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Submitted via www.regulations.gov

Jean-Didier Gaina
Department of Education
400 Maryland Avenue SW
Washington DC, 20202

Re: 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)

Dear Jean-Didier Gaina:

The National Women's Law Center ("the Center") submits this comment in opposition to the Department of Education's proposed rule as published in the Federal Register on January 17, 2020.¹ Since 1972, the Center has worked to protect and advance the progress of women and girls and their families in core aspects of their lives, including education, with an emphasis on the needs of low-income women and girls and those who face multiple and intersecting forms of discrimination. To that end, the Center has long worked to secure equal educational opportunities for women and girls, and to ensure that civil rights laws are interpreted correctly to include important protections against sex discrimination. Founded in the same year as Title IX of the Education Amendments Act of 1972 ("Title IX") was enacted, the Center has participated in all major Title IX cases before the Supreme Court as counsel or as amicus curiae. The Center is committed to eradicating sex discrimination in schools in all its forms, specifically including discrimination against pregnant and parenting students, LGBTQ students, and students who face multiple forms of discrimination, such as girls of color and girls with disabilities.

Our experience has shown us that robust enforcement of civil rights laws such as Title IX, including the narrow application of any exemptions from its nondiscriminatory mandate, is crucial for the success of women and girls in education. We are gravely concerned, therefore, that the Department of Education ("the Department") proposes to significantly expand its interpretation of Title IX's religious exemption, ignoring the statute's language, flouting its purpose, and subjecting students at many more educational institutions to sex discrimination. Additionally, we are deeply troubled by other aspects of the rule, including provisions that seek to strip beneficiaries of critical protections in Department-funded services and those that seek to grant special exemptions for religious student organizations. While this comment focuses primarily on the expanded

¹ 85 Fed. Reg. 3190 (proposed Jan. 17, 2020) (to be codified at 2 C.F.R. pt. 3474 & 34 C.F.R. pts. 75, 76, 106, 606, 607, 608, 609) [hereinafter Proposed Rule].

interpretation of the exemption to Title IX, we echo the concerns detailed by the Coalition Against Religious Discrimination regarding these provisions.²

I. Expanding the Department’s interpretation of the Title IX religious exemption would harm the students and employees Title IX is meant to protect.

a. The proposed rule will exacerbate existing sex discrimination.

More than 45 years after the passage of Title IX, sex discrimination remains a persistent problem in schools. The dangerous persistence of sex discrimination in educational institutions demands the Department’s full commitment to enforcing Title IX and its recognition of the long-lasting harms such discrimination can have. The Department’s proposal to instead retreat from its enforcement obligations by purporting to bestow an exemption from Title IX’s protections on a large and undefined universe of schools threatens to expose many more students and school employees to the harms of sex discrimination.

i. Sex discrimination against students

Sex-based discrimination remains a persistent problem in K-12 educational programs, with particularly severe outcomes for Black and brown girls. Girls are often subjected to sex stereotyping as soon as they enter school. For example, teachers consistently rate boys’ ability in math higher than that of girls with similar achievements and behavior.³ The impact of such stereotyping can be seen early on: one study found that while there was no average gender gap in math test scores when children enter kindergarten, a large gap emerges by second or third grade.⁴ Stereotypes based on sex and race also underly many school dress codes, which subject Black girls to harsh discipline for how they look and dress.⁵

Girls in K-12 face also high rates of sexual harassment. In grades 7-12, 56% of girls and 40% of boys are sexually harassed in any given school year.⁶ More than one in five girls ages 14 to 18 are kissed or touched without their consent.⁷ Historically marginalized and underrepresented groups are more likely to experience sexual harassment than their peers. Native, Black, and Latina girls are more likely than white girls to be forced to have sex when they do not want to.⁸ Fifty-six percent of girls ages 14-18 who are pregnant or parenting are kissed or touched without their

² Comment of the Coalition Against Religious Discrimination, Proposed Rule, 85 Fed. Reg. 3190.

³ Joseph R. Cimpian et al., *Have Gender Gaps in Math Closed? Achievement, Teacher Perceptions, and Learning Behaviors Across Two ECLS-K Cohorts*, 2 AERA OPEN 1 (2016).

⁴ Joseph Paul Robinson & Sarah Theule Lubienski, *The Development of Gender Achievement Gaps in Mathematics and Reading During Elementary and Middle School: Examining Direct Cognitive Assessments and Teacher Ratings*, 48 AM. EDUC. RESEARCH J. 268 (Apr. 2011).

⁵ Alexandra Brodsky et al., *Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools* (2018), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/04/5.1web_Final_nwlc_DressCodeReport.pdf.

⁶ Am. Ass’n of Univ. Women, *Crossing the Line: Sexual Harassment at School 2* (2011), <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

⁷ Nat’l Women’s Law Ctr., *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Sexual Harassment and Sexual Violence* 1 (Apr. 2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

⁸ *Id.* at 3.

consent.⁹ More than half of LGBTQ students ages 13 to 21 are sexually harassed at school.¹⁰ Similarly, during college nearly two-thirds (62%) of women are sexually harassed¹¹ and 1 in 5 are sexually assaulted.¹² Rates of sexual harassment and assault are substantially higher for women of color, especially Black and Native American women,¹³ as well as for students with disabilities¹⁴ and LGBTQ students.¹⁵ For many students, facing sexual harassment and assault often carries both short-term and long-term ramifications, including loss of educational and professional opportunities and negative health outcomes.¹⁶

Schools are also often hostile places for women and girls who are pregnant and parenting. Nearly two-thirds of girls in high school who are pregnant or parenting (64%) reported that not feeling safe was a barrier to attending school, and nearly four in ten (39%) were absent from school because they felt they would be unsafe on the way to or from school.¹⁷ Only about half of young mothers will earn a high school diploma by the age of 22, compared with 89% of women who did not have a child during their teenage years,¹⁸ and one third of young mothers will never get a G.E.D. or a diploma.¹⁹

Unfair discipline practices also create barriers to education for girls of color. Black and Native American girls are suspended from school at rates disproportionate to their enrollment. According

⁹ Kelli Garcia & Neena Chaudry, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting>.

¹⁰ Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 28 (2018).

¹¹ Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus* 17 (2006), <https://history.aauw.org/aauw-research/2006-drawing-the-line>.

¹² David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* 13-14 (2015), <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>.

¹³ E.g., Women of Color Network, *Domestic Violence in Communities of Color* (2006), http://www.doj.state.or.us/wpcontent/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf.

¹⁴ E.g., Karen Schulman, Kayla Patrick, & Neena Chaudry, *Let Her Learn: Stopping School Pushout for Girls with Disabilities* 7 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

¹⁵ E.g., Hill & Silva, *supra* note 11 at 19; Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, 63 MORBIDITY AND MORTALITY WEEKLY REPORT 67, 69 (Jan. 25, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf>; Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 134, 136 (2016), www.ustranssurvey.org/reports.

¹⁶ E.g., Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), <https://doi.org/10.1177/1521025115584750>; Alexandra Brodsky, *How Much Does Sexual Assault Cost College Students Every Year?*, WASHINGTON POST (Nov. 18, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexualassault-cost-students-every-year>; Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvzjpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus. See also Kosciw et al., *supra* note 10 at 43.

¹⁷ Garcia & Chaudry, *supra* note 9 at 12. By contrast, 32% of girls overall reported that not feeling safe was a barrier to attending school and 14% were absent from school because they felt they would be unsafe on the way to or from school. *Id.*

¹⁸ Kate Perper, Kristen Peterson, and Jennifer Manlove, *Diploma Attainment Among Teen Mothers* 1 (2010), https://www.childtrends.org/wp-content/uploads/2010/01/child_trends-2010_01_22_FS_diplomaattainment.pdf.

¹⁹ *Id.*

to the 2015-16 CRDC, Black girls are almost six times more likely and Native American girls are three times more likely to be suspended from school compared to white girls.²⁰

Sex discrimination against LGBTQ students is also rampant. A national study of nearly 28,000 transgender people found that respondents who were out or perceived to be transgender in K-12 faced frequent discrimination because of sex.²¹ More than three quarters (77%) were harassed, physically attacked, sexually assaulted, or faced some other form of mistreatment in K-12 because of being transgender—with especially high rates among respondents with disabilities (82%) and respondents of color, including Native American (92%), Middle Eastern (84%), and multiracial (81%) respondents.²² One in six (17%) left a school because of the severity of the mistreatment they faced.²³ In college, nearly one in four transgender students are sexually assaulted.²⁴ In college, nearly three quarters (73%) of LGB students were sexually harassed in college, compared to 61% of heterosexual students; nearly one in five (18%) were harassed on a frequent basis, more than twice the rate among heterosexual students.²⁵

Another example of the barriers women face can be found in debt disparities: a recent study found that, in part due to the wage gap and other inequities, women take on more debt to attend college and they take longer and struggle more to pay it off.²⁶ These disparities are particularly large for women of color, and especially for Black women.²⁷

When students are pushed out or not given the support they need to succeed in schools, the effects can be substantial. Women who have not completed high school are more likely to be unemployed, to be living in poverty, and to report poor health.²⁸ LGBTQ middle and high school students who faced higher levels of in-school victimization were three times as likely to have missed school in the past month because they felt unsafe, were less likely to plan on pursuing post-secondary education, and had lower GPAs than other LGBTQ students.²⁹ Transgender adults who faced mistreatment in school were more likely to have been homeless and more likely to have attempted suicide over their lifetime.³⁰

ii. Sex discrimination against school employees

Disparities based on sex also persist among employees at educational institutions. For example, a 2017 study by the College and University Professional Association for Human Resources found that the gender pay gap among higher education administrators—a difference of about \$20,000

²⁰ National Women’s Law Center calculations from U.S. Dep’t of Educ., *Civil Rights Data Collection, 2015-16*.

²¹ James et al., *supra* note 15 at 134.

²² *Id.* at 132.

²³ *Id.* at 135.

²⁴ Cantor et al., *supra* note 12 at 13-14.

²⁵ Hill & Silva, *supra* note 11 at 17. *See also* Kosciw et al., *supra* note 10 at 23-26 (in middle and high school, more than 8 in 10 LGBTQ students faced harassment or assault.)

²⁶ American Association of University Women (“AAUW”), *Deeper in Debt: Women and Student Loans*, <https://www.aauw.org/research/deeper-in-debt/> (2019).

²⁷ *Id.*

²⁸ Jasmine Tucker & Kayla Patrick, *What Happens When Girls Don’t Graduate From High School? The Long-Term Effects of Not Completing High School* (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/09/final_nwlc_2017WhenGirlsDontGraduat.pdf.

²⁹ Kosciw et al, *supra* note 10 **Error! Bookmark not defined.** at 43.

³⁰ James et al., *supra* note 15 at 132.

when comparing men and women working in higher education administration—has failed to shrink over the previous fifteen years, and in fact was somewhat larger in 2016 than it was in 2001.³¹ The study also found that while women represent approximately half of administrators in higher education, their representation is heavily clustered in lower-paying positions: the more high-ranking and high-paying a job is, the lower the representation of women.³²

A similar pattern emerges in K-12. Although most teachers are women, superintendents overwhelmingly tend to be male. A 2019 AASA study found that three quarters of superintendents are male,³³ with women of color making up less than 3% of superintendents.³⁴ Another study of school superintendents in major urban areas found that 7 in 10 were men³⁵ and that they earn an average of \$20,000 to \$30,000 more than female superintendents per year.³⁶ The gender wage gap persists across numerous positions: for example, on average male teachers in pre-K through 12 make \$5,000 more than their female counterparts.³⁷

Women are also underrepresented in faculty and academia in medicine, law, and STEM fields. Only 13% of full professor positions in academic medicine are held by women. In 2013-2014, women comprised only 16% of medical school deans and 15% of medical school department chairs.³⁸ Women make up only 30% of full legal professors and 20% of law school deans, and generally receive lower pay, are denied tenure at higher rates, and are disproportionately concentrated in lower-ranked schools.³⁹ The same is true in STEM. Women faculty in STEM fields are more likely than men to leave or change positions in academia, and their decisions to leave are explained by an “academic culture that provides women fewer opportunities, limited support, and inequity in leadership, rather than gender-based differences such as roles in family responsibilities.”⁴⁰ Disparities also persist between men and women in authoring and publishing academic articles.⁴¹

³¹ Jacqueline Bichsel & Jasper McChesney, *The Gender Pay Gap and the Representation of Women in Higher Education Administrative Positions: The Century So Far* 4, https://www.cupahr.org/wp-content/uploads/cupahr_research_brief_1.pdf (2017).

³² *Id.* at 10.

³³ Robert S. McCord & Leslie A. Finnan, *2018-19 AASA Superintendent Salary & Benefits Study* 11 (2019), https://aasa.org/uploadedFiles/Policy_and_Advocacy/FinalReport_NonMember_2018-19.pdf.

³⁴ *Id.*

³⁵ Council of the Great City Schools, *Urban Superintendents: Characteristics, Tenure, and Salary* 2 (2014), https://www.cgcs.org/cms/lib/DC00001581/Centricity/Domain/87/Urban%20Indicator_Superintendent%20Summary%2011514.pdf.

³⁶ *Id.* at 9.

³⁷ NWLC calculations using American Community Survey (ACS) 2018 1-year estimates using IPUMS-USA.

³⁸ Laura Allison Woods, Terrie Fox Wetle, & Katherine M. Sharkey, *Why Aren't More Women in Academic Medicine Reaching the Top?* (Apr. 2018), Rhode Island Medical Journal, <http://www.rimed.org/rimedicaljournal/2018/04/2018-04-19-cont-woods.pdf>.

³⁹ See, e.g., Paola Cecchi-Dimeglio, “Legal Education and Gender Equality,” *Integrating Gender Equality into Business and Management Education* (Patricia M. Flynn et al., eds. 2017); LaWanda Ward, *Female Faculty in Male-Dominated Fields: Law, Medicine, and Engineering*, 143 NEW DIRECTIONS FOR HIGHER EDUCATION 63 (2008).

⁴⁰ Yonghong Jade Xu, *Gender Disparity in STEM Disciplines: A Study of Faculty Attrition and Turnover Intentions*, Research in Higher Education (Nov. 2008) <https://link.springer.com/article/10.1007/s11162-008-9097-4>.

⁴¹ See, e.g., Jevin D. West et al., *The Role of Gender in Scholarly Authorship*, 8 PLOS ONE e66212 (July 2013) <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0066212> (women are generally underrepresented as authors of single-authored papers and as the prestigious first- and last-author positions); Michael Bendels et al., *Gender Disparities in High-Quality Research Revealed by Nature Index Journals* 13 PLOS ONE e0189136 (Jan. 2018) <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0189136> (in scientific academic journals, women

The gender disparities among academic leadership and faculty affect the experiences of female students as well. Gender inequality in faculty and leadership roles affect how female students perceive the fields they choose to study, their mentorship opportunities, and their general ability to succeed in their chosen major.⁴²

b. Sex discrimination is frequently couched in the language of religion.

Students and employees of educational institutions have been subjected to a range of discrimination based on sex in the name of religion. Religious beliefs about how a woman should organize her private life—such as her decisions about how to dress, look, and behave; whether and whom to marry; and whether, when, and how to have children—have frequently motivated sex discrimination.

Unmarried women have been fired from schools in the name of religion when they have become pregnant.⁴³ For example, Teri James, a financial aid specialist at San Diego Christian College, was fired when she became pregnant on the grounds that she engaged in “sexually immoral behavior” by having premarital sex with her fiancé. The same standard was not applied to her fiancé: after she was fired, the school offered him her job.⁴⁴ Michelle Ganzy, a math teacher at Allen Christian School, was fired when she became pregnant while unmarried. While the school did not have an explicit policy against premarital sex, the school claimed that it was “implied...on theological grounds,” such as on a general statement teachers signed upon hiring recognizing “the Holy Scripture...[as] the supreme authority by which our lives are governed.”⁴⁵ Jarretta Hamilton became pregnant three weeks before getting married and was then fired from Southland Christian School when she said she would be requesting maternity leave in the next year.⁴⁶

Religious terms have also been used to justify firing women for undergoing fertility treatments. When Emily Herx learned that she had a medical condition causing infertility, she underwent in

are published less than their male peers and are specifically underrepresented in prestigious authorships and highly competitive articles); Vincent Larivière et al., *Bibliometrics: Global Gender Disparities in Science*, NATURE (Dec. 11, 2013) <https://www.nature.com/news/bibliometrics-global-gender-disparities-in-science-1.14321> (articles written by women receive fewer citations than those written by men in the same positions).

⁴² See, e.g., Eric P. Bettinger & Bridget Terry Long, *Do Faculty Serve as Role Models? The Impact of Instructor Gender on Female Students*, UNDERSTANDING TEACHER QUALITY AEA PAPERS AND PROCEEDINGS 156 (2005) (finding that female faculty served as role models for female students and positively influence course selection and major choice in some disciplines); Susan Nolan et al., *Training and Mentoring of Chemists: A Study of Gender Disparity* (Dec. 2007) 58 SEX ROLES: A JOURNAL OF RESEARCH 235, <https://link.springer.com/article/10.1007/s11199-007-9310-5> (finding that women perceived they received less mentoring than men at the undergraduate, graduate, and post-doctoral levels of training in chemistry, likely related to gender differences in eventual career success); Jennifer Waljee et al., *Gender Disparities in Academic Practice*, 136 PLAST. RECONSTR. SURG. 380e (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4785879> (finding that lack of mentorship from female mentors in medical school propagates gender inequities in medical faculty positions).

⁴³ 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>.

⁴⁴ Katie Bindley, *Teri James, Pregnant Woman Allegedly Fired For Premarital Sex, Sues Christian School*, HUFFINGTON POST (Mar. 1, 2013) https://www.huffpost.com/entry/teri-james-pregnant-woman-fired-premarital-sex-christian-school_n_2790085.

⁴⁵ *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 344 (E.D.N.Y. 1998).

⁴⁶ *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012). While the school justified the termination based on its religious prohibition of premarital sex, the Eleventh Circuit rejected concluded there was evidence that this justification was a pretext for firing Mrs. Hamilton based on her request for maternity leave.

vitro fertilization. Ms. Herx, a language arts teacher at a Catholic school in Fort Wayne, Indiana, was surprised to learn that the Diocese considered in vitro fertilization to be immoral.⁴⁷ She was fired from her position for “improprieties related to church teachings of law.”⁴⁸ Other women have similar stories, like Kelly Romenesko, a teacher in Wisconsin who was fired for undergoing in vitro fertilization,⁴⁹ and Christa Dias, a computer teacher in Cincinnati, who was fired after she became pregnant through artificial insemination.⁵⁰

LGBTQ teachers have also faced termination based on religious grounds, such in two schools that were ordered by the Archdiocese of Indianapolis to fire two openly gay teachers or else lose their status as Catholic schools.⁵¹ Marla Krolikowskii, a popular high school teacher at a Catholic school, was fired after 32 years of employment because it was revealed that she was transgender.⁵² English professor Rachel Tudor was denied tenure and later fired in part because of a Vice President’s religious objection to her “transgender lifestyle.”⁵³ And Monica Toro Lisciandro, a theater teacher at Covenant Christian School, would go on to describe her experience of being fired for being a lesbian as “traumatic”: “It’s hard to stomach that the message they’re sending is you can’t be gay and be a teacher.”⁵⁴

Some employers may refuse to employ women altogether based on a religious belief that women, or mothers, should not work outside the home. For instance, a religious school failed to renew a pregnant employee’s contract because of a belief that mothers should stay at home with young children.⁵⁵ Teachers also have been discriminated against in terms of pay and benefits and working conditions because of religious beliefs about the appropriate role of women in society. For example, a religious school denied women health insurance by providing it only to the “head of household,” which it defined to be married men and single persons, based on its belief that a woman cannot be the “head of household.”⁵⁶

⁴⁷ *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1172-73 (N.D. Ind. 2014).

⁴⁸ *Id.* Ms. Herx sued the school for gender discrimination and won; a jury awarded her two million dollars in damages. Rebecca S. Green, *Jury Sides With Fired Teacher*, JOURNAL GAZETTE (Mar. 16, 2016), <https://www.journalgazette.net/news/local/courts/Jury-sides-with-fired-teacher-4094706>.

⁴⁹ NBC News, *Teacher Says She Was Fired Over in Vitro*, NBCNEWS.COM (Sept. 28, 2006), <http://www.nbcnews.com/id/12738144/ns/health-pregnancy/t/teacher-says-she-was-fired-over-vitro/#.XkWQ39NKjct>.

⁵⁰ CBS News, *Jury Finds for Catholic Teacher Fired After Artificial Insemination Pregnancy*, CBS NEWS (June 3, 2013), <https://www.cbsnews.com/news/jury-finds-for-catholic-school-teacher-fired-after-artificial-insemination-pregnancy>.

⁵¹ Jack Jenkins, *Why Are Catholic Schools Firing Gay Teachers, and How Can One Refuse?*, NATIONAL CATHOLIC REPORTER (Jul. 1, 2019), <https://www.ncronline.org/news/people/why-are-catholic-schools-firing-gay-teachers-and-how-can-one-refuse>.

⁵² Sam Roberts, *Marla Krolikowskii, Transgender Teacher Fired for Insubordination, Dies at 62*, NEW YORK TIMES, (Sep. 27, 2015), <https://www.nytimes.com/2015/09/28/nyregion/marla-krolikowski-transgender-teacher-fired-for-insubordination-dies-at-62.html>; James Nichols, *Marla Krolikowskii, Transgender Catholic School Teacher, Receives Legal Victory*, HUFFINGTON POST (Sep. 11, 2013), https://www.huffpost.com/entry/marla-krolikowskii-transgender-teacher_n_3903603.

⁵³ *See, e.g.*, Brief of Intervenor/Plaintiff Dr. Rachel Tudor in Response and Opposition to Defendants’ Motion for Summary Judgment, Doc. 205, *United States v. Se. Okla. State Univ.*, No. CIV-15-324 (Oct. 13, 2017).

⁵⁴ Gwen Aviles, *‘It Was Traumatic’: After Being Outed, Lesbian Teacher is Fired From Christian School*, NBC NEWS (Oct. 28, 2019), <https://www.nbcnews.com/feature/nbc-out/it-was-traumatic-after-being-outed-lesbian-teacher-fired-christian-n1072826>.

⁵⁵ *Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986).

⁵⁶ *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

Religious beliefs have also been used as grounds for disciplining students based on their pregnancy, their gender identity, and their sexual orientation. Maddi Runkles was a senior at a small Christian school in Maryland when she became pregnant. The school “humiliated” her, banning her from her graduation ceremony and removing her from student leadership positions.⁵⁷ Maddi felt that she was singled out, “treated like an outcast,”⁵⁸ and subjected to a far harsher punishment than other students who had violated the student code.⁵⁹ Kamaria Downs, a senior honors student in a South Carolina Christian college, was kicked out of her dorms when the school learned she was pregnant.⁶⁰ Domaine Javier, an aspiring nurse, was expelled from California Baptist University when the school discovered that she was transgender.⁶¹ And when Danielle Powell’s same-sex relationship was revealed just a semester before her graduation, her university refused to let her reenroll unless she went through a “restoration program.”⁶² When they realized that she would continue to date women, school officials expelled her and demanded that she return more than \$6,000 in federal aid money.⁶³

While some of these incidents of discrimination have occurred in schools that are already considered eligible for a religious exemption under Title IX, they illustrate the pervasiveness of religion-based sex discrimination and the immense harms that students and teachers must shoulder when they face sex discrimination with no legal redress. Expanding these exemptions to an even larger range of schools, as the Department proposes, would spread these harms to even more women and LGBTQ people.

II. The religious exemption in Title IX must be interpreted narrowly to give effect to the statute’s primary purpose.

Contrary to Title IX’s clear purpose, the Department of Education proposes to interpret the exemption broadly, thus limiting the reach of the statute’s antidiscrimination mandate and narrowing the rights of the individuals the statute protects. This interpretation is inconsistent with the Department’s obligations to adequately enforce Title IX and give maximum effect to its protections. Consistent with the purpose of Title IX and relevant case law, the Department must give the exemption a narrow interpretation in order to effectuate Title IX’s remedial purpose.

⁵⁷ Madeline Runkles, *I Got Pregnant. I Chose to Keep My Baby. And My Christian School Humiliated Me.*, WASHINGTON POST (Jun. 1, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/06/01/i-got-pregnant-i-chose-to-keep-my-baby-and-my-christian-school-humiliated-me>.

⁵⁸ *Id.*

⁵⁹ Joe Heim, *Christian School: Teen Banned From Graduation ‘Not Because She is Pregnant but Because She Was Immoral’*, WASHINGTON POST (May 24, 2017), https://www.washingtonpost.com/local/education/a-christian-school-rejects-calls-to-let-pregnant-senior-attend-graduation/2017/05/24/5b798cbc-4090-11e7-9869-bac8b446820a_story.html.

⁶⁰ Susan Donaldson James, *Student Changes Christian College’s Policy After Getting Kicked Out for Being Pregnant*, NBC NEWS (Sep. 16, 2016), <https://www.nbcnews.com/feature/college-game-plan/student-changes-christian-college-s-policy-after-getting-kicked-out-n649381>.

⁶¹ Lila Shapiro, *Domaine Javier, Transgender Student, Sues University That Expelled Her for ‘Fraud’*, HUFFINGTON POST (Feb. 2, 2016), https://www.huffpost.com/entry/domaine-javier-lawsuit_n_2775756. See also Sarah Warbelow & Remington Gregg, *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk* (2015), https://assets2.hrc.org/files/assets/resources/Title_IX_Exemptions_Report.pdf (recounting stories of LGBTQ students at religious schools facing discrimination).

⁶² Allie Grasgreen, *Expelled for Sexuality, and Sent a Bill*, INSIDE HIGHER ED (June 13, 2013), <https://www.insidehighered.com/news/2013/06/13/student-expelled-being-gay-and-charged-6000-back-tuit>.

⁶³ *Id.*

a. The Department must interpret Title IX consistent with its anti-discriminatory purpose.

The Department must enforce Title IX in a manner that effectuates rather than undermines its purpose, consistent with the mission of its Office for Civil Rights to protect students and “ensure equal access to education...through the vigorous enforcement of civil rights.”⁶⁴

The Supreme Court has reaffirmed that the primary purpose of Title IX is to protect individuals against sex discrimination in education:

Title IX...sought to accomplish two...objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on [Title IX].⁶⁵

There is no dispute about who the statute is intended to serve: an individual who faces discrimination on the basis of sex “[u]nquestionably...is clearly a member of that class for whose special benefit the statute was enacted.”⁶⁶

The Supreme Court has further made clear that Title IX’s protections must be interpreted broadly. Holding that Title IX’s “broad directive” against discrimination should apply expansively,⁶⁷ the Supreme Court stated, “There is no doubt that if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.”⁶⁸ Federal courts have echoed the Supreme Court in affirming that “[c]ivil rights statutes such as Title IX generally are entitled to broad interpretation to facilitate their remedial purposes.”⁶⁹ The “logical corollary” to the principle that Title IX must be interpreted expansively “is to construe narrowly any exemption,”⁷⁰ consistent with the statute’s overall purpose.⁷¹

Title IX regulations by the Department therefore must, as a default rule, aim primarily to realize its purpose of preventing and addressing sex discrimination in federally funded entities. These regulations must chiefly serve the intended beneficiaries of the statute and give the statute’s

⁶⁴ Office for Civil Rights, “About OCR,” U.S. DEPARTMENT OF EDUCATION, <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified Jan. 10, 2020).

⁶⁵ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). See also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

⁶⁶ *Cannon*, 441 U.S. at 694.

⁶⁷ *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 520 (1982).

⁶⁸ *Id.* at 521.

⁶⁹ *Haffer v. Temple Univ. of Com. System of Higher Ed.*, 524 F.Supp. 531, 537 (E.D. Pa. 1981), *aff’d and remanded sub nom. Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982). See also *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 995 (S.D. Iowa 1993).

⁷⁰ *United States v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990) (determining that exemptions to the Fair Housing Act must be narrowly interpreted to give effect to a “generous construction” of its protections).

⁷¹ *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (quoting *Commissioner v. Clark*, 489 U.S. 726, 739 (1989)) (“An exception to a ‘general statement of policy’ is ‘usually read...narrowly in order to preserve the primary operation of the provision.’”) (alteration in original); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (“Any exemption from...remedial legislation must...be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.”); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) (It is not permissible to adopt an interpretation of the statute in which “the exception swallows the proviso and destroys its practical effectiveness.”); *King v. Burwell*, 135 S.Ct. 2480, 2496 (2015) (“[I]n every case we must respect the role of the Legislature, and take care not to undo what it has done.”)

protections broad effect, while any exceptions that compromise the rights of beneficiaries must be narrowly construed. If the Department of Education chooses to disrupt this default expectation, it must provide extremely compelling justification for doing so. But in the instant proposed rule, the Department offers little justification for its broad interpretation of the exemption, an interpretation that the statute neither requires nor permits.

b. Legislators intended for Title IX to be broad and the religious exemption to be narrow.

The limited nature of Title IX's exemptions is further underscored by its legislative history, which makes clear that legislators intended and understood the exemptions to be narrow. When introducing Title IX in 1972, Senator Birch Bayh described the amendment a "comprehensive" and "broad," with only "limited exemptions."⁷² Under Title IX, agencies were to issue implementing regulations that would "permit differential treatment by sex only [in] very unusual cases where such treatment is absolutely necessary to the success of the program."⁷³ Senator Bayh stressed that the exemptions were restrictive, noting that they were added to the bill "pending the completion of more extensive investigation" of their necessity and impact and that he believed "that many of these exemptions would not be supportable after further study and discussion."⁷⁴

Later negotiations over amendments to Title IX underscore the restrictiveness of the religious exemption in particular. In 1988, Senator Orrin Hatch proposed an amendment to expand the exemption, applying it to institutions "closely identified with a religious organization" rather than only to those "controlled by a religious organization."⁷⁵ Senators differed on what the law *ought* to be and whether it was sound policy for the exemption to be as narrow and restrictive as it was; the one thing that senators on all side agreed upon, however, was that, as a factual matter, the existing exemption was indeed restrictive, and that it did not extend to institutions that merely shared a close identification or association with a religious organization.

One senator, for example, stressed when speaking against the amendment that the goal of civil rights laws like Title IX is "universal compliance," and "[i]mmunity from such compliance should be granted cautiously and judiciously, *as is the current practice*."⁷⁶ Another agreed that the status quo provided for only a limited religious exemption, noting that "[a]dmittedly, the control test is, and should be, a difficult one."⁷⁷ A third senator suggested that while he opposed the Hatch amendment, a legislative change to the exemption may be needed, as "it may be true...that the current criterion for educational institutions to receive an exemption from title IX—that they be 'controlled by a religious organization'—is too rigorous a standard."⁷⁸ A representative in the

⁷²118 Cong. Rec. 5803. See *North Haven Bd. of Ed.*, 456 U.S. at 526-527 ("Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.... And because [Title IX] originated as a floor amendment, no committee report discusses the provisions; Senator Bayh's statements...are the *only* authoritative indications of congressional intent regarding the scope" of the statute.) (emphasis added).

⁷³ 118 Cong. Rec. 5807.

⁷⁴ *Id.*

⁷⁵ A similar amendment had been proposed in 1985 and rejected by the House Judiciary Committee and the Senate Labor and Human Resources Committee. See 134 Cong. Rec. 333.

⁷⁶ 134 Cong. Rec. at 333 (statement of Sen. Stafford) (emphasis added).

⁷⁷ *Id.* at 334 (statement of Sen. Kennedy).

⁷⁸ *Id.* at 335 (statement of Sen. Levin).

House later reiterated the narrow scope of the exemption in response to concerns that it would encompass schools whose boards are not directly controlled by a religious organization⁷⁹:

Religiously affiliated educational institutions governed by lay boards of directors are not covered by the title IX exemption. Congress rejected expansion of the exemption to include such institutions because creation of such a loophole could increase the number of institutions exempt from sex discrimination regulations as well as inviting other institutions, such as segregated private schools, to create a ‘religious identity’ in order to discriminate while receiving financial assistance.

Senator Hatch fully endorsed the view that the existing exemption was a narrow one. He went so far as to claim that under the current standard, “only two schools in the whole country” would qualify for a religious exemption.⁸⁰ While these numbers are clearly inconsistent with the manner in which the exemption has been applied, Senator Hatch’s estimate underscores his understanding of just how limited the exemption is.

Numerous legislators expressed concern that expanding the religious exemption beyond its existing scope would undermine the purpose of Title IX. Speaking against the Hatch amendment, one senator said: “Discrimination against women should be eradicated from our society. Expanding definitions and manipulating words only creates a greater potential of side-stepping equal treatment.”⁸¹ According to another senator, “[e]xpanding the exemption would substantially broaden the exemption by allowing potentially hundreds of schools and colleges to escape from title IX coverage.”⁸² Stressing that “any exemptions that are granted should be very narrow in terms of scope,” another forecasted, “In this particular instance, all sorts of untold mischief would occur as to title IX were the amendment to be adopted.”⁸³ The amendment was “rejected overwhelmingly.”⁸⁴

c. Language in prior and contemporaneous laws indicates that Congress specifically opted for a narrow meaning of “controlled by a religious organization.”

While Title IX provides exemptions for only educational institutions that are “controlled by” religious organizations, other statutes enacted before Title IX or shortly afterwards provide exemptions both to entities “controlled” by religious organizations and to those with looser or more informal relationships with religious organizations. In fact, we have identified no other federal law adopted before or around the time of Title IX’s enactment that limits a religious exemption solely to entities “controlled by” religious organizations.⁸⁵ The unique phrasing of Title

⁷⁹ 134 Cong. Rec. E1049-01.

⁸⁰ *Id.* at 335.

⁸¹ *Id.* at 333 (statement of Sen. Stafford).

⁸² *Id.* at 334 (statement of Sen. Kennedy).

⁸³ *Id.* at 335 (statement of Sen. Weicker).

⁸⁴ *Id.* at 376 (statement of Sen. Simon).

⁸⁵ The Americans with Disabilities Act, passed eighteen years after Title IX, exempts “religious organizations or entities controlled by religious organizations.” 42 U.S.C. § 12187. The ADA is distinct from Title IX, however, in that its appendix includes instructions for courts to interpret the exemption as “very broad,” and notes that an entity can be exempt even if, for example, it has a lay board or other “secular corporate mechanism.” 28 C.F.R. Pt. 36, App. B. Courts interpreting the scope of the exemption have relied heavily on this instruction. *E.g.*, *Rose v. Cahee*, 727 F.Supp.2d 728, 734 (E.D.Wis. 2010); *Marshall v. Sisters of Holy Family of Nazareth*, 399 F. Supp.2d 597, 606 (E.D.Pa. 2005). Title IX, however, contains no such indication that the legislature intended for its exemption to be

IX’s religious exemption suggests that Congress deliberately diverged from prior language to limit the exemption in Title IX strictly to relationships of control by religious organizations.

For example, the Federal Unemployment Tax Act of 1939 exempts from its requirements “an organization which is operated primarily for religious purposes and which is *operated, supervised, controlled, or principally supported* by a church or convention or association of churches.”⁸⁶ The Fair Housing Act of 1968, enacted just four years before Title IX, uses similar language, exempting “a religious organization, association, or society, or any nonprofit institution or organization *operated, supervised or controlled by or in conjunction with* a religious organization, association, or society.”⁸⁷ ERISA, enacted shortly after Title IX in 1974, exempts an organization that “is *controlled by or associated with* a church or a convention or association of churches.”⁸⁸ As these additional terms cannot be treated as “mere surplusage,”⁸⁹ these statutes further emphasize that “controlled by” must mean something different than simply being “associated with” or “supported by” a religious organization.

Particularly pertinent is the exemption to Title VII of the Civil Rights Act of 1964 for educational institutions: it provides that it “shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of higher learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution of learning is, in whole or substantial part, owned, supported, or managed by a particular religion or by a religious corporation, association, or society, or if the curriculum...is directed toward the propagation of a particular religion.”⁹⁰ If Congress in 1972 intended to apply an exemption to a similar breadth of entities in Title IX, it would have been most straightforward for Congress to simply echo and repurpose this language. Instead, it opted for language that was substantially narrower in several respects. It abandoned “owned, supported, or managed by” in favor of the stricter, more formal relationship of being “controlled by.” It removed the reference to “in whole or substantial part,” suggesting that religious organizations needed to have the ultimate decision-making authority over a school, rather than being only one of several influences on its operations and beliefs. Rather than the more expansive “[r]eligious corporation, association, or society” Title IX employed the more limited “religious organization.” And Title IX dispenses entirely with language that exempts institutions solely because their curriculum “is directed toward the propagation of a particular religion,” reinforcing that under Title IX, internal religious belief systems and practices are not sufficient bases to qualify for the exemption: an educational institution needs to be able to directly identify another organization that controls it.

interpreted broadly; on the contrary, the legislature’s clear intent as reflected in Senator Bayh’s remarks was for these exemptions to be narrow. *Supra* notes 72-74.

⁸⁶ 26 U.S.C. § 3309(b)(1) (emphasis added).

⁸⁷ 42 U.S.C. § 3607(a) (emphasis added).

⁸⁸ 29 U.S.C. § 1002(33)(A) (emphasis added).

⁸⁹ *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

⁹⁰ 42 U.S.C. § 2000e-2(e).

d. Courts have affirmed that “control” in other statutes has a narrow meaning.

While courts have not interpreted Title IX’s use of the language “controlled by,”⁹¹ cases interpreting similar language in other statutes are instructive for understanding Title IX’s intended scope.

As noted above, a number of other laws provide exemptions referring to entities “controlled” by a religious organization. Under the Federal Unemployment Tax Act (FUTA), courts have demanded a showing of actual or legal control of an entity’s governing body to establish that an entity is “controlled by” a religious organization.⁹² For example, a court found a school was controlled by a religious organization for FUTA purposes when a school principal was appointed by a church and when a school was controlled by committees that were in turn elected by church congregations.⁹³ Highlighting how intimately these schools were tied to churches, the court noted that they are “so closely affiliated with a church that...each might even be classified as a ‘church’” itself.⁹⁴ In contrast, a school was determined not to be controlled by a religious organization when it was run by a board of directors elected by the *parents* of students rather than the church, even though it was undisputed that the association adhered to religious principles and exclusively served Christian families.⁹⁵

Courts have also applied a narrow interpretation to similar language in the Fair Housing Act (FHA). For example, the Third Circuit declined to extend the FHA’s religious exemption to a Catholic country club that had been founded by a Catholic organization, allowed only Catholic members, and required membership applications to “be accompanied by a written recommendation from the applicant’s parish priest stating that the applicant is a practicing Roman Catholic in good standing.”⁹⁶ The club organized religious activities, had a chapel and Catholic iconography, and had continuous relationships with the Archbishop of Philadelphia.⁹⁷ The Archbishop granted the club permission to celebrate mass on the grounds on Sundays and provided a priest for these services.⁹⁸ The Third Circuit, however, determined that none of these facts was sufficient to establish that the club fell within the exemption, because it had no “formal or legal relationship” with the Catholic Church or any “direct affiliation” with it.⁹⁹ It noted that “there must be a mutual relationship between the non-profit society and a religious organization,” the existence of which “cannot depend solely on the activities of the non-profit organization nor be viewed only from its perspective.”¹⁰⁰ In other words, it would not be sufficient evidence of control for an entity to simply declare that it subscribes to beliefs associated with a religious organization, that its members to

⁹¹ *Hall v. Lee College, Inc.*, 932 F. Supp. 1027, 1033 (E.D. Tenn. 1996) (noting the lack of case law on the scope of Title IX’s religious exemption but declining to reach issue); *Goodman v. Archbishop Curley High Sch. Inc.*, 149 F. Supp. 3d 577, 583-84 (D. Md. 2016) (concluding that the religious exemption under Title IX is “narrow” but not ruling on their scope); *Wilson v. Glenwood Intermountain Properties, Inc.*, 876 F. Supp. 1231, 1244-45 (D. Utah 1995).

⁹² Most courts examining the religious exemption under FUTA have not parsed its meaning separately from other terms included in the statute, such as being “operated,” “supervised,” or “principally supported” by such organizations, 26 U.S.C. § 3309(b)(1). *E.g.*, *Salem Coll. & Acad. v. Emp’t Div.*, 695 P.2d 25 (1985). These decisions are therefore not relevant for an analysis of the meaning of “controlled.”

⁹³ *Christian Sch. Ass’n of Greater Harrisburg v. Com., Dep’t of Labor & Indus.*, 423 A.2d 1340, 1346 (1980).

⁹⁴ *Id.*

⁹⁵ *Id.* at 1347.

⁹⁶ *United States v. Columbus Country Club*, 915 F.2d 877, 878-879 (3d Cir. 1990).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Columbus Country Club*, 915 F.2d at 882.

¹⁰⁰ *Id.* at 883.

adhere to a particular religion or engage in practices related to the religion, or that it has an informal relationship with a religious organization.

The Third Circuit rejected the club’s argument that “the broad language of the exemption and the common dictionary meaning of the words used indicate that the relationship between the religious organization and the non-profit organization may consist of anything ranging from a formal, highly structured, hierarchical relationship to an informal, loosely-structured relationship”¹⁰¹:

We cannot agree with [the club’s] contention that the exemption is to be read broadly. A unanimous Supreme Court mandated in *Trafficante v. Metropolitan Life Ins.* a “generous construction” of the Fair Housing Act in order to carry out a “policy that Congress considered to be of the highest priority.” The logical corollary to such a construction, as well as the general rule of statutory interpretation, is to construe narrowly any exemptions to the Act.¹⁰²

As previously discussed, the language of the FHA religious exemption is broader than that of Title IX, and so courts’ narrow interpretation of the FHA exemption demands an even narrower interpretation in the Title IX context.

III. The proposed rule is inconsistent with Title IX.

By definition, an exemption from a nondiscrimination law permits otherwise unlawful discrimination. Broadening the Department’s interpretation of the religious exemption in Title IX will thus necessarily sanction otherwise unlawful sex discrimination by covered entities. While Title IX’s exemption permits some educational institutions to engage in sex discrimination without the loss of federal funds, the proposed rule stretches the religious exemption to reach far more educational institutions. The Department’s interpretation is not supported by the statutory text of Title IX, and indeed it entirely disregards key limitations in the statute with no justification.

The religious exemption in Title IX explicitly lays out criteria that educational institutions must meet in order to be eligible for the exemption. First, the institution must be “controlled by the religious organization.”¹⁰³ As discussed in the previous section, the language of “control” is a restrictive one that demands more than mere affiliation with a religious organization or adherence to particular principles. The educational institution must, in some tangible way, be subject to a religious organization’s power and authority.

Second, it must demonstrate that an application of Title IX “would not be consistent with the religious tenets of such organization.”¹⁰⁴ Importantly, the statute does not simply require a school to demonstrate that it operates according to particular religious beliefs in conflict with Title IX; in fact, as far as the statute is concerned, the beliefs of the leaders of the educational institution are irrelevant. Rather, a school must demonstrate that an application of Title IX is inconsistent with the religious tenets of *the religious organization* that controls it.

¹⁰¹ *Id.*

¹⁰² *Id.* at 883 (citations omitted).

¹⁰³ 20 U.S.C. § 1681(a)(3).

¹⁰⁴ *Id.*

A basic prerequisite to meeting either of these criteria is showing that a religious organization actually exists. This “organization” cannot be an abstract collection of principles or a loose, informal network: it must be capable of holding specific religious tenets and of exerting control over a school. The Department, however, appears to have dispensed with the notion that a school must demonstrate that it is controlled by a religious organization and the notion that the school must be able to attribute the religious tenets in question to that organization. In fact, it appears to have dispensed with the requirement that a religious organization exist at all.

- a. *By purporting to allow exemptions based on “moral beliefs or practices,” proposed section 106.12(c)(5) represents an unsupported and unprecedented expansion of the exemption.*

Under proposed section 106.12(c)(5), the Department would consider an educational institution to be “controlled by a religious organization” if, for example, it claims it “subscribes to specific moral beliefs or practices,” and “members of the institution community may be subjected to discipline for violating those beliefs or practices.”¹⁰⁵ The Department’s interpretation, if understood as broadly as it is currently written, would distort the boundaries of the religious exemption beyond any resemblance to the statutory language. Contrary to the statute, a school would not need to demonstrate that it is controlled by a religious organization. It would not need to demonstrate that the “moral beliefs” are attributable to a religious organization. It would not even need to demonstrate that it is affiliated with any religion or religious organization, or that a relevant religious organization exists.

Perhaps the starkest departure from the statute, however, is the Department’s attempt to expand “religious tenets” to encompass “moral beliefs or practices.” Particularly in contrast with all the other subsections of proposed section 106.12(c), which reference “religious” tenets and practices, the language of section 106.12(c)(5) indicates that the Department is seeking to expand the exemption to conflicting tenets that are not religious in nature, but rather are based on “moral” principles. The proposed rule does not define the term “moral beliefs and practices” and provides no clarity regarding what non-religious “moral beliefs and practices” the Department would consider to be within the exemption’s scope. It provides no limiting principle that would exclude a non-religious school from claiming it is “controlled by a religious organization” and thus exempt from some or all of Title IX’s antidiscrimination mandate on the grounds that it subscribes to particular moral beliefs or practices. It gives no indication whether it would consider a non-religious school that subscribes to moral beliefs like fairness, integrity, or intellectual freedom—principles that many institutions of higher education embrace on non-religious grounds—to be controlled by a religious organization.

If interpreted literally, section 106.12(c)(5) would suggest that, in the Department’s view, a school would meet the criteria of being “controlled by a religious organization” even if it has no meaningful relationship with a religious organization, let alone being controlled by one. Given that by definition a school disciplinary code is rooted in some vision of morality, taken to its logical extreme, this would mean that almost any private school, religious or non-religious, would be able to claim that it is “controlled by a religious organization”—an outcome that would fundamentally undermine Title IX’s efficacy—and the Department provides no guidance as to how it would limit its interpretation of this subsection to avoid this absurd outcome. But even if the Department does

¹⁰⁵ Proposed Rule, 85 Fed. Reg. at 3226.

not apply this proposed subsection as broadly as its language would suggest, it still represents a massive expansion of the exemption’s scope.

Compounding these concerns, the Department does not require that the school’s claim of subscribing to moral beliefs or principles be approved by the governing body of a school or a controlling religious organization, or be reflected in any official school documents or policies, or be accompanied by any evidence of prior positions on the stated moral principles: as currently written, the proposed rule suggests that a school facing an OCR investigation for Title IX violations could end that investigation with little more than a letter from a school administrator stating that the school subscribes to particular moral beliefs or practices, thus demonstrating “control by a religious organization.” The rule does not require any showing that the school adheres to its stated moral beliefs or practices. Nor does it require that conduct inconsistent with these beliefs actually be prohibited and that a prohibition on the conduct be applied consistently, or applied at all; it only requires the *potential* that members of the educational community may be subject to discipline pursuant to moral beliefs. In other words, proposed section 106.12(c)(5) includes few meaningful limitations. Its potential scope bears little resemblance to that of the statutory language—and that scope is so broad that it threatens to fundamentally undermine Title IX’s protections for students across private educational institutions any time a school chooses to defend sex discrimination using the language of morality.

This is cause for particular concern given that sex discrimination has traditionally been justified in just such moral terms. Beliefs that white women’s moral purity is compromised by engagement in the public sphere, that a woman should be subject to her husband’s authority, that women must not have sex outside of heterosexual marriage, or that mothers should not work outside of the home—were (and are) frequently couched in the language of morality.¹⁰⁶ Values such as chastity, modesty, and domesticity have been employed as rationales for closing opportunities for women and girls and punishing those who departed from gendered expectations. The values formed a basis for the “‘romantic paternalism’ which...put women, not on a pedestal, but in a cage,”¹⁰⁷ as epitomized in Justice Bradley’s infamous concurring opinion upholding Illinois’ refusal to grant Myra Bradwell a license to practice law: “Man is...woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”¹⁰⁸ These morally-inflected beliefs were used to justify exclusion of them from professions and colleges and justify restrictions on women’s rights, in the name of preventing promiscuity and the coarsening of mores.¹⁰⁹ These beliefs became entrenched in social

¹⁰⁶ See, e.g., Catherine Verniers & Jorge Vala, *Justifying Gender Discrimination in the Workplace: The Mediating Role of Motherhood Myths*, 13 PLOS ONE e010657 (Jan. 9, 2018).

¹⁰⁷ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

¹⁰⁸ *Bradwell v. People of the State of Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

¹⁰⁹ E.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Bradwell*, 83 U.S. at 141 (1872); *United States v. Virginia*, 518 U.S. 515, 544 (1996) (describing arguments that “sexual misconduct” would result if women became police officers); *id.* at 555 n.20 (noting that Virginia’s prime concern in denying women admission to the Virginia Military Institute appeared to be that “plac[ing] men and women into the adversative relationship inherent in the VMI program... would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes” and comparing this concern to concerns expressed by the Wisconsin Supreme Court that admitting women to the bar “‘would tend to relax the public sense of decency and propriety’”); *id.* at 537-38 (“If women were admitted [to the University of Virginia], it was feared, they ‘would encroach on the rights of men; there would be new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust.’”); *id.* at 544 (quoting nineteenth-century opponent of women’s admission to medical school as stating, “God forbid that I should ever see men and women aiding each other to display with the scalpel the

as well as legal mores.¹¹⁰ Title IX’s promise of equality was designed to break down these very mores; an exemption to sex discrimination rules based on expressions of morality would enable the very type of discrimination that Title IX was created to prohibit.¹¹¹

b. Proposed sections 106.12(c)(4), (6), and (7) are unsupported by the statute.

Sections 106.12(4), (6), and (7) also substantially expand the religious exemption to schools that are not in fact controlled by a religious organization. Section 106.12(c)(4) allows a school to be exempted from Title IX based on “a statement that the educational institution has a doctrinal statement or a statement of religious practices,” without any requirement that those doctrines or religious practices be derived from a religious organization or that the educational institution has any relationship with such an organization.

Section 106.12(c)(6) would exempt a school from Title IX’s requirements when a governing body of a school approves a statement that “includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.” Yet the approval of such a statement does not transform a school’s governing body into a controlling religious organization as required by Title IX. Further, an expansive reading of the proposed language could encompass a secular statement on *any* topic, as long as it is simply “predicated upon”—that is, it draws from or is inspired by—religious teachings. There is no requirement that the statement explicitly identify the religious teachings, or that the teachings need to be more specific to any particular religion than principles like “compassion,” “justice,” “obedience,” or “modesty.” But even a narrower reading of the proposed language—for example, interpreting it to require a statement that includes some explicit mention of religion—would fall far short of Title IX’s requirements.

Finally, section 106.12(7) makes the Department’s interpretation of the religious exemption even broader and more ill-defined, offering a catch-all category that allows an institution to demonstrate its eligibility for the exemption in any way not listed. The Department provides no clarity regarding the scope of this addition. On the contrary, it highlights its nearly unlimited breadth, referring to it as a “safe harbor” and emphasizing that its “criteria do not in any way limit the methods and means that an educational institution may use to demonstrate eligibility to assert the exemption,”¹¹² a statement that is especially concerning given the enormous breadth of the remaining proposed criteria.

IV. The adoption of the proposed rule would be impermissible under the APA, other laws governing the Department’s rulemaking processes, and executive orders.

secrets of the reproductive system... ”); *id.* at 531 n.5 (1996) (“As Thomas Jefferson stated the view prevailing when the Constitution was new: “Were our State a pure democracy...there would yet be excluded from their deliberations...[w]omen, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men.”).

¹¹⁰*E.g.*, *Goesaert*, 335 U.S. at 466 (upholding a law restricting women from working in bars unless those bars were operated by their husband or father, reasoning that “since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures the legislature need not go to the full length of prohibition if it believes that, as to a defined group of females, other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition”).

¹¹¹ *See, e.g.*, 118 Cong. Rec. 5803 (statement of Sen. Bayh) (Title IX would reduce the “destructive presence” discrimination based on beliefs about the proper place of men and women).

¹¹² Proposed Rule, 85 Fed. Reg. at 3207.

Under the Administrative Procedures Act (APA) and binding Supreme Court precedent on agency regulation, one of the minimum requirements of rulemaking is that an agency gives a “reasoned explanation” justifying its proposed rule and assessing its impacts.¹¹³ The agency “must examine the relevant data and articulate a satisfactory explanation for its action,”¹¹⁴ including by “paying attention to the advantages *and* the disadvantages of agency decisions.”¹¹⁵ As the Supreme Court has explained, “where an agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.”¹¹⁶

The Department has failed to meet this minimum standard. The proposed rule (a) fails to justify the Department’s reversal of its previous, decades-old position, (b) fails to provide a reasoned justification for the proposed rule; (c) fails to provide adequate evidence of the need for the proposed rule or its benefits; (d) exceeds the Department’s statutory authority in creating exemptions beyond those permitted in Title IX; and (e) fails to provide an adequate regulatory analysis and consider important evidence regarding the rule’s impact. Adopting this rule would therefore be impermissible under the APA, as well as other legal standards discussed below.

a. The proposed rule fails to justify its departure from its own prior positions.

When an agency seeks to reverse its previous policy in a regulation, it generally must provide a “reasoned analysis for the change,” including by contending with the evidence and rationale on which its previous policy was based.¹¹⁷ It must do so when the prior policies were adopted through sub-regulatory guidance as well as regulations: the factual evidence and legal basis that an agency had previously relied on when forming its position is necessarily “an important aspect of the problem” addressed in the proposed regulation.¹¹⁸ The agency must at least provide “a reasoned explanation...for disregarding facts and circumstances that underlay or were engendered by the prior policy.”¹¹⁹ This is particularly important in a reversal of a long-standing policy, which may have “engendered serious reliance interests that must be taken into account.”¹²⁰ Given that a change in policy disrupts a “settled course of behavior,”¹²¹ agencies must articulate an explanation for the change in policy to overcome the presumption “*against* changes in current policy that are not justified by the rulemaking record.”¹²²

A basic prerequisite to contending with the reasons for changing a policy is for the agency to recognize it is proposing a change at all. As the late Justice Scalia wrote, “the requirement that an agency provide a reasoned explanation for its action would ordinarily demand that it display

¹¹³ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

¹¹⁴ *Id.* (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹¹⁵ *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (emphasis in original).

¹¹⁶ *Encino Motorcars*, 136 S. Ct. at 2125.

¹¹⁷ *State Farm*, 463 U.S. at 30. *See also* *Washington v. Azar*, 376 F.Supp.3d 1119, 1131 (E.D. Wash. 2019) (a health care rule was “arbitrary and capricious because it reverses long-standing positions of the Department without proper consideration of sound medical opinions and the economic and non-economic consequences.”).

¹¹⁸ *See State Farm*, 463 U.S. at 43.

¹¹⁹ *Fox Television Stations*, 556 U.S. at 515-16.

¹²⁰ *Id.* at 515.

¹²¹ *State Farm*, 463 U.S. at 41 (quoting *Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973)).

¹²² *Id.* at 42 (emphasis in original).

awareness that it *is* changing position.”¹²³ An agency cannot “depart from a prior policy *sub silentio*”¹²⁴ or provide only “conclusory statements” for its change.¹²⁵ A proposed rule that fails to engage with the underlying reasons of its previous position likely has not provided a “reasoned analysis”: “an ‘[u]nexplained inconsistency’ in agency policy is ‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice’” and “[a]n arbitrary and capricious regulation of this sort is itself unlawful.”¹²⁶

The Department does not engage with the underlying reasons for its previous policy. In fact, it goes so far as to claim that the proposed rule codifies its existing policy,¹²⁷ in spite of the many substantial differences set out in the proposed rule, suggesting that the Department does not even “display awareness that it *is* changing position.”¹²⁸

As the Department itself notes,¹²⁹ for more than 30 years it has used the same specific, limited test to assess whether an educational institution is controlled by a religious organization. Under its long-standing policy, the Department of Education would typically find 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, and 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.¹³⁰

The language of the test has been virtually unchanged since its first public appearance in a proposed HEW regulation in 1977,¹³¹ and was later reiterated in internal agency memos like the 1985 Singleton memo.¹³² During the deliberations around the Civil Rights Restoration Act in 1987 and 1988, the Senate considered and rejected a proposal to change the control standard, and in doing so both formally included the existing control test in a report of the Senate Labor and Human Resources Committee¹³³ and introduced it into the record during Senate floor debate prior to the

¹²³ *Fox Television Stations*, 556 U.S. at 515 (emphasis in original).

¹²⁴ *Id.*

¹²⁵ *Encino Motorcars*, 136 S. Ct. 2117, 2127.

¹²⁶ *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981 (2009)).

¹²⁷ Proposed Rule, 85 Fed. Reg. at 3206.

¹²⁸ *Fox Television Stations*, 556 U.S. at 515 (emphasis in original).

¹²⁹ Proposed Rule, 85 Fed. Reg. at 3206 (noting that “many of these factors [in the control test] are contained in non-binding guidance issued to OCR personnel dating back more than 30 years”).

¹³⁰ 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).

¹³¹ Assurance of Compliance with Title IX of Educational Amendments of 1972, 42 Fed. Reg. 15141, 15142-43 (proposed Mar. 18, 1977).

¹³² Memo from Harry M. Singleton, Assistant Secretary for Civil Rights to Regional Civil Rights Directors, Re: Policy Guidance for Resolving Religious Exemption Requests, at 2 (Feb. 19, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/singleton-memo-19850219.pdf>

¹³³ Senate Report (Labor and Human Resources Committee) No. 100-64, June 5, 1987.

vote to maintain this standard.¹³⁴ It has since routinely been included in letters to schools under Republican and Democratic administrations alike.¹³⁵

While the Department claims that it is merely codifying this existing policy, the proposed rule actually represents a major departure from the Department's existing policy, and thus requires a "reasoned analysis for the change." First, as discussed in further detail in the previous section, it introduces four new ways for an educational institution to demonstrate control by a religious organization that are not found in the existing control test nor—contrary to its assertions otherwise—any other memo or policy.

Additionally, the proposed rule substantively changes the existing control test: for example, section 106.12(c)(2) would allow an institution to qualify for an exemption not only if it requires members of its community "to be members of...or espouse a personal belief in" the religion of the organization that controls it, but also when they are only required to "otherwise engage in the religious practices of" that religion. Compared to the existing test, where an institution would need to show that members of its community are required to be part of a religion or believe in its basic tenets, the proposed definition would encompass institutions that only require its members to engage in activities that it associates with the religion. For example, a school might argue that it is religiously controlled because it requires students to participate in community service or charity work, a practice associated with its religion, even if students are not in fact required to have any affiliation or belief in the religion and even if the community service requirement is not framed in religious terms.

The Department, however, does not acknowledge these changes. It does not provide any new evidence that would justify a shift in policy or dispute the factual or legal evidence upon which the existing policy was based, nor does it otherwise contend with the evidence underlying the existing policy in any way.

b. The Department fails to provide a reasoned justification for the expanded religious exemption.

The proposed rule is also impermissible under the APA because it fails to provide a reasoned justification for the expansion of the Department's interpretation of the religious exemption. The Department's justification largely consists of conclusory or unsupported statements that fail to explain the reasoning for its proposal. For example, the Department entirely fails to explain the merits of proposed sections 106.12(c)(1) through 106.12(c)(3), but merely asserts out that this standard has been used in the past.¹³⁶ Regardless of whether it has been the Department's internal policy in the past, the Department is required to provide at least some explanation of why each element it is codifying into regulations is justified as a definition of "controlled by a religious organization," including why it has chosen to modify 106.12(c)(2), as noted above.

Proposed Section 106.12(c)(4) purports to allow educational institutions to claim an exemption when they "have a doctrinal statement or a statement of religious practices" and when "members of the institution community must engage in the religious practices of, or espouse a personal belief

¹³⁴ 134 Cong. Rec. at 334 (statement of Sen. Kennedy); *see also id.* at 376 (statement of Rep. Simon).

¹³⁵ *See* Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. KAN. L. REV. 327, 396-97 (2016).

¹³⁶ Proposed Rule, 85 Fed. Reg. at 3207.

in, the religion, its practices, or the doctrinal statement or statement of religious practices.” While it claims that section 106.12(c)(4) is adapted from existing Department policy,¹³⁷ the Department does not explain why this should be codified as a definition of “controlled by a religious organization.” It does not justify, for example, why adherence to a school’s own doctrinal statement, rather than to a doctrinal statement by a religious organization, would suffice in showing that the school is controlled by a religious organization. Nor does it justify why, instead of narrowly requiring that members of the institution’s community “espouse a personal belief in the religion or doctrinal statement,”¹³⁸ the Department would allow for a determination religious control when members of the institution community “must *engage in the religious practices* of, or espouse a personal belief in, the religion, *its practices*, or the doctrinal statement *or statement of religious practices*.”¹³⁹ While the meaning of this requirement is unclear, what is clear is that the Department is attempting to expand the scope of this definition so that it is met by a showing of adherence to practices associated with a religion without requiring a showing of adherence to the religion itself. As noted in the previous section, by interpreting Title IX’s reference to “religious tenets” to encompass practices associated with a religion, the Department is signaling that it believes a school may be eligible for an exemption even though what they require of students and employees is many steps removed from an adherence to the religion of the controlling organization. This definition suggests that schools with no relationship with a religious organization, or even only a tangential relationship with religion, could claim the exemption.

As discussed above, section 106.129(c)(5) represents an especially unwarranted expansion of the religious exemption. While the Department claims it is an adaptation of existing policy, it fails to explain how any existing policy—or any source at all—supports this expansive provision, particularly the attempt to expand the definition to encompass objections based on “moral beliefs or practices.” The Department fails to explain the scope and limits of this expansion, demonstrate that it is supported by Title IX, or justify why it is necessary to expand the religious exemption to schools that cannot produce a statement of religious rather than moral beliefs. The proposed rule fails to provide any explanation about how broadly the Department intends to interpret “moral beliefs and practices,” a particularly concerning omission considering that on its face the language of this proposed section could allow almost any private school, including non-religious schools, to claim a religious exemption empowering it to discriminate on the basis of sex.

The Department points to the 1989 Smith memo in support of its assertion that (c)(5) merely codifies longstanding Department policy, perhaps because the memo notes that “[course] catalogs often explain moral beliefs and may outline disciplinary measures for violating those beliefs,” something that “may support a request for exemption to §§106.21(c), 106.40, 106.57, and 106.60 regarding the marital or parental status of students and employees and applicants for admission and employment.” This reliance, however, ignores that the context in the Smith memo makes it clear that it is referring to moral beliefs held by specifically religious institutions, rather than suggesting expressed moral beliefs as a standalone basis for claiming the religious exemption. The Smith memo is indicating that moral beliefs stated in course catalogs can be tools to help

¹³⁷ *Id.* at 3207.

¹³⁸ *Compare with* Memo from William L. Smith, Acting Assistant Secretary for Civil Rights to OCR Senior Staff, Re: Title IX Religious Exemption Procedures and Instructions for Investigating Complaints at Institutions with Religious Exemptions, at 2 (Oct. 11, 1989), <https://www2.ed.gov/about/offices/list/ocr/docs/smith-memo-19891011.pdf>.

¹³⁹ Proposed Rule, 85 Fed. Reg. at 3226.

Department staff understand the tenets of a religious organization—not that a statement of moral beliefs establishes that a school is controlled by a religious organization.¹⁴⁰

As for section 106.12(c)(6), the Department fails to adequately justify its conclusion that Title IX provides a religious exemption for an educational institution that asserts it is its own controlling religious organization.¹⁴¹ The Department also fails to justify its proposal to exempt schools from Title IX’s requirements based on their production of a statement that “includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.” In contrast with a statement that establishes the governing body’s religious control over the school or even a statement of religious doctrine, accepting a statement that merely refers to or is predicated upon religious tenets could open the door for exemption claims by schools that are not in fact controlled by any religious organization, whether internal or external. The Department fails to provide the public with any guidance on how broadly it intends to interpret this provision—for example, whether it intends to apply it to secular statements with phrases that it concludes are implicitly or indirectly predicated upon religious teachings—or the types of schools that it believes would be permitted to claim a religious exemption on this ground.

Finally, the Department fails to provide adequate justification of section 106.12(c)(7), which allows an educational institution to establish that it is “controlled by a religious organization” by providing any “[o]ther evidence establishing that an educational institution is controlled by a religious organization.” This tautological catch-all provides the public with no notice of the bases that the Department might consider to be sufficient to establish eligibility for a religious exemption. The Department fails to provide any examples of what might be included, or explain why the expansive criteria that it has already explicitly laid out in its proposed rule are insufficient. The Department has therefore provided an inadequate justification for its proposed rule, and its adoption would be impermissible under the APA.

c. The Department fails to provide adequate evidence of the need for the proposed rule or its benefits.

The Department suggests that new rules are needed because its “practices in the recent past regarding assertion of a religious exemption...may have caused educational institutions to become reluctant to exercise their rights under the Free Exercise Clause of the First Amendment, and the Department would like educational institutions to fully and freely enjoy rights guaranteed under the Free Exercise Clause of the U.S. Constitution without shame or ridicule.”

The Department fails to provide any facts in support of its claim that some educational institutions were “reluctant to exercise their rights” or that the existing policy subjects educational institutions to “shame or ridicule.” It does not identify by type or number any institutions that have raised this concern or explain why changing the definition of “controlled by a religious organization” is

¹⁴⁰ See Smith Memo, *supra* note 138 at 2. Additionally, the Department ignores that even the Smith memo’s narrow recommendations regarding the use of “moral statements” by a religious organization apply only to exemptions related to regulations on a specific topic, not religious exemptions generally.

¹⁴¹ The Department simply claims that recognizing an institution as its own controlling religious organization is consistent with existing OCR practice of a divinity school as an eligible educational institution. Proposed Rule, 85 Fed. Reg. at 3207. However, the facts better align with the interpretation that OCR exempts such schools not because they are their own controlling religious organizations but because it is presumed that a divinity school is controlled by a religious organization.

necessary to alleviate their concerns. It also disregards the fact that the Department has never denied a request for a religious exemption,¹⁴² a fact that belies the Department’s suggestion that its existing policy hinders educational institutions from exercising their religious rights.

The Department asserts that it is “constitutionally obligated to broadly interpret ‘controlled by a religious organization’” to avoid violations of the Religious Freedom Restoration Act (RFRA).¹⁴³ The Department’s interpretation, however, must necessarily be guided and restricted by the clear language of Title IX, which limits the exemption to educational institutions that are *controlled* by a religious organization. Its definition of this term must be a reasonable and justifiable interpretation of the statute, consistent with Title IX’s language and purpose. As demonstrated above, it is not.

Additionally, contrary to the Department’s claim, RFRA does not require this proposed rule. Under RFRA, the government “should not substantially burden religious exercise without compelling justification,”¹⁴⁴ and it should do so only if it furthers a compelling government interest in the least restrictive way possible.¹⁴⁵ The Supreme Court, however, has already determined that prohibitions on sex discrimination are narrowly tailored to further the compelling government interest of preventing sex discrimination.¹⁴⁶ Thus, even if the existing policy substantially burdens any person’s exercise of religion—a hypothetical that the Department has not offered any evidence to support—the full enforcement of Title IX does not present RFRA concerns.

The Department suggests it needs to propose new rules so that schools can have “clarity regarding what it means to be ‘controlled by a religious organization,’” which would then “create more predictability, consistency in enforcement, and confidence for educational institutions asserting the exemption.” But, by replacing a clear, limited, and easily measurable test with a vague, subjective, and non-exhaustive list of possible bases for claiming the exemption, the proposed rule would actually create more confusion and inconsistency in enforcement than before.

d. The proposed rule exceeds the Department’s authority by creating religious exemptions not provided in the statute.

The Department has the authority and responsibility to enforce laws as they are written, including laws creating and delimiting religious exemptions. This rule, however, proposes exemptions that are far broader than those permitted under Title IX. The Department does not have the statutory authority to expand or create new religious exemptions beyond what is provided by Title IX, especially not when those expanded exemptions fundamentally obstruct the enforcement of the statute. Nor does it have the discretion to supplant limited terms in the statute, such as “controlled

¹⁴² See Augustine-Adams, *supra* note 138; Office for Civil Rights, “Other Correspondence,” <https://www2.ed.gov/about/offices/list/ocr/correspondence/other.html> (last modified Jan. 10, 2020).

¹⁴³ Proposed Rule, 85 Fed. Reg. at 3207.

¹⁴⁴ 42 U.S.C. § 2000bb(a)(3).

¹⁴⁵ 42 U.S.C. §2000bb-1(b)(2).

¹⁴⁶ *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (recognizing “State’s compelling interest in eliminating discrimination against women”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (“Assuring women equal access to...goods, privileges, and advantages clearly furthers compelling state interests.”); see also *id.* at 623 (holding that the state’s “compelling interest in eradicating discrimination against its female citizens” justified the statute’s impact on associational freedoms). See also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (“The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”)

by a religious exemption,” with more expansive ones based on policy or ideological priorities that differ from that of the enacting Congress. The adoption of this proposed rule would thus be “in excess of statutory jurisdiction, authority, or limitations” and impermissible under the APA.¹⁴⁷

e. The proposed rule fails to conduct a meaningful regulatory impact analysis of the proposed rule and consider important evidence regarding the rule’s impact.

As the Supreme Court has emphasized, an agency must “examine the relevant data,”¹⁴⁸ “paying attention to the advantages *and* the disadvantages of agency decisions.”¹⁴⁹ Agency action that has “failed to consider an important aspect of the problem” may be arbitrary or capricious. Additionally, in order to comply with executive orders governing the rulemaking process, agencies must conduct an accurate assessment of costs and benefits, and they may only propose rules after arriving at a reasoned determination that the benefits outweigh the costs and that the regulations are tailored “to impose the least burden on society.”¹⁵⁰ Executive Order 12866 requires agencies to “assess *all* costs and benefits” and “should select those approaches that maximize *net* benefits.”¹⁵¹

The Department has failed to consider or even acknowledge critical aspects of the problem, failed to “examine the relevant data,” and has failed to “assess all costs and benefits.” Specifically, the Department fails to consider the costs of increased discrimination in schools and makes inaccurate claims regarding the necessity and benefits of the proposed rule. Because the Department’s regulatory impact assessment is fundamentally flawed, it deprives the public of the information needed for a meaningful notice and comment and cannot adequately support the proposed rule.

As discussed above, the purpose of Title IX and the Department’s mission in enforcing it is to protect individuals from sex discrimination in schools. It is particularly troubling, therefore, that the proposed rule makes no attempt to estimate or consider the potential costs of expanding religious exemptions for current and prospective students and school employees. Its entirely inadequate cost-benefit analysis—an assessment totaling all of four sentences—claims without evidence that the rule would have “no quantifiable costs.”¹⁵² The Department does not mention, even in passing, the potential and well-documented economic and non-economic costs of educational inequality and discrimination. Indeed, the Department shows no recognition that the proposed rule can lead to increased discrimination in schools. The absence of any attempt to identify or estimate costs of such a clearly “important aspect of the problem” is suggestive of arbitrary and capricious rulemaking.

The Department must assess the net economic and non-economic effects of the proposed changes, including costs for current and prospective students and for schools. Regardless of its motivation, such discrimination can harm students’ educational opportunities, professional prospects, financial

¹⁴⁷ 5 U.S.C. § 706.

¹⁴⁸ *State Farm*, 463 U.S. at 43.

¹⁴⁹ *Michigan v. EPA*, 135 S. Ct. at 2707 (emphasis in original).

¹⁵⁰ Exec. Order 13663 § 1(b)(2), 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order 12866 § 1(b)(11), 58 Fed. Reg. 51735 (Oct. 4, 1993).

¹⁵¹ Exec. Order 12866 § 1(a) (emphasis added).

¹⁵² Proposed Rule, 85 Fed. Reg. at 3219.

stability, and health.¹⁵³ For example, current and prospective students who face discrimination, such as being forced out of their school or denied equal educational opportunities, can face lost educational and professional opportunities, lost tuition and deeper debt obligations, isolation from their peers and networks, and short- and long-term health consequences. These costs may be especially high for students who did not anticipate that their school could be eligible for a religious exemption and acted in reliance of an expectation that their school will not discriminate on the basis of sex, a scenario that is made more likely by the proposed rule. A reasonable cost-benefit analysis must include, among other considerations, the direct financial costs to students and prospective students resulting from increased discrimination in schools. Additionally, students may also face costs as they limit the scope of schools they consider attending or educational activities they pursue in order to avoid sex discrimination.

The Department must also consider costs to current and prospective employees who may face higher rates of sex discrimination by religious schools and Department-funded faith-based organizations due to this proposed rule. For example, such individuals may face lost wages, fewer future employment opportunities, and long-term health consequences.

Additionally, the Department must consider the more indirect costs of increased discrimination. For example, discrimination in education and employment contributes to higher levels of unemployment and poverty for individuals and for communities that are disproportionately affected by discrimination. Studies have shown a correlation between experiences of discrimination and likelihood of living at or below the poverty line.¹⁵⁴ Experiences of discrimination themselves are stressful events that can negatively affect mental and physical health. A robust body of literature demonstrates the corrosive effects of a well-recognized phenomenon known as “minority stress” on morbidity, mortality, and health care costs, including costs related to depression, anxiety, high blood pressure, and other stress-related diseases.¹⁵⁵ As the U.S. Department of Health and Human Services has previously recognized, discrimination is “a social stressor that has a physiological effect on individuals (e.g., irregular heartbeat, anxiety, heartburn) that can be compounded over time and can lead to long-term negative health

¹⁵³ See, e.g., Joseph G. Kosciw et al., *The 2017 National School Climate Survey* 43 (2018) (finding that students who had faced higher levels of discrimination had lower GPAs, were less likely to plan to continue their education, were more likely to have missed school because of feeling unsafe, and had lower levels of self-esteem and higher levels of depression).

¹⁵⁴ Jonathan E. Fielding & Steven Teutsch, *Social Determinants of Health: Building Wide Coalitions Around Well-Honed Messages*, 107 *AMERICAN JOURNAL OF PUBLIC HEALTH* 870 (2017); Gene H. Brody, Yi-fu Chen, & Steven M. Kogan, *A Cascade Model Connecting Life Stress to Risk Behavior Among Rural African American Emerging Adults*, 22 *DEVELOPMENT AND PSYCHOPATHOLOGY*, 667 (2011); Sylvia Walby & Jo Armstrong, *Developing Key Indicators of “Fairness”: Competing Frameworks, Multiple Strands and Ten Domains - An Array of Statistics*, 10 *SOCIAL POLICY AND SOCIETY* 205 (2011).

¹⁵⁵ See, e.g., Elizabeth A. Pascoe & Laura Smart Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 *PSYCHOLOGICAL BULLETIN* 531 (2009); Mark L. Hatzenbuehler et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 *AM. J. PUB. HEALTH* 813, 816 (2013); Nancy Krieger et al., *Breast Cancer Estrogen Receptor Status According to Biological Generation: US Black and White Women Born 1915-1979*, 187 *AMERICAN J. OF EPIDEMIOLOGY* 960 (2018); Sarah K. Calabrese et al., *Exploring Discrimination and Mental Health Disparities Faced by Black Sexual Minority Women Using a Minority Stress Framework*, 39 *PSYCHOLOGY OF WOMEN QUARTERLY* 287 (2015); Jaclyn M. White Hughto, Sari L. Reisner, & John E. Pachankis, *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, 147 *SOCIAL SCIENCE & MEDICINE* 222, 226 (2015); Sari L. Reisner et al., *Legal Protections in Public Accommodation Settings: A Critical Public Health Issue for Gender Minority People*, 93 *MILBANK QUARTERLY* 1-32 (2015).

outcomes.”¹⁵⁶ For example, one study found that, after adjusting for other influences, women who experienced recent workplace discrimination were 30% more likely to report poor mental health outcomes such as depression.¹⁵⁷ Another found that experiences of discrimination was associated with reports of poorer overall health¹⁵⁸ and yet another found that women who had experienced discrimination based on their gender were less likely to utilize preventive breast and cervical cancer screening.¹⁵⁹

In addition to costs to students, school employees, and beneficiaries, the Department must consider costs to schools and other covered entities. For example, the Department’s misreading of Title IX’s religious exemption sends schools the message that they are permitted to engage in sex discrimination that is in fact unlawful, creating confusion and opening schools up to litigation costs if they act in reliance of the proposed rule. Similarly, its assertion that Department-funded faith-based organizations may engage in prohibited employment discrimination could lead such organizations to engage in unlawful practices. Covered entities will also incur greater familiarization, legal, and administrative costs, particularly since the lack of clarity of many of the provisions, such as the definition of “controlled by a religious organization,” will require independent analysis by those entities.

Discrimination in education and employment also has broader societal costs. For example, one study on the cost of gender-based discrimination in social institutions found that higher levels of discrimination were associated with lower levels of national income and that “constraints on women’s access to education and labor distort the economy by artificially reducing the pool of talent from which employers can draft, thereby reducing the average productivity of the production factor.”¹⁶⁰

The Department fails to even estimate basic relevant information, such as the number of schools that would be affected by the expansion of its interpretation of the Title IX religious exemption or that might newly claim a religious exemption; the types and sizes of these covered entities; and the number of students and employees impacted. The Department only provides a vague and self-contradictory comment on this question, suggesting in the same breath that the proposed rule would not “substantially change the number or composition of entities asserting the exemption,”¹⁶¹ but that the “substantial clarity” purportedly provided by the rule would result in “an expansion of previously eligible entities beginning to assert the exemption.”¹⁶² This speculative, unsupported,

¹⁵⁶ Office of Disease Prevention and Health Promotion, “Discrimination,” HEALTHPEOPLE.GOV, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/discrimination> (last accessed Feb. 6, 2020).

¹⁵⁷ Eliza K. Pavalko, Krysia N. Massakowski, & Vanessa J. Hamilton, *Does Perceived Discrimination Affect Health? Longitudinal Relationships Between Work Discrimination and Women’s Physical and Emotional Health*, 44 J. HEALTH AND SOCIAL BEHAVIOR 18 (2003).

¹⁵⁸ Soudabeh Fazeli Dehkordy et al., *The Link Between Everyday Discrimination, Healthcare Utilization, and Health Status Among a National Sample of Women*, 25 J. WOMEN’S HEALTH 1044 (2016).

¹⁵⁹ Elizabeth A. Jacobs, *Perceived Discrimination is Associated with Reduced Breast and Cervical Cancer Screening: The Study of Women’s Health Across the Nation (SWAN)*, 23 J. WOMEN’S HEALTH 138 (2013).

¹⁶⁰ Gaëlle Ferrant & Alexandre Kolev, *The Economic Cost of Gender-based Discrimination in Social Institutions*, (2016).

¹⁶¹ To the extent that the Department assumes that the proposed rule would not increase the number of entities claiming the exemption, this assertion raises further questions about whether the Department has justified the need for this proposed rule.

¹⁶² Proposed Rule, 85 Fed. Reg. at 3219.

and contradictory remark does not constitute sufficient information to allow the public to assess the effects of the proposed rule and provide meaningful comment.

While predicting the exact amount of increased discrimination and related costs that would be attributable specifically to these purported exemptions is difficult, it is clear from the well-documented impacts of sex discrimination in education that the costs could be substantial. As Executive Order 12866 emphasizes, even those costs that are “difficult to quantify” are “nevertheless essential to consider.”¹⁶³

f. By publishing this proposed rule before finalizing a rule on a closely related topic, the Department denies the public the opportunity to assess the impacts of its proposal.

In its November 29, 2018, proposed rule on sexual harassment, the Department proposed revising 34 CFR 106.12(b), which sets out the procedure required for requesting a religious exemption. The proposed rule would remove the requirement that educational institutions provide the Department with a letter requesting an exemption and outlining the applications of Title IX that conflict with their religious principles.¹⁶⁴ As we expressed in our comment, we strongly oppose this unjustified proposal: it could encourage educational institutions to conceal their intent to discriminate and to retroactively assert an exemption only after a Title IX complaint has been filed, potentially resulting in far-reaching harms for students who would have had no way of knowing that their school considers itself exempt.¹⁶⁵

Together, these two proposed changes to 34 CFR 106.12 amplify each other’s harms; their combination makes it more likely that students would not have sufficient notice of their school’s asserted exemption and that the exemptions will be open to abuse by educational institutions seeking to evade Title IX liability. The Department is opening the door for an undefined universe of schools to seek an exemption while at the same time removing one of the few remaining safeguards: requiring schools to provide notice of their exemption request in advance. If the current proposed rule is adopted, many students who do not attend a religiously controlled school may be surprised to find out that the Department would consider their school to be eligible for an exemption in advance; the lack of any required notice to the Department makes this unfair surprise even more likely. And some educational institutions, which are strongly incentivized to avoid liability when facing a possible Title IX complaint, may disingenuously assert a religious exemption to defend a discriminatory policy, and removing the notice requirement would enable them to do so with few means for accountability.

Proposed 106.12(b) and 106.12(c) are thus intimately connected, and the Department’s revisions to the notice requirement could fundamentally affect the impacts of its proposed definition of “controlled by a religious organization.” Advancing proposed 106.12(c) before informing the public of its final interpretation of 106.12(b) prevents commenters from fully assessing the impacts that the Department’s present rule would have and therefore denies them a meaningful opportunity for notice and comment.

¹⁶³ Exec. Order 12866 § 1(a).

¹⁶⁴ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

¹⁶⁵ Comment by the National Women’s Law Center at 44, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-30297>.

V. The provisions of the proposed rule regarding federally funded faith-based organizations would harm beneficiaries and employees.

a. The proposed rule would strip beneficiaries of important rights when seeking federally funded services.

The proposed rule would deny beneficiaries critical protections when they access services through federally funded faith-based organizations,¹⁶⁶ creating significant barriers to receiving life-changing and often life-saving services for women, LGBTQ people, religious minorities, non-religious people, and others. The proposed rules would remove the requirement that a faith-based organization offer an alternative provider for beneficiaries who are uncomfortable receiving services in a religious context or in the context of the organization's particular religion. This means that a beneficiary who is unable to find an alternative provider may be forced to receive Department-funded services from a faith-based organization, in violation of that individual's religious freedom rights, or else forgo services altogether. For many individuals, removing the alternative provider protection means that they will not seek or receive services, amounting to a denial of Department-funded services on the basis of religion. Additionally, the Department seeks to remove the negligible obligation that Department-funded faith-based organizations provide beneficiaries with written notice of their rights to receive services without discrimination. Without notice, many beneficiaries may not be aware of their rights and may fear that they will be turned away by the faith-based organization because they do not themselves adhere to that religion, or that they would be required to participate in religious activities as a condition of receiving services, potentially leading some intended beneficiaries to forgo services.

Among the programs likely affected by the Department's proposed rule are the 21st Century Community Learning Centers, which operate in every state and serve two million youth by providing afterschool, before-school, and summer programs.¹⁶⁷ Such programs can contribute to students' academic, professional, and personal growth, as well as defraying child care costs for parents.¹⁶⁸ Another affected program is Upward Bound, a program assisting low-income and other underrepresented youth prepare for college.¹⁶⁹ Many individuals, however, may be unable to benefit from these programs as a result of the proposed rule. A low-income lesbian couple, for example, may forgo enrolling their child in afterschool or summer program operated by an organization affiliated with a faith that opposes same-sex relationships, because they fear that they will be turned away or their child will be mistreated based on religious disapproval of their family.¹⁷⁰ An unmarried pregnant or parenting student may avoid participating in a program that prepares underrepresented students for college when it is operated by an organization affiliated with a faith that condemns pregnancy outside of marriage.

¹⁶⁶ Proposed Rule, 85 Fed. Reg. at 3199.

¹⁶⁷ Afterschool Alliance, "21st Century Community Learning Centers," AFTERSCHOOLALLIANCE.ORG, <http://www.afterschoolalliance.org/policy21stccclc.cfm> (last accessed Jan. 31, 2020).

¹⁶⁸ E.g., Afterschool Alliance, *21st Century Community Learning Centers* (2019), <http://afterschoolalliance.org/documents/21stCCLC-Overview.pdf>.

¹⁶⁹ U.S. Department of Education, "Upward Bound Program," U.S. DEPARTMENT OF EDUCATION, <https://www2.ed.gov/programs/trioupbound/index.html> (last modified Dec. 20, 2019).

¹⁷⁰ Compare, e.g., Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It*, WASH. POST (Feb. 19, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it>.

Further, the Department’s assessment of the costs and benefits of these extensive changes is inadequate. It claims that most of the changes would not have “any quantifiable costs,” except for potential benefits achieved “by improving the clarity of the regulations.”¹⁷¹ The Department claims that removing the alternative provider requirement “likely would result in some cost savings for faith-based entities,” but that it “does not have adequate information available at this time to estimate those savings.” This cost-benefit analysis clearly fails to recognize an “important aspect of the problem”: the impact on beneficiaries. Beneficiaries who are denied access to government-funded services or that forgo these services as a result of the proposed rule may need to shoulder onerous costs. For example, beneficiaries who are unable to access Upward Bound programs may face short-term as well as long-lasting costs for their educational opportunities and their professional readiness. Parents who are unable to send their children to afterschool programs as a result of this rule may see costs in the form of childcare expenses and lost wages, while their children may lose out on the educational and personal opportunities that can come with these programs. The significant costs of these proposed changes mean that they do not have a “net benefit” and therefore should not be adopted.¹⁷²

b. The Departments fails to consider the costs of its expanded interpretation of permissible employment discrimination.

The Department proposes expanding the exemption for federally funded faith-based organizations that currently exists in its regulations, allowing them to discriminate based on employees’ and applicants’ religious affiliation. The proposed rule suggests that such faith-based organizations should also be permitted to discriminate based on their “acceptance of or adherence to the religious tenets of the organization.” For example, under this proposed rule, a faith-based organization can discriminate against women with children even if they are of the same faith as the organization, because the employer interprets its religious tenets to require mothers to stay at home with their children. As previously discussed, employment discrimination can have substantial costs for individuals, including lost wages and professional opportunities. The Department again fails to consider the costs to employees of this significant change, and so its regulatory impact analysis cannot support the proposed rule and has not provided the public with a meaningful opportunity for comment.

c. The Department failed to follow proper rulemaking procedures.

Several of the provisions of the proposed rule pertaining to Department-funded services and grants rely on 20 U.S.C. § 6571 as the authority for the Department’s rulemaking, namely proposed 34 C.F.R. §§ 76.52, 76.53, 76.500, 76.684, and 76.784.¹⁷³ Rules promulgated under 20 U.S.C. § 6571, however, must follow specific procedures that the Department did not adhere to. First, the Department must begin by engaging in negotiated rulemaking, and “obtain the advice and recommendations of representatives of Federal, State, and local administrators, parents, teachers,

¹⁷¹ E.g., Proposed Rule, 85 Fed. Reg. at 3217-19.

¹⁷² See Exec. Order 12866 § 1(a).

¹⁷³ Proposed Rule, 85 Fed. Reg. at 3225-26. The Department actually cites to 20 U.S.C. § 6511, but this section does not exist. A review of potentially applicable sections strongly suggests that the Department meant to cite to 20 U.S.C. § 6571, which authorizes the Department to promulgate regulations for certain Every Student Succeeds Act programs. Regardless of the Department’s intent, however, this section does apply to several of the programs affected by its proposed rule.

principals, other school leaders (including charter school leaders), paraprofessionals, and members of local school boards and other organizations involved with the implementation and operation of programs....”¹⁷⁴ The Department, however, failed to initiate negotiated rulemaking or follow any of the requirements related to negotiated rulemaking in the statute.¹⁷⁵

The Department may commence public rulemaking only in certain cases when relying on its authority under 20 U.S.C. § 6571: when a consensus is not reached in negotiated rulemaking, or when negotiated rulemaking is determined to be unnecessary.¹⁷⁶ If the Department has made such a determination for this proposed regulation, it has not provided it to the public or provided any reasoning for such a determination. The Department has also failed to meet any of the other conditions required for public rulemaking under this statute. First, the Department must provide relevant Senate and House committees with the proposed rule at least 15 days in advance of its publication.¹⁷⁷ It must provide Congress with an opportunity to comment on the rule, and it must include and address all comments submitted by Congress into the public rulemaking record.¹⁷⁸ The Department has not done so.

Additionally, the Department is required to give the public a comment period of at least 60 days.¹⁷⁹ It may make an exception only in “emergency situations,” in which case it must explicitly designate the proposed rule as an emergency, provide Congress with an explanation for the designation during the prior 15-day comment period, and “conduct immediately thereafter regional meetings to review such proposed regulation before issuing any final regulation.”¹⁸⁰

Finally, the statute authorizes regulations only when those regulations “are necessary to reasonably ensure that there is compliance with this subchapter,”¹⁸¹ the purpose of which “is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”¹⁸² The Department does not explain how provisions that erode the rights of beneficiaries receiving Department-funded services—and thus making it less likely that they have equitable access to education—would serve to ensure compliance with the subchapter.

VI. The provisions regarding student organizations are harmful and contrary to law.

The proposed rule would also give special rights to religious student groups by allowing them to opt out of nondiscrimination requirements broadly applicable to all other student groups. Contrary to the Department’s claim that the proposed rule would require schools to treat religious and non-religious student organizations equally, it would in fact prohibit schools from applying the same policies to religious and non-religious groups and create special exemptions only for religious student groups.

¹⁷⁴ 20 U.S.C. § 6571(b)(1).

¹⁷⁵ See 20 U.S.C. § 6571(b).

¹⁷⁶ 20 U.S.C. § 6571(c).

¹⁷⁷ 20 U.S.C. § 6571(c)(1).

¹⁷⁸ 20 U.S.C. § 6571(c)(2).

¹⁷⁹ 20 U.S.C. § 6571(c)(3).

¹⁸⁰ *Id.*

¹⁸¹ 20 U.S.C. § 6571(a).

¹⁸² 20 U.S.C. § 6301.

Directly contradicting Supreme Court precedent squarely on point,¹⁸³ the Department proposes to prohibit public educational institutions from applying the same viewpoint-neutral requirements to religious student organization that are applied to non-religious groups. Under the proposed rule, a public college would not be able to, for example, require that all student organizations abide by nondiscrimination policies in their membership standards as a condition of recognition, funding, or other benefits.¹⁸⁴ This, however, is precisely the practice that the Supreme Court permitted in *Christian Legal Society v. Martinez*.¹⁸⁵ By contrast, the Department would demand that the school give religious student groups a special exemption not available to other groups, permitting them to be broadly exempted from generally applicable requirements. Under the Department’s proposed policy, if a religious student club refuses to include women, people of color, or people with disabilities, a school could not decline to recognize the club or decline to provide it with funding. Rather than allowing schools to apply their nondiscrimination policies to religious and non-religious groups equally, the proposed rule creates a new exemption for religious organizations purporting to permit them, and them alone, to discriminate based on their “membership standards” and other policies.¹⁸⁶ A public educational institution that follows this rule would not conform with the First Amendment; rather, its policy would constitute discrimination based on viewpoint in a public forum and therefore not be allowable under Supreme Court precedent.¹⁸⁷

The Department disregards the costs for students, whose tuition may now go to fund student groups that discriminate against them. It also disregards costs to public universities, who may face increased litigation, lose prospective students because of the discrimination they must allow on campus, and be forced to deal with the corrosive impacts of that discrimination on their student bodies. In addition, the Department has failed to conduct a federalism analysis, as required under Executive Order 13132 when a federal regulation would “have substantial direct effects on the States.”¹⁸⁸ This regulation would directly prohibit states from applying their nondiscrimination laws and constitutional protections in the public educational institutions that they fund. For example, in states whose constitutions prohibit them from discriminating based on sex, a state-funded public university may not engage in sex discrimination and therefore may not be allowed to fund or recognize a student group that discriminates on that basis. This proposed rule potentially puts public schools in an untenable position of having to choose between following state law and following federal law as the Department interprets it. The Department appears to be trying to preempt state nondiscrimination laws without the required federalism analysis.

VII. The 30-day comment period is inadequate for meaningful notice and comment.

In addition to violating 20 U.S.C. § 6571, the 30-day period does not provide adequate opportunity for public notice and comment and so must be extended. The Department’s rule is part of a coordinated suite of nine regulations, which impact a large number of entities, cover a complex range of topics and programs, and propose significant changes from the status quo. As the White House explained in a call announcing these proposed regulations on January 16, the agencies themselves coordinated for “many months” to publish the proposed rules, describing it as a complex task. In a highly irregular decision, however, the agencies have provided only 30 days for

¹⁸³ *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).

¹⁸⁴ Proposed Rule, 85 Fed. Reg. at 3223 (proposed 34 C.F.R. § 75.500(d)).

¹⁸⁵ 561 U.S. at 689.

¹⁸⁶ Proposed Rule, 85 Fed. Reg. at 3223 (proposed 34 C.F.R. § 75.500(d)).

¹⁸⁷ *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

¹⁸⁸ Exec. Order 13132, § 1(a).

comment on all of these rules. A 30-day comment period for such a large number of complex rules is wholly inconsistent with the requirements of the APA and applicable executive orders.

There is no basis to deviate downward from the 60-day norm for these proposed rules. The Department has not identified any exigent circumstances that require such a rushed rulemaking. Indeed, its own assertions that much of the rule simply codifies the status quo belie any claim that this unusual process is required. The 60-day comment period provided for a similar proposed rule by the Department of Housing and Urban Development—which was published on a delayed schedule and covers fewer topics than the Department of Education’s rule—underscores that a rushed comment period is not necessary.¹⁸⁹

On the contrary, the complexity and wide-ranging impacts of this rule demand at least a 60-day comment period. The Department’s rule proposes policies impacting all public and private post-secondary institutions and many secondary and elementary schools; current and prospective Department grantees; beneficiaries and prospective beneficiaries of the Department’s programs and the families of these beneficiaries and prospective beneficiaries; and current and prospective employees and students at schools that have been granted a religious exemption by the Department or may go on to assert one. The rule addresses a wide range of issues—including the faith-based organizations providing Department-funded services, religious exemptions for schools, First Amendment and free speech rights, the rights of religious student organizations, and the use of federal funds related to academic study of religious worship—each impacting different entities and individuals and drawing on different legal regimes, and each with potentially onerous impacts on affected parties. The Department also proposes a large number of changes that significantly shift its long-standing legal interpretations and practices and that disrupt the status quo and the reliance interests of many entities and individuals. The public, including current and potential recipients of federal funding and beneficiaries of federally funded programs and activities, need an adequate opportunity to examine the many changes proposed in this rule to assess the extent to which they are impacted, analyze the potential costs and benefits for them and others, and submit comments. In light of the Department’s failure to provide a meaningful cost-benefit analysis, including a failure to provide any estimates of the scope of the rule’s impact or any evidence to support its conclusions, the need for stakeholders to undertake an analysis of the rules is all the more essential. In the absence of any proffered good cause, shortening the usual 60-day period to an “abbreviated notice and comment” period is clearly inconsistent with the APA’s requirement that the public have a meaningful opportunity to comment.¹⁹⁰

The 30-day comment period is also inconsistent with the norms and requirements laid out by applicable executive orders. Specifically, Executive Order 13563 directs that “[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be *at least 60 days*.”¹⁹¹ Similarly, Executive Order 12866 directs that “[e]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*.”¹⁹² These expectations are reflected in the public factsheet on the regulatory timeline provided on Regulations.gov, which

¹⁸⁹ See Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 35 Fed. Reg 8215 (proposed Feb. 13, 2020) (to be codified at 24 C.F.R. pts. 5, 92, and 578).

¹⁹⁰ See *Housing Study Group v. Kemp*, 736 F. Supp. 321, 334 (D.D.C. 1990).

¹⁹¹ Exec. Order 13563 §2(b) (Jan. 18, 2011) (emphasis added).

¹⁹² Exec. Order 12866 (Sept. 30, 1993) (emphasis added).

states: “Generally, agencies will allow *60 days* for public comment. Sometimes they provide much longer periods.”¹⁹³

The Department has received reasonable requests for an extension, including a January 28, 2020, letter on behalf of 57 organizations.¹⁹⁴ Particularly in light of the complexity and wide-ranging impact of the rule, the large number of rules accompanying it, and the insufficient analysis provided by the Department, “[t]he Secretary’s failure to extend [a comment] period pursuant to the numerous requests to do so [is] arbitrary and capricious.”¹⁹⁵

* * *

The proposed rule distorts the text of Title IX and undermines its purpose. Its unwarranted and sweeping expansion of Title IX’s religious exemption far exceeds what the statute would permit and compromises Title IX’s protections for many students and school employees. The harms that it would cost to current and prospective students and employees, to schools, and to society at large overwhelm any benefits it might have. Additionally, the Department’s proposals to strip beneficiaries of key protections, expand an exemption permitting employment discrimination by federal grantees, and create a special exemption for religious student organizations are harmful and contrary to law. The Department has failed to provide a reasoned analysis supporting these regulatory rescissions and failed to consider important impacts of its proposed rule, depriving the public of an adequate opportunity to comment. We therefore urge you to withdraw the proposed rule. Please contact Emily J. Martin (emartin@nwlc.org) with any questions.

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¹⁹³ *Regulatory Timeline*, REGULATIONS.GOV, (accessed Jan. 24, 2020) (emphasis added). *See also* Office of the Federal Register, *A Guide to the Rulemaking Process* (2011) (“For complex rulemakings, agencies may provide for longer time periods, such as 180 days or more.”).

¹⁹⁴ Letter to agencies on behalf of 57 organizations, RE: Participation of Faith-Based Organizations in Federal Programs—NPRM Extension Request (Jan. 28, 2020), <https://nwlc.org/wp-content/uploads/2020/01/Extension-Request-Letter-for-Faith-Based-Organization-Rules.pdf>.

¹⁹⁵ *Estate of Smith v. Bowen*, 656 F. Supp. 1093, 1099 (D. Colo. 1987).