssa N. Bryant, *The Effects of Involvement in Campus religious Communities on College Student Adjustment and Development*, 8 J. of College & Character 1 (2007), <https://www.tandfonline.com/doi/abs/10.2202/1940-1639.1178>.

¹⁹³ Carrie Spector, *Religiously engaged adolescents demonstrate habits that help them get better grades, Stanford scholar finds*, Stanford Research Stories, Apr. 15, 2018, <https://ed.stanford.edu/news/religiously-engaged-adolescents-demonstrate-habits-help-them-get-better-grades-stanford-scholar>. Spector was reporting on findings by Professor Ilana Horwitz, who has since published her findings in her book, *God, Grades, and Graduation: Religion’s Surprising Impact on Academic Success*, Oxford University Press (2022).

¹⁹⁴ Ilana M. Horwitz, *God, Grades, and Graduation: Religion’s Surprising Impact on Academic Success*, Oxford University Press (2022).

¹⁹⁵ Erica Irlbeck et al., *First Generation College Students: Motivations and Support Systems*, 55 J. of Ag. Ed. 154 (2014), <https://files.eric.ed.gov/fulltext/EJ1122313.pdf>.

¹⁹⁶ See, e.g., Alyssa N. Rockenbach, Matthew J. Mayhew, Mary Ellen Giess, Shauna M. Morin, B. Ashley Staples, Benjamin P. Correia-Harker, & Associates, *IDEALS (Interfaith Diversity Experiences & Attitudes Longitudinal Survey): Bridging Religious Divides through Higher Education*, Interfaith Youth Core (2020), <https://www.interfaithamerica.org/research/bridging-religious-divides-through-higher-education/> (last visited March 22, 2023).

on most campuses.”¹⁹⁷ They recommend that colleges encourage the formation of religious student groups on campus.¹⁹⁸

34 C.F.R. §§ 75.500 (d) and 76.500 (d) are an important component to increasing diversity on campus. It is arbitrary and capricious for the Department to insist that colleges invest heavily in efforts to increase campus diversity while simultaneously rescinding regulations that increase intellectual, spiritual, and cultural diversity on campus.

D. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) directly benefit institutions of higher education by helping them avoid costly litigation.

As seen in Part III *supra*, 34 C.F.R. §§ 75.500 (d) and 76.500 (d) help colleges and their students avoid litigation. It would seem a self-evident proposition that it is good for colleges to avoid litigation where possible. Avoiding litigation is also good for college administrators (as discussed in Part IV *supra*), as well as taxpayers and all students—not just religious student groups.

34 C.F.R. §§ 75.500 (d) and 76.500 (d) assist colleges in prudent risk management. By providing clear guidance in a legal area that has given rise to many lawsuits for decades, the regulations help colleges avoid costly litigation. And the economic costs alone of such litigation has been high for many universities. The University of Iowa paid \$1.9 million in attorney’s fees to the religious student group plaintiffs in two cases in 2021.¹⁹⁹ That figure does not include the cost to taxpayers of the University’s and state attorney general’s time and expenses in defending the lawsuits. Nor does it include the time that university administrators were distracted from performing their actual duties by the demands of litigation.

34 C.F.R. §§ 75.500 (d) and 76.500 (d) prevent costly litigation for college and universities, their taxpayers, as well as for students in the form of higher tuition bills. The failure of some college administrators and their advocacy groups to accept the gift that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) are to them is puzzling. But the Department should not let this lack of perception cloud the Department’s objective assessment of the many benefits 34 C.F.R. §§ 75.500 (d) and 76.500 (d) provide. Otherwise, the Department will act arbitrarily and capriciously if it rescinds 34 C.F.R. §§ 75.500 (d) and 76.500 (d).

VI. 34 C.F.R. §§ 75.500 (d) and 76.500 (d) Directly Benefit Other Students, including Other Student Organizations, at Public Institutions of Higher Education.

For the same reasons that 34 C.F.R. §§ 75.500 (d) and 76.500 (d) benefit colleges, they benefit the student bodies at public colleges and universities. Religious, cultural, and ideological diversity benefits the entire student body as well as the college. As discussed in Part V *supra*, religious student groups contribute overall to student well-being. Religious student groups in

¹⁹⁷ *Id.* at 5.

¹⁹⁸ *Id.* at 27.

¹⁹⁹ See note 3 *supra*.

particular seem to aid the academic success of many students, including first generation students. But there are other practical benefits to students.

A. Nonreligious student organizations benefit from 34 C.F.R. §§ 75.500 (d) and 76.500 (d) by disincentivizing the adoption of all-comers policies and increasing the likelihood that a student activity fees system will withstand constitutional challenge.

1. 34 C.F.R. §§ 75.500 (d) and 76.500 help protect student activity fees systems.

In *Board of Regents of the University of Wisconsin System v. Southworth*,²⁰⁰ the Supreme Court upheld the constitutionality of compelling public college students to pay activity fees. But there was an important constitutional caveat. The allocation of student activity fees must be viewpoint neutral—or the allocation system must cease. Specifically, the Court held that “[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech *if the program is viewpoint neutral*[.]” but the Court refused to “sustain . . . the student referendum mechanism of the University’s program which appears to permit the exaction of fees in violation of the viewpoint neutrality principle.”²⁰¹

The Court remanded the case to determine how the referendum worked. Specifically, the Court explained, “it appears that by majority vote of the student body a given RSO may be funded or defunded. . . . To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. *The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here.*”²⁰²

The frequently heard argument that students are harmed when some portion of their mandatory student activity fees go to student groups with religious beliefs they don’t like is obviously completely contrary to the Court’s holding in *Southworth*. Only if student activity fees go to student groups with viewpoints with which some students disagree is a student activity fee system viewpoint neutral and, therefore, constitutional. This is particularly true where a majority of students disagree with the viewpoints of certain student groups, as the *Southworth* Court made clear.

If unpopular student groups do not have receive some portion of student activity fees, then the activity fee system is unconstitutional. Either the allocation system must become viewpoint neutral and fund unpopular student groups, or it must cease.

If one assumes that mandatory student activity fee systems are beneficial to colleges and their students, then it is in everyone’s best interest for the allocation of student activity fees to be inclusive of all student groups, regardless of the popularity of their viewpoints or beliefs. As a

²⁰⁰ 529 U.S. 217 (2000).

²⁰¹ *Id.* at 221.

²⁰² *Id.* at 235.

matter of constitutional principle, students and student governments do not have the right to pick and choose subjectively which viewpoints and beliefs are funded.

This is also true as a matter of fairness. All students pay the mandatory student activity fee, including the religious students, so all student groups should be given access to student activity fee funding, including the religious students' groups.

34 C.F.R. §§ 75.500 (d) and 76.500 protect these basic principles of constitutionality and fairness for all students and prevent student governments and colleges from jeopardizing their student activity fees systems by excluding religious student groups from access to them.

2. 34 C.F.R. §§ 75.500 (d) and 76.500 help protect other student groups from exclusion.

As seen most clearly in the remarkable document that the University of Iowa filed in federal district court,²⁰³ other student groups are at risk of exclusion when a university moves to exclude a religious student group because of its religious leadership requirements. At the district judge's request, the university highlighted the groups it would derecognize if it won a lawsuit brought by a religious group that it had derecognized. The list showed that 32 groups would be derecognized – all religious groups, including Muslim, Jewish, Sikh, Catholic, and Protestant groups.

In other words, religious student groups of all faiths are put at risk when a university proposes to exclude one religious student group. Many religious groups have religious leadership requirements that surface once college administrators realize that they have to exclude all religious groups with leadership requirements if they wish to exclude a particular religious group. Otherwise, the university will be in violation not only of free speech and free exercise of religion, but also the Establishment Clause.²⁰⁴

But nonreligious student groups also are at risk of exclusion because a university cannot selectively enforce any policy, including its nondiscrimination policy. A university cannot exempt fraternities and sororities from its nondiscrimination policy's prohibition on sex discrimination without exempting religious groups from its nondiscrimination policy's prohibition on religious discrimination.²⁰⁵ That would be the epitome of selective enforcement. The same is true of exceptions for single-sex organizations, including but not limited to single-sex a cappella groups and club sports teams.

²⁰³ See Attachment B *supra*.

²⁰⁴ See *Larson v. Valente*, 456 U.S. 228 (1982) (the Establishment Clause absolutely prohibits governmental preference among religions).

²⁰⁵ Title IX's exemption for fraternities and sororities acts only to exempt them from Title IX; it does not exempt them from any other state or local nondiscrimination policies, contrary to what many college administrators mistakenly believe.

Universities have learned that they cannot selectively enforce their nondiscrimination policies against religious student groups while exempting favored student organizations, such as Greek organizations.²⁰⁶

3. 34 C.F.R. §§ 75.500 (d) and 76.500 help protect other student groups from the implementation of an all-comers policy that would require a college to prohibit every student group from requiring its leaders or members to agree with the group's core beliefs.

University administrators often have a mistaken belief that an all-comers policy allows them to exclude disfavored religious groups while keeping the status quo as to other student groups. This is incorrect. All-comers policies are only constitutionally permissible if they are applied *uniformly* to *all* groups. To date, no university with hundreds of recognized student groups has successfully implemented an all-comers policy. For one reason, an all-comers policy cannot co-exist with a Greek system. Most colleges are unwilling to shut down fraternities and sororities in order to exclude religious student groups, once they understand that all-comers policies are only permissible if uniformly applied to *all* student groups.²⁰⁷

An *all-comers* policy is quite different from a *nondiscrimination* policy. An all-comers policy prohibits *any* and *all* student groups from having *any* belief-based requirements. That is, an all-comers policy requires a Muslim group to allow a Hindu individual to lead its worship, a Democratic group to allow a Republican to set its agenda, an environmental group to allow a climate denier to be its principal spokesperson, and so forth.

Even if a college has an all-comers policy, it is permitted to apply it to religious groups only if it also *applies* it to all groups, which never happens. The Court was clear that an all-comers policy both 1) had to exist and 2) had to be applied evenly to *all* student groups.²⁰⁸ It could not be applied just to religious groups, which is what happens, in reality, when a college claims to be applying an all-comers policy. In *Martinez* itself, the Court remanded the case for further proceedings on whether the all-comers policy in that case had actually been applied even-handedly. But the Ninth Circuit never ruled on that question because of a procedural issue. No one actually knows whether the all-comers policy in *Martinez* itself was ultimately permissible because the courts never determined whether it had been applied even-handedly.

The unfortunate fact is that, since *Martinez*, the threat of a college adopting an all-comers policy has been used to target religious student groups for exclusion from campus. As a realistic matter, national religious student organizations are unaware of any college that has a true all-comers policy evenhandedly applied to all student groups. This is obviously because an all-

²⁰⁶ See *InterVarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021) (holding that university officials unconstitutionally selectively enforced their nondiscrimination policies when they derecognized a religious student group because of its religious leadership requirements while exempting other student groups from the nondiscrimination policy); *Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021) (same); *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F.Supp. 3d 785 (E.D. Mich. 2021) (same).

²⁰⁷ *Martinez*, 561 U.S. at 694, 697-98; *id.* at 703-704 (Kennedy, J., concurring).

²⁰⁸ *Id.*

comers policy means that a college would have to prohibit all sororities, both social and professional, from requiring their leaders and/or members to be female. Fraternities could not be male-only. Single-sex choral groups or club sports teams would be prohibited. An environmental group could not require its leaders to agree that climate change is occurring or is bad. An animal rights group could not require its leaders to denounce hunting or wearing fur. College Democrats could not require their leaders to agree with the Democratic Party's platform. A veterans' group could not require that its leaders be veterans, and a pacifist group could not require its leaders not have served in the military.

An all-comers policy is toxic for a healthy campus ecosystem for all student groups. And as an empirical fact, when a college has claimed to implement an all-comers policy, only religious groups have been targeted for exclusion.

B 34 C.F.R. §§ 75.500 (d) and 76.500 help ensure that international students learn what religious freedom looks like in a free society.

International students make up a significant portion of the student body on many college and university campuses. Many international students find a home on campus in the religious student groups, particularly the many religious groups whose specific mission is to welcome international students and help them acclimate to American life. Religious groups provide not only emotional support for these persons, who are far from home, but they also provide academic support for students who are unfamiliar with American approaches to education or who struggle to keep up with lectures and reading that are not in their first language.

Many international students, whether they are religious or nonreligious, are from countries where religious freedom is not respected by their government or their society. It is essential that these students observe religious freedom practiced robustly on public college campuses. If they observe government officials excluding religious groups from campus, they will take home the lesson that government officials can exclude religious groups from the public square.

For our colleges to be exporting this dangerous lesson is unacceptable. And it is an unacceptable to allow that lesson to infect American civil society. The genius of America's experiment in religious freedom is that it protects everyone's human right to live their lives in accordance with their deepest religious convictions—no matter how unfashionable or unpopular those convictions are. When we abandon religious freedom for all persons, including on public college campuses, then the freedom of speech and belief so vital to sustaining our political and religious freedoms will soon cease to exist.

34 C.F.R. §§ 75.500 (d) and 76.500 are integral to protecting religious speech and belief on college campuses. For the many reasons found throughout this letter, the Department's rescission of 34 C.F.R. §§ 75.500 (d) and 76.500 would be arbitrary and capricious. 34 C.F.R. §§ 75.500 (d) and 76.500 should be preserved.

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