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Submitted electronically

Re: Proposed Rule at 85 Fed. Reg. 3,190, RIN 1840-AD45 titled "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"

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The American Civil Liberties Union ("ACLU") submits these comments on the proposed rule published at 85 Fed. Reg. 3,190 (proposed Jan. 17, 2020), RIN 1840-AD45 titled "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" (the "Proposed Rule" or "Rule").

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than 8 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The Proposed Rule eliminates key protections for people who seek services funded by the Department of Education ("the Department") that are provided by faith-based organizations. Although the Proposed Rule claims to clarify the requirements for faith-based organizations and to bring the requirements into compliance with federal law, it does not achieve those goals. Instead, the Rule upsets the careful, studied balance that the current regulations provide between the religious character of the service providers and the religious-liberty rights of beneficiaries of those services. Crucially, the Proposed Rule does not even acknowledge that program beneficiaries could suffer substantial harms, including discrimination and denials of services, if the proposed changes are implemented. No one should be faced with the stark choice between accessing the government-funded services they need or retaining their religious-freedom protections, identity, or other rights, but the Proposed Rule would leave program beneficiaries in exactly that quandary.[1]

For these reasons, as well as the ones that follow, we urge the Department to decline to finalize the Proposed Rule.

I. BACKGROUND

In November 2010, President Barack Obama signed Executive Order 13,559, titled "Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations," to strengthen the capacity of faith-based organizations to deliver services effectively to those in need. 75 Fed. Reg. 71,319 (November 17, 2010) ("EO 13,559"). The order built upon policies for faith-based organizations developed under President George H.W. Bush's administration. *See* Executive Order 13,279—Equal Protection of the Laws for Faith-Based and Community Organizations, 67 Fed. Reg. 77,141 (Dec. 12, 2002). EO 13,559 drew from the recommendations contained in a detailed report issued by the Advisory Council for Faith-Based and Neighborhood Partnerships.[2] The

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[1] Despite the national impact of the Proposed Rule, the Department has failed to provide any justification for an unusually short 30-day comment period. Given that the Proposed Rule represents substantial shifts in the Department's approach to faith-based organizations, the comment period on the Proposed Rule should be extended to a minimum of 60 days to provide adequate time to comment on the numerous legal issues presented and the potential harms the Rule will cause. The Department of Housing and Urban Development, for example, has a 60-day comment period for a substantially similar rule. Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 8,215-01 (Feb. 13, 2020).

[2] President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (Mar. 2010),

Advisory Council included interested parties from diverse groups, and was likely "the first time a governmental entity has convened individuals with serious differences on some church-state issues and asked them to seek common ground."[3] Despite the members' differences, the Advisory Council issued several unanimous recommendations aimed at honoring the government's commitment to religious freedom, such as "*insist[ing]* that beneficiaries be notified of their religious liberty rights, including their rights to alternative providers."[4] The Advisory Council also agreed that the needs of the people seeking services must be the primary concern: "Reverberating through this report is a call for the concerns of people who are poor and vulnerable to be prioritized."[5]

EO 13,559 emphasized that faith-based organizations are welcome to compete for government funding while maintaining a religious identity and clarified that they must separate any explicitly religious activity from programs supported with direct federal financial assistance. 75 Fed. Reg. at 71,320. Additionally, EO 13,559 required agencies administering federal funds to implement protections for program beneficiaries guided by the principle that beneficiaries should receive timely, appropriate referrals to secular programs if they object to the religious character of an organization. *Id.* at 71,320–21. The final rule implementing EO 13,559 was issued in 2016, and required that any social services provided via indirect aid mechanisms include at least one adequate secular alternative provider, as a counterbalance to the fact that indirect-aid providers may include religious elements in their programming. Federal Agency Final Regulations Implementing Executive Order 13,559: Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19,355, 19,407–28 (Apr. 4, 2016).

Just two years after those rules were finalized, the Trump Administration issued Executive Order 13,831, which purported to focus on further assisting faith-based organizations that wish to provide government-funded social services. Establishment of a White House Faith and Opportunity Initiative, 83 Fed. Reg. 20,715 (May 3, 2018) ("EO 13,831"). In addition to creating the White House Faith and Opportunity Initiative, EO 13,831 eliminated the referral requirement outlined in EO 13,559. *Id.* The Administration did not provide a reason for taking this step, describe any changed circumstances, or offer guidance on alternative means for protecting beneficiaries' rights. On January 17, 2020, the Department published this Proposed Rule to further implement EO 13,831.

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https://obamawhitehouse.archives.gov/sites/default/files/docs/ofbnp-council-final-report.pdf ("Advisory Council Report").

[3] *Id.* at 120.

[4] *Id.* at viii (emphasis added).

[5] *Id.* at vi.

II. THE DEPARTMENT SHOULD NOT UNDERMINE BENEFICIARIES' RELIGIOUS-LIBERTY RIGHTS.

The Department asserts concern with protecting the religious freedom of faith-based organizations, *see, e.g.*, 85 Fed. Reg. at 3,195–96, but it ignores the religious freedom of the beneficiaries those organizations are supposed to be serving. The Proposed Rule would undermine beneficiaries' religious liberty in ways that cannot be ignored:

- *Notice and Referral Requirements:* The current regulations require that faith-based organizations provide beneficiaries with notice that they can access alternative providers if they object to the religious nature of the organization, and a referral to a secular provider if the beneficiaries raise such an objection. 34 C.F.R. § 75.713(a), (c). Faith-based organizations must also provide notice to beneficiaries of their rights to be free from discrimination based on religion; to decline to participate in religious activities, which must be voluntary and separate in time or place from federally-funded activities; and to report violations of these rights. *Id.* § 75.712(a). The Proposed Rule would eliminate these notice and referral requirements, purportedly because they are not required of secular organizations. 85 Fed. Reg. at 3194–95. But that reasoning ignores that faith-based organizations are subject to separate rules, not to punish them for their religious character, but to protect the religious rights of the people they serve.

  As the Advisory Council's report cautioned, people seeking aid may not be aware of their rights; the report thus unanimously recommended providing notice of those rights as well as adding the alternative-provider referral requirement.[6] This is in no small part because people who require government-funded services are more likely to be unaware that they can object to discrimination or proselytization in this context, and they may be more vulnerable to coercion to participate in religious activities—however subtle and even if not intended by the provider—if they mistakenly believe it is necessary to access support.

  Alternatively, beneficiaries may forgo services entirely if they don't know they have an alternative to a faith-based organization. For example, a person of a minority faith or a non-religious person might forgo desperately needed services altogether if their initial contact with a provider is in a church adorned with Christian iconography or messages stating that non-believers are going to hell; a lesbian, gay, bisexual, or transgender ("LGBT") homeless teen might not seek shelter if the faith-based provider is known to condemn LGBT people as abominations; or a single, pregnant person might not seek services from a religious provider that disapproves of having children outside

[6] Advisory Council Report at 141.

of marriage. In these situations, the notice-and-referral requirements are vital to ensuring that the ultimate goal of the Department's social-services programs—to provide assistance directed at reducing poverty and empowering low-income populations—is actually met. *See* 67 Fed. Reg. at 77,141.

To justify eliminating these notice and referral requirements, the preamble to the Proposed Rule makes contradictory claims about the burdens of providing notice. The preamble contends, for example, that providing notice and referrals is so burdensome and costly that eliminating these requirements will result in savings substantial enough to trigger a noticeable increase in services. 85 Fed. Reg. at 3,217. But no evidence is offered to support this conclusion. In fact, in 2016, when the provisions were originally proposed, the Department estimated that, because the agencies would be providing the required language, the notice would "not place an undue burden on recipients of direct Federal financial assistance, particularly when balanced against the notice's benefit—informing beneficiaries of valuable protections of their religious liberty." 81 Fed. Reg. at 19,365. The Department has not explained how that balance has changed in the few short years since the current regulations were promulgated. Further, with respect to the requirement that providers refer beneficiaries to an alternative secular provider when requested, the Department claims (again, based on incomplete evidence) that beneficiaries never use the option. 85 Fed. Reg. at 3,194. If it is true that this option is never or rarely used, it cannot be said to impose a significant burden on providers.

Indeed, even if the notice-and-referral requirements do impose some minimal burden on providers, retaining these requirements confers important protections to beneficiaries, whose well-being must be the primary focus of any government aid program. Organizations are *funded* by the government to *serve* beneficiaries—no less so when the form that service takes is notifying beneficiaries of their rights, and on occasion, referring them to a different provider if necessary.

The proposed elimination of vital religious-freedom protections for beneficiaries stands in stark contrast to the Proposed Rule's requirements of increased notice to religious organizations of their rights. *Id.* at 3,196. The Proposed Rule offers no reason to provide greater notice requirements of religious-liberty rights to faith-based organizations and institutions, which are much better positioned to already know their rights in this area, than to vulnerable service beneficiaries.

- *Definition of "Indirect Federal Financial Assistance":* While some programs receive funding directly from the government, others receive "indirect Federal financial assistance." Under the existing and proposed rules, that means that

"the choice of a service provider under a program of the Department is placed in the hands of the beneficiary." 81 Fed. Reg. at 19,407–26. The existing and proposed rules differ in one fundamental respect, however. Under the current rule, for any particular service program to be categorized as "indirect Federal financial assistance," "[t]he beneficiary [must have] at least one adequate secular option for use of the voucher, certificate, or other similar means of government-funded payment." *Id.* The Department now intends to remove that requirement. 85 Fed. Reg. at 3,224–25 (to be codified at 34 C.F.R. § 76.52(c)(3)). This change is especially troubling because the Proposed Rule also includes new language explicitly allowing organizations accepting "indirect" aid to require beneficiaries to participate in religious activities. *Id.* at 3,221 (to be codified at 34 C.F.R. § 3474.15(f)).

The proposed change compromises the religious liberty of beneficiaries. Simply put, if no adequate secular option is required for programs receiving indirect funds, some beneficiaries will be subjected to unwanted religious practices, with no alternative available to them. In other words, beneficiaries in some locales will be able to access services they need only if they attend a government funded religious program that runs contrary to their beliefs, with no alternative. The new language providing that attendance can be required also conflicts with EO 13,559 and the current rules, which bar discrimination in "direct" and "indirect" aid programs against beneficiaries on the basis of "refusal to attend or participate in a religious practice."[7] In permitting indirect aid recipients to require participation in religious activities, the Department would, effectively, permit these providers to turn away beneficiaries who do not want to, or cannot (as a matter of their faith or religious belief) submit to certain religious practices or programming that are mandatory. And because the proposed changes also eliminate any requirement that a secular provider be available to dispense the same services, these beneficiaries will be left with no place to obtain services.

The Department's justification for these changes is inadequate. The purported constitutional and practical bases for permitting faith-based organizations to participate in voucher programs while also including religious elements in their services is that the beneficiary will be *choosing* their services—but that is not the case if there is no secular alternative. Without both options available, there cannot be the requisite "true private choice" that creates the constitutionally required conditions to render it permissible for federal funding to be used in support of religious programs.

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[7] Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec, 12, 2002), as amended by Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 17, 2010) at § 2(d). *See also* 81 Fed. Reg. at 19,360–61 ("[S]ection 2(d) of the Executive order does not limit these nondiscrimination obligations to direct aid programs.").

See Zelman v. Simmons-Harris, 536 U.S. 639, 653, 662 (2002) (upholding "indirect aid" in form of school vouchers on ground that the program was set up to allow "individuals to exercise genuine choice among options public and private, secular and religious").

- *Definition of "Federal Financial Assistance":* The Proposed Rule also would define "federal financial assistance" in a manner that would allow indirect aid providers to discriminate *outright* against beneficiaries based on religion, by rolling back which programs the nondiscrimination requirements cover. 85 Fed. Reg. at 3,222 & 3225 (to be codified at 34 C.F.R. §§ 75.52(c)(3)(iii) & 76.52(c)(3)(iii)). Under the proposed language, for example, indirect aid providers could simply turn away beneficiaries who are the "wrong" religion—even if those beneficiaries would be willing to submit to mandatory religious practices as a condition of receiving services. No beneficiary should be turned away from a government-funded program based on religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

  Allowing such government-funded discrimination, whether supported through direct or indirect financial assistance, would be unprecedented and cannot be reconciled with the Department's professed commitments to protecting religious liberty or serving those most in need through these programs. Indeed, in *Zelman*, which the Department repeatedly relies on to justify these changes, the Supreme Court explicitly noted that all private schools participating in the challenged voucher program, including religious schools, were prohibited by the program's terms from discriminating on the basis of race, religion, or ethnic background. 536 U.S. at 645.

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In addition to other misguided justifications, discussed above, the Department also asserts that the proposed changes to the notice-and-referral requirements and "financial assistance" definitions are necessary to avoid "tension" with the Supreme Court's opinion in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4. Neither constitutional precedent nor federal statute requires these changes, however.

In *Trinity Lutheran,* the Court reaffirmed the principle that government funds cannot be denied simply because of a recipient's religious character. 137 S. Ct. at 2025. The Court did not prohibit the government from taking steps to protect the religious liberty of beneficiaries of federal funding. Indeed, the Court expressly distinguished a prior case that upheld a prohibition on government funds supporting, even as part of an indirect aid program, activities constituting an "'essentially religious endeavor.'" *Id.* at 2023 (quoting *Locke v. Davey*, 540 U.S. 712,

721 (2004)). The current regulations' provisions protecting beneficiaries' autonomy do not require faith-based organizations to renounce their religious character—to the contrary, they were designed to permit religious organizations to participate fully in government-funded programs, while balancing the rights and interests of the populations they are serving.

Likewise, the Department does not explain how any of the current provisions violate RFRA, beyond a vague assertion that they could impose an abstract, undefined burden on the religious exercise of faith-based organizations. 85 Fed. Reg. at 3,206. As discussed above, there is no evidence that these requirements impose any significant burden on providers. Even assuming such a burden, the current provisions are narrowly tailored to further the government's compelling interest in protecting third-party beneficiaries' religious-liberty rights and ensuring that federally funded social-services programs effectively serve the vulnerable populations the programs were created to help.

As the Supreme Court has recognized, the RFRA analysis should consider whether an accommodation ensures that beneficiaries of government programs are not harmed. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 732 (2014). And there are circumstances where it is appropriate to treat religious organizations differently, because there is a separate interest in protecting the religious-liberty interests of beneficiaries. *See, e.g.*, *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 410–12 (6th Cir. 2007) (holding that faith-based youth-services organization was not entitled to continue contract with state where organization insisted on subjecting youth in their care to religious instruction in contravention to state policy barring funding for such activity).

Here, the intended beneficiaries of social-services programs funded by the Department will suffer significant harm if the Proposed Rule is implemented. As the Department acknowledges, under the Proposed Rule, beneficiaries will be left to "research[] available providers" and potentially seek their own relief under RFRA if no alternative is available. 85 Fed. Reg. at 3,194. But potentially missing work, finding child care, paying for transportation, and visiting various other organizations to find alternative options—with no guidance from grantees funded by the Department—will be extremely taxing for the very people who should be supported by these organizations. The individuals whom the Department's social-services programs are targeted toward helping already have limited resources. Indeed, many of the programs are designed to serve people experiencing severe poverty and other socioeconomic deprivations.[8] Shifting this burden to beneficiaries risks leaving them with no services, contrary to the very purpose of the program. The Department does not explain why low-income program participants are better positioned than grantees to undertake this task, considering grantees are currently required to provide the referral and are more likely to have easy access to that

[8] Exec. Order No. 13,279.

information.

Furthermore, as discussed above, the Proposed Rule could lead to religious coercion of beneficiaries, who may feel pressured to participate in religious activities offered by providers, even if they are separate from the social-services program and even if providers do not intend to exert such pressure. Even more troubling, the Proposed Rule will increase the ability of providers receiving indirect financial assistance to impose religious exercise on beneficiaries, and even to discriminate against them outright, with no alternative available. Under the Proposed Rule for instance, every provider of a particular service that is funded indirectly could be religious and could impose religious-activity requirements or turn away minority-faith beneficiaries, and beneficiaries would have no recourse or other way to obtain services. These changes will have the greatest impact on already vulnerable populations, such as LGBT people, people of color, and female-led households, which are more likely to rely on public benefit programs and more likely to face discrimination in accessing those services.[9]

III. THE DEPARTMENT SHOULD NOT OPEN THE DOOR TO ADDITIONAL EXEMPTIONS FOR FAITH-BASED ORGANIZATIONS THAT WOULD PERMIT GOVERNMENT-FUNDED DISCRIMINATION.

A. The Department Should Not Permit Discriminatory Denials of Services by Faith-Based Providers.

The Proposed Rule adds new language that could permit faith-based organizations to participate in federally funded programs, even if they cannot meet all program requirements. Currently, providers are required to carry out all activities in accordance with program requirements. The Proposed Rule would insert into that mandate the caveat that those requirements apply after "considering any permissible accommodation." 85 Fed. Reg. at 3,221 (to be codified at 34 C.F.R. § 75.52(a)(1)). The Proposed Rule does nothing, however, to ensure that accommodations are granted only where beneficiaries' needs are still addressed.

The Administration has time and again confirmed that it considers religious accommodations and exemptions appropriate even where they harm third parties. The Attorney General's Memorandum on Religious Liberty, cited extensively as a basis for the Proposed Rule, explains that "the fact that an exemption would deprive

[9] Caitlin Rooney et al., *Protecting Basic Living Standards for LGBTQ People*, Ctr. for Am. Progress (Aug. 13, 2018), https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/; *21.3 Percent of U.S. Population Participates in Government Assistance Programs Each Month*, United States Census Bureau (May 28, 2015), https://www.census.gov/newsroom/press-releases/2015/cb15-97.html.

a third party of a benefit does not categorically render an exemption unavailable."[10] Further, the Administration has already put that theory into practice by proposing and finalizing several rules that cite RFRA as a basis for organizations to override existing protections for third parties, based on the organization's religious beliefs. *See, e.g.*, Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (expanding exemptions to the contraceptive coverage mandate by allowing any for-profit company or non-profit organization to invoke religious beliefs to block their employees' or students' health-insurance coverage for contraception); "Nondiscrimination in Health and Health Education Programs or Activities," 84 Fed. Reg. 27,846 (proposed June 14, 2019) (permitting religiously affiliated health care entities to discriminate based on sex in providing access to health care and insurance coverage); 84 Fed. Reg. 63,831-01 (proposed Nov. 19, 2019) (licensing Department of Health and Human Services grantees to discriminate against beneficiaries seeking health services).

The Proposed Rule inserts this language permitting accommodations without considering the harm to beneficiaries, or explaining the need for such a change. The Proposed Rule would further enable faith-based organizations to receive federal funding even if they are unwilling to abide by all program requirements by proposing to change the current provision prohibiting discrimination against a potential provider based on an organization's religious "character," to prohibiting discrimination against a potential provider based on the organization's religious "exercise." 85 Fed. Reg. at 3,220 (to be codified at 2 C.F.R. § 3474.15(b)(2)). If a faith-based organization's religious exercise precludes it from fulfilling the program's requirements to an extent that program beneficiaries would be harmed, it should not be considered *discrimination* to deny it federal funding, any more than it would be discrimination to deny funding to a non-religious provider that cannot or will not conform to all program requirements. Further, combined with the changes detailed above, beneficiaries may not know their rights or that there may be alternative programs that offer all services.

Religious exemptions and accommodations are not permitted where they would harm third parties. *See Hobby Lobby*, 573 U.S. at 732; *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). This is all the more true where the harm is government funded. The Proposed Rule elevates the rights of faith-based organizations over beneficiaries, but "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Thornton*, 472 U.S. at 710 (internal quotation marks omitted).

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[10] Office of the Attorney General, Federal Law Protections for Religious Liberty at 5, (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download.

B. The Department Should Not License Hiring Discrimination.

The Proposed Rule would broadly license discrimination by faith-based organizations against their employees. Title VII creates a limited exemption from its nondiscrimination provisions to permit religious organizations to hire based on an employee's "particular religion," allowing such organizations to give employment preference to individuals who share their religion. But Title VII does not permit religious employers to discriminate on other grounds.[11] The exemption thus recognizes the religious-freedom interests of religious entities, but also protects the government's interest in preventing wide-scale employment discrimination.

The Proposed Rule, however, would go further than the Title VII exemption by allowing faith-based providers to select employees of government-funded programs "on the basis of their acceptance of or adherence to the religious tenets of the organization." 85 Fed. Reg. at 3,221 (to be codified at 2 C.F.R. § 3474.15(g)). The proposed change could allow a wide range of employment discrimination in taxpayer-funded programs. For example, a faith-based provider could fire an employee who marries a spouse of a different race on the ground that the employee did not adhere to the organization's religious tenets regarding interracial marriage. A faith-based provider could also fire a single woman who became pregnant or an employee discovered to have used contraception—all on the ground that the employees did not comport with the group's religious tenets.

By permitting religious organizations to discriminate with federal funds, the Proposed Rule unconstitutionally puts the government's imprimatur on discrimination in violation of the Equal Protection Clause and the Establishment Clause. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion). And "it is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (citation and internal quotation marks omitted); *cf. United States v. Burke*, 504 U.S. 229, 238 (1992). The Department offers no persuasive reason for changing its current policy, which adopts the Title

[11] *See Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) ("While the language of [the exemption] makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin."); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 331, 337, 339–40 (1987) (holding Title VII exemption is constitutional as applied to employment of co-religionists by parties not funded by the government, partnering with the government, or exercising government functions).

VII exemption as is. And crucially, the Department completely ignores potential harms to employees of religious organizations—let alone factors the risks and costs they face into its legally mandated assessment of the Proposed Rule's benefits and burdens.

C. The Department Should Not Expand the Availability of the Exemption from Title IX.

Title IX of the Education Amendments of 1972 prohibits educational programs and activities receiving federal financial assistance from discriminating against anyone on the basis of sex. 20 U.S.C. § 1681(a). It grants a narrow exemption to educational institutions that are "*controlled* by a religious organization." *Id.* § 1681(a)(3) (emphasis added).

The Department of Education has typically found that a school is controlled by a religious organization when one of the following is true: 1) it is a divinity school; or 2) it requires employees or students to subscribe to the religion of the controlling organization; or 3) its official documents say it is controlled by a religious organization or is committed to the doctrines of a religion, the members of its governing board are appointed by the controlling religious organization, and it gets "a significant amount of financial support" from the controlling religious organization. *See, e.g.*, Office for Civil Rights, "Exemptions from Title IX," U.S. Department of Education, https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html (last modified Jan. 15, 2020).

The Proposed Rule, however, affords an exemption to educational institutions without regard to this clear statutory limitation and the Department's long-standing policy for determining whether a school is controlled by a religious organization. Instead, it provides several methods for schools to qualify for the exemption, even for schools that cannot demonstrate that they are controlled by a particular religious organization. As a result, more students and employees of those schools would lack the protection against sex-based discrimination provided by Title IX.

Under the Proposed Rule, for example, it would be sufficient for a school to provide a "statement that the educational institution subscribes to specific moral beliefs or practices, and a statement that members of the institution community may be subjected to discipline for violating those beliefs or practices." 85 Fed. Reg. at 3,226 (to be codified at 34 C.F.R. § 106.12(c)(5)). But this type of statement is wholly insufficient for the school to qualify for an exemption under Title IX, as it does nothing to show that the institution is governed by religion in any respect, let alone that it is formally controlled by a religious institution. Likewise, the fact that an educational institution has a "statement of religious practices" that members of the institution must "espouse a personal belief in" does not establish the religious

nature of the controlling organization. *Id.* (to be codified at 34 C.F.R. § 106.12(c)(4)). Nor can the bar be set so low as to permit a statement "that includes, refers to, or is predicated upon religious tenets" to be sufficient to demonstrate that the exemption should apply. *Id.* (to be codified at 34 C.F.R. § 106.12(c)(6)). The Department's proposal would permit discrimination against students far outside the realm contemplated by the statute.

Once again, the Proposed Rule fails to account for the harm that beneficiaries will suffer. *See id.* at 3,215 (stating Department does not believe the proposed regulations will result in any significant costs to students or the general public); *id.* at 3,219 (stating that even if more schools qualify for the exemption, it will not result in "any quantifiable cost"). These harms are not hypothetical; there is extensive documentation of the emotional, financial, and professional injuries suffered by students who, for example, have been expelled for being in a same-sex relationship or being transgender,[12] as well as school employees who have been fired for having an abortion,[13] becoming pregnant outside of marriage,[14] or not conforming with a school's beliefs in other ways.[15] The harm that will result from this extension of the Title IX exemption will be compounded by the fact that the Proposed Rule does not include a method to ensure that students have notice that their school is exempt from Title IX protections. Students and prospective students should know what protections the law provides against discrimination, and the Proposed Rule would only diminish already insufficient protections.

The Department does not explain how these proposals are consistent with the statute, why the changes are needed to assist qualifying institutions, or why any alleged benefits of the changes are worth the discriminatory harms faced by students and employees at educational institutions. The proposed changes go well beyond "avoid[ing] religious discrimination among institutions of varying

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[12] *See, e.g.*, Sarah Warbelow & Remington Gregg, *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk*, Human Rights Campaign (2015), https://assets2.hrc.org/files/assets/resources/Title_IX_Exemptions_Report.pdf.

[13] *See, e.g.*, *Ducharme v. Crescent City Déjà Vu, LLC,* 406 F. Supp. 3d 548 (E.D. La. 2019).

[14] *See, e.g.*, Dana Liebelson & Molly Redden, "A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time," Mother Jones (Feb. 10, 2014), https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant.

[15] For example, a pregnant employee at a religious school was denied a contract renewal because of the school's belief that mothers should stay at home with young children. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986). Another religious school denied married women health insurance because it believed that women should not be the "head of household." *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986).

denominations." 85 Fed. Reg. at 3,207. They would extend the exemption to educational institutions with no connection to any religious denomination. It may be true that "religious organizations are organized in widely different ways that reflect their respective theologies," *id.* at 3,206, but that concern does not justify skirting—indeed, effectively eliminating—the statutory requirement that the educational institution be controlled by a religious organization in order to qualify for Title IX's exemption.

D. The Department Should Not Roll Back Protections Against Discriminatory Student Groups.

The Proposed Rule would also create a loophole to allow religious student groups at public universities to implement discriminatory policies and practices that are contrary to universities' nondiscrimination policies. The Supreme Court has already addressed this conflict, holding that where a school implements a nondiscrimination policy requiring official, school-funded student groups to accept "all-comers," the policy is a reasonable, viewpoint neutral condition governing the formal recognition of student organizations. *Christian Legal Soc. Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 669 (2010). In that case, the Christian Legal Society argued that being required to accept members who did not share the organization's core beliefs about religion and sexual orientation violated its First Amendment rights to free speech, expressive association, and free exercise of religion. *Id.* at 668. But the Court recognized that it is "hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers, *id.* at 694, and that what the group actually sought was "not parity with other organizations, but a preferential exemption from [the school's] policy." *Id.* at 669.

The Department is now attempting to mandate the very same preferential treatment for religious student organizations that the Supreme Court held was not necessary. The Proposed Rule would prevent schools receiving federal funds from applying reasonable, viewpoint-neutral policies to religious student organizations when their practices, policies, or membership standards violate those school policies. 85 Fed. Reg. at 3,223 (to be codified at 34 C.F.R. § 75.500(d)); *id.* at 3,226 (to be codified at 34 C.F.R. § 76.500(d)). Schools cannot target religious organizations or any student organizations for their beliefs, but they can enforce neutral, generally applicable policies requiring officially recognized and funded groups to be open to all in order to access benefits and recognition.

The Department does not explain the need for this broad exemption for religious groups on campus. Nor does it address the harm that such an exemption would pose for students who would face discrimination by school-sanctioned student groups. Because of the central role that access to education plays in personal and professional development, eliminating discrimination in education has long been recognized as a governmental interest of the utmost importance. *See, e.g.*, *Norwood*, 413 U.S. at 469 (holding that Mississippi could not give textbooks to students

attending racially segregated private schools because "discriminatory treatment exerts a pervasive influence on the entire educational process"); *see also, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education."). There is a long history of student groups serving as vehicles for discrimination, preventing marginalized students from being fully integrating into student life on university campuses across the country. *See* Brief of Amicus Curiae of the ACLU et al. at 10–12, *Christian Legal Soc.*, 561 U.S. 661 (Mar. 15, 2010). The Department's Proposed Rule would return our public-university campuses to a shameful era in which public universities broadly countenanced discrimination against vulnerable groups of students.

IV. CONCLUSION

For all of these reasons, the Department should withdraw the Proposed Rule. Please contact Lindsey Kaley at lkaley@aclu.org with any questions.

Sincerely,

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