Comment of the Foundation for Individual Rights in Education in Support of the Department of Education's Proposed Regulations on Eligibility of Faith-Based Entities

Department of Education
Notice of Proposed Rulemaking

Docket No. ED-2019-OPE-0080, RIN 1840-AD45

Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program

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Introduction

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America's college campuses. These rights include freedom of speech, freedom of assembly, due process, academic freedom, legal equality, and freedom of conscience—the essential qualities of individual liberty.

FIRE commends the Department of Education for following the Administrative Procedure Act in proposing these regulations. The proposed regulations provide a framework for the Department to leverage a portion of the taxpayer dollars it invests in higher education to ensure that recipient institutions deliver on their legal obligations to protect religious liberty, freedom of association, free speech, freedom of assembly, freedom of the press, and academic freedom.

FIRE is cautiously optimistic about this proposal because of its potential to incentivize institutional respect for and attention to these core civil liberties, which are too often ignored on campuses across the country. Nevertheless, the proposal is not without risks that might undercut its effectiveness.

This comment will provide analysis of the proposed regulations' strengths and potential pitfalls, concluding with an alternative proposal that FIRE believes will enhance the proposed regulations' strengths and lessen the risk of unintended consequences that might undermine their stated goals.

Background

The proposed regulations promote religious liberty, freedom of association, freedom of speech, freedom of assembly, freedom of the press, and academic freedom at institutions of higher education. Because the proposal's provisions addressing religious liberty and freedom of association are independent of the provisions addressing the other rights, this comment will likewise discuss those concepts separately. We begin with background on religious liberty and freedom of association.

Religious Liberty and Freedom of Association

Religious liberty, freedom of association, and equal protection are bedrock constitutional rights that are sometimes in tension on and off college campuses. The proposed regulations seek to address those tensions in several contexts. One in particular falls directly within the scope of FIRE's mission: the ability of students to form religious student organizations that enjoy the same access to campus benefits and resources as their secular counterparts.

The First Amendment implicitly guarantees citizens the right to join together their voices and associate with those of like mind in furtherance of a wide variety of purposes. Consistent with the right to associate with others around a particular set of beliefs is an accompanying right to choose *not* to associate, and to do so without undue governmental interference. In *NAACP v. Alabama*, a case in which Alabama tried to force the NAACP to disclose its membership rolls, Supreme Court Justice John Marshall Harlan II wrote: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[1] Moreover,

[1] 357 U.S. 449, 460 (1958).

determining the conditions of one's associations without undue government interference is a "crucial" aspect of freedom of association because it prevents state coercion of "groups that would rather express other, perhaps unpopular, ideas."[2]

Freedom of association extends to students attending public universities and the student organizations they may wish to form and have recognized by their institution. In *Healy v. James*, the Supreme Court held, "There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [their] associational right . . . ."[3] The Supreme Court also championed the rights of religious student organizations in *Widmar v. Vincent*, wherein the Court held that by denying a religious student group the use of campus facilities for meetings, a public university violated the group's right to free exercise of religion and freedom of speech and association.[4]

In recent years, however, public colleges and universities have created a new barrier to expressive association: nondiscrimination policies interpreted to prohibit not only invidious discrimination on the basis of status or immutable characteristics, but also "discrimination" on the basis of belief.

Despite the precedents established in *Healy* and *Widmar*, in *Christian Legal Society v. Martinez*, the Supreme Court concluded that a public university did not violate the First Amendment by attempting to address discrimination through a policy requiring its student organizations to accept any student as a voting member or leader, regardless of whether the student openly disagrees with or is even hostile to the group's fundamental beliefs.[5]

Importantly, the *Martinez* Court did not hold that the Equal Protection Clause of the Fourteenth Amendment *required* institutions to maintain such a policy. Indeed, since *Martinez*, institutions have remained free to allow belief-based organizations, including religious student organizations, to set their own membership and leadership requirements.[6]

The proposed regulations would provide religious student organizations a regulatory right to maintain belief-based membership and leadership requirements and would prohibit public institutions of higher education from withholding benefits and resources from those organizations

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[2] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000).
[3] 408 U.S. 169, 181 (1972).
[4] 454 U.S. 263, 269 (1981).
[5] 561 U.S. 661 (2010).
[6] Despite the Supreme Court's conclusion that all-comers policies pass constitutional muster when applied uniformly, institutions have repeatedly engaged in viewpoint discrimination by enforcing anti-discrimination policies selectively against some religious groups, while allowing secular belief-based groups to set belief-based membership and leadership criteria. *See Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 889–95 (S.D. Iowa 2019), *appeal filed*, No.: 3:17-cv-00080-SMR-SBJ (8th Cir., Mar. 29, 2019) (denying Christian student group recognition due to faith-based requirement of leadership while allowing another religious group to set its requirements); *InterVarsity Christian Fellowship v. Univ. of Iowa*, 408 F. Supp. 3d 960, 983–85 (S.D. Iowa 2019) (finding First Amendment violation when university deregistered Christian student group because of requirement of leadership to affirm faith); *InterVarsity Christian Fellowship v. Bd. of Governors of Wayne State Univ.*, No. 19-10375, 2019 U.S. Dist. LEXIS 160351, at *18–24 (E.D. Mich. Sep. 20, 2019) (denying university's motion to dismiss Christian group's claims that its First Amendment rights had been violated following de-recognition due to leadership faith prerequisite, in light of the institution's willingness to recognize other student organizations that limited leadership requirements based on sex and national origin).

who exercise that right. The rule does not contradict or overturn the decision in *Martinez*; rather, it reflects the Department's appropriate emphasis on pluralism and associational rights as the most principled means of promoting diversity and inclusion.

Expressive Rights

The proposed regulations also address students' free speech, freedom of assembly, free press, and academic freedom rights.

With limited, narrowly defined exceptions, the First Amendment prohibits the government—including governmental entities such as state universities—from restricting the freedom of speech, freedom of assembly, and freedom of the press of their students and faculty members.[7] A good rule of thumb is that if a state law would be declared unconstitutional for violating the First Amendment, a similar regulation at a state college or university is likewise unconstitutional.

Despite the clear application of the First Amendment to college campuses, and the overwhelming weight of legal authority striking down public institutions' policies restricting speech, or speech codes,[8] FIRE's latest data shows that roughly 87.2% of the 366 public institutions we studied

[7] *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'").

[8] *See McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (upholding district court's invalidation of public university harassment policy on First Amendment grounds); *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008) (striking down former sexual harassment policy on First Amendment grounds and holding that because policy failed to require that speech in question "objectively" created a hostile environment, it provided "no shelter for core protected speech"); *Justice for All v. Faulkner*, 410 F.3d 760, 762 (5th Cir. 2005) ("Affirming the district court's holding that the University of Texas at Austin's policy on the distribution of literature is invalid under the First Amendment."); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Olsen v. Rafn*, 400 F. Supp. 3d 770, 777–80 (E.D. Wis. 2019) (finding public college's public assembly policy unconstitutional where it prevented hand-to-hand literature distribution by a single student in public areas of campus); *Shaw v. Burke*, No. 17-cv-2386, 2018 U.S. Dist. LEXIS 7584, at *22 (C.D. Cal. Jan. 17, 2018) ("open, outdoor areas of universities . . . are public fora[,]" regardless of a college's regulations to the contrary); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, Civ. No. 12-155, 2012 U.S. Dist. LEXIS 80967, at *29–30 (S.D. Ohio June 12, 2012) (holding public university's quarantine of expressive activities to so-called "free speech zones" unconstitutional); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring "harassment by personal vilification" policy unconstitutional); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality).

maintain at least one policy that violates the First Amendment or could too easily be used to punish constitutionally protected speech.[9]

"Free Speech Zone" Policies

Freedom of speech and freedom of assembly are routinely threatened on college campuses. Our research found that of the 471 schools we reviewed, 39 institutions (8.3%) enforce "free speech zone" policies that limit student demonstrations and other expressive activities to small and often out-of-the-way areas on campus.[10]

The threat to student and faculty speech presented by free speech zones is often exacerbated by burdensome permitting requirements. Students are sometimes required to obtain signatures from multiple officials, a process that can take days or weeks depending on the bureaucratic process, to use even a so-called "free speech zone." Yet much campus speech involves spontaneous responses to recent or still-unfolding developments. Requiring a student or student group to remain silent until a university administrator has completed processing paperwork may interfere with the student or students' intended message by rendering it untimely and ineffective. Furthermore, these permitting requirements often become mechanisms for viewpoint discrimination and selective enforcement, as university administrators—endowed with unfettered discretion or no limits on how long they may take to approve expressive activity—may waive or expedite requirements for events of which they personally approve, or which they believe will be uncontroversial, but insist on observing all procedures at length should they feel less positive towards the event. In short, the permitting regulations that often accompany free speech zones, in addition to being unconstitutional prior restraints on their face, also invite administrative abuse.

Troublingly, many institutions will not revise their speech-restrictive policies until they are forced to do so. For example, in 2015, Modesto Junior College in California settled a lawsuit by agreeing to eliminate its restrictive free speech zone, which was brought into the national spotlight after security officers and a campus official were video-recorded telling a student—who was also a military veteran—that he could not hand out copies of the U.S. Constitution because he was not standing in the campus's tiny "free speech zone."[11] Ironically, this incident took place on Constitution Day, the very day Congress has designated to celebrate our constitutional rights.

Similarly, in 2017, students at Kellogg Community College in Michigan sued the institution after they were arrested while distributing pocket-sized versions of the Constitution on campus.[12]

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[9] FIRE, SPOTLIGHT ON SPEECH CODES 2020 7 (Dec. 4, 2019), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/12/04102305/FIRE-Spotlight-On-Speech-Codes-2020.pdf [hereinafter SPOTLIGHT ON SPEECH CODES].

[10] *Id.* at 23.

[11] Tal Kopan, *Student stopped from handing out Constitutions on Constitution Day sues*, POLITICO: UNDER THE RADAR (Oct. 10, 2013, 2:47 PM), politico.com/blogs/under-the-radar/2013/10/student-stopped-from-handing-out-constitutions-on-constitution-day-sues-174792.

[12] *Community College Agrees to Resolve Free Speech Lawsuit*, ASSOCIATED PRESS (Jan. 23, 2018, 11:43 AM), usnews.com/news/best-states/michigan/articles/2018-01-23/community-college-agrees-to-resolve-free-speech-lawsuit.

Also in 2017, student Kevin Shaw filed suit against Los Angeles Pierce College after he was stopped from distributing Spanish-language copies of the Constitution on a campus thoroughfare.[13] Shaw was told he must obtain a permit and confine his activity to the college's miniscule free speech zone, roughly the size of a few parking spaces. The U.S. Department of Justice filed a Statement of Interest in support of Shaw's First Amendment claims, arguing the college's policies were unconstitutional.[14]

In March 2015, student Nicolas Tomas filed a First Amendment lawsuit against California State Polytechnic University, Pomona, after a campus police officer stopped him from handing out pro-animal rights flyers on a campus sidewalk. The officer told Tomas he would need to have a permit and wear a badge while distributing any written material. He was told he would also be confined to Cal Poly Pomona's tiny free speech zone, which made up less than 0.01 percent of campus.[15]

The continued maintenance of free speech zones threatens the free speech and freedom of assembly rights of all campus community members. Institutions risk losing First Amendment lawsuits while also denying students the educational benefits of diverse viewpoints on campus. Students risk punishment for protected speech, learn the wrong lesson about their expressive rights, and will likely conclude that speaking their minds is not worth the punishment.

Overbroad Discriminatory Harassment Policies

Of course, free speech zones are not the only type of policy used to unlawfully restrict speech on college campuses. Overbroad anti-harassment policies also commonly stifle campus expression.

Discriminatory harassment, properly defined, is not protected by the First Amendment. The Supreme Court has set forth a clear definition of discriminatory harassment in the educational setting, carefully tailored to fulfill public schools' twin obligations to respect freedom of speech and prevent harassment. In *Davis v. Monroe County Board of Education*, the Court defined student-on-student (or peer) harassment in the educational context as targeted, unwelcome, discriminatory conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[16] Public colleges and universities are legally obligated to maintain policies and practices aimed at preventing this type of genuine harassment from happening on their campuses, while also honoring student and faculty First Amendment rights.

Unfortunately, institutions often inappropriately cite obligations under federal antidiscrimination laws to investigate and punish protected speech that is unequivocally not peer harassment. In 2018, 18 students, all members of Syracuse University's Theta Tau engineering fraternity, were removed

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[13] *Student sues Los Angeles Community College District to free over 150,000 students from unconstitutional 'free speech zones'*, FIRE (Mar. 28, 2017), thefire.org/student-sues-los-angeles-community-college-district-to-free-over-150000-students-from-unconstitutional-free-speech-zones.
[14] *Department of Justice files statement of interest in FIRE lawsuit*, FIRE (Oct. 25, 2017), thefire.org/department-of-justice-files-statement-of-interest-in-fire-lawsuit.
[15] *Victory: Animal Rights Activist Restores Free Speech Rights of Cal Poly Pomona Students with Lawsuit Settlement*, FIRE (July 23, 2015), thefire.org/victory-animal-rights-activist-restores-free-speech-rights-of-cal-poly-pomona-students-with-lawsuit-settlement.
[16] 526 U.S. 629, 651 (1999).

from classes after a video of them participating in satirical skits mocking bigoted beliefs at a private event was leaked to the public. The campus administrators refused to acknowledge the plainly satirical nature of the private skits and instead summarily suspended the students, prohibiting them from continuing to attend their classes.[17] As justification, the university cited its overbroad anti-harassment policy.

Further examples abound. Starting in April 2013, the University of Alaska Fairbanks' student newspaper was subjected to a 10-month investigation because a professor repeatedly claimed that two articles constituted sexual harassment prohibited by Title IX.[18] The two articles at issue were an April Fool's Day article about a "building in the shape of a vagina" (a visual joke taken from the movie *Patch Adams*) and a factual report about the public "UAF Confessions" Facebook page.[19] Student journalists told FIRE that this baseless investigation chilled their reporting, even making the then-editor-in-chief too apprehensive to publish an in-depth informational article about sexual assault on campus.[20]

Despite the Supreme Court's clear guidance, far too many universities continue to maintain harassment policies that fall far short of the Court's *Davis* standard and prohibit or threaten speech protected by the First Amendment—or, in the case of private universities, speech protected by the school's own promises.

Colleges and universities in the aggregate have shown little inclination to change this unacceptable status quo, as overbroad anti-harassment policies have been consistently struck down on First Amendment grounds by federal courts for over two decades, yet unconstitutional definitions of harassment remain widespread. The proposed regulations may finally result in colleges and universities taking their constitutional obligations and institutional promises seriously.

Freedom of the Press on Campus

The freedom of the press is also commonly threatened on college campuses. In his concurring opinion in *New York Times Co. v. United States*, Justice Hugo Black wrote that the purpose of the press is "to serve the governed, not the governors."[21] So, too, is the purpose of the student press to serve the university's constituents, not the institutional public relations needs of the university.

Student journalists play a vital role in their communities, often serving as a check on their academic institutions or finding stories that might escape other members of the media, especially as local

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[17] Lauren del Valle, *Their fraternity is expelled. They're removed from classes. And another disturbing Syracuse frat video surfaces*, CNN (Apr. 23, 2018, 3:46 PM), cnn.com/2018/04/23/us/new-video-syracuse-university-theta-thau-frat/index.html.
[18] Sam Friedman, *Appeal seeks re-examination of sexual harassment complaints against UAF student newspaper*, FAIRBANKS DAILY NEWS-MINER (Nov. 11, 2013), newsminer.com/news/local_news/appeal-seeks-re-examination-of-sexual-harassment-complaints-against-uaf/article_82c9309e-4ab0-11e3-b059-0019bb30f31a.html.
[19] Susan Kruth, *VIDEO: University of Alaska Fairbanks Newspaper Investigated for Nearly a Year for Protected Speech*, FIRE (Sept. 19, 2014), thefire.org/video-university-alaska-fairbanks-newspaper-investigated-nearly-year-protected-speech.
[20] *Id.*
[21] 403 U.S. 713, 717 (1971).

news outlets struggle to stay open.[22] Examples abound from 2019 alone. In September, the University of Georgia's *The Red & Black* conducted an investigation based on an open records request that uncovered a massive "lack of financial oversight" occurring over a decade in the university's Greek Life Office.[23] That same month, Arizona State University's *The State Press* was first to break the news of the resignation of Kurt Volker, the State Department's special envoy for Ukraine and a figure in a whistleblower's complaint about the Trump administration's dealings with Ukraine.[24] And multiple student journalists have filed lawsuits against their universities, including Ohio State University[25] and Western Washington University,[26] to defend their right to access public records.

According to Frank LoMonte, director of the University of Florida's Brechner Center for Freedom of Information and former executive director of the Student Press Law Center, "you may have a powerful, well-funded government agency [*i.e.,* a state university] that's being watched by nobody" if student media organizations cease to operate. [27] Unfortunately, student newspaper censorship remains a problem on college and university campuses nationwide.[28]

Too often, student journalists are expected to act as publicists rather than journalists. And when they stray from the misplaced expectations of administrators—and sometimes even their fellow students—student journalists may face consequences. In our 20 years of defending student and faculty rights, FIRE has seen the different forms those consequences can take, whether through blunt acts of censorship like newspaper confiscation or through comparatively subtle efforts to punish newspaper advisers who fail to rein in their staff.

The proposed regulations hold promise in reducing or eliminating these threats to press freedom on campus by instructing the Department of Education to withhold grant money from institutions that lose a court case for violating the freedoms of expression, religion, association, assembly, or of the press.

Private Institutions

The proposed regulations also seek to promote free speech and academic freedom at private institutions of higher education. The guarantees of the First Amendment generally do not apply to students at private colleges because the First Amendment regulates only government—not

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[22] William Anderson, *Student Journalists Are Our Future—We Should Start Treating Them Like It*, THE NATION (July 11, 2017), thenation.com/article/archive/student-journalists-are-our-future-we-should-start-treating-them-like-it.
[23] Hunter Riggall et al., *The full story: How lack of oversight allowed a Greek Life employee to steal $1.3 over a decade*, THE RED & BLACK (Sept. 5, 2019), redandblack.com/uganews/the-full-story-how-lack-of-oversight-allowed-a-greek/article_69c72842-cf90-11e9-8241-4f0901a611fa.html.
[24] Andrew Howard, *McCain Institute head Kurt Volker steps down as US diplomat*, THE ST. PRESS (Sept. 27, 2019, 10:13 PM), statepress.com/article/2019/09/sppolitics-mccain-head-steps-down#.
[25] Kaylee Harter, *Ohio State Found in Violation of Ohio Public Records Law*, THE LANTERN (Sept. 13, 2019), thelantern.com/2019/09/ohio-state-found-in-violation-of-ohio-public-records-law.
[26] Ginny Bixby, *Student journalists sue Western Washington University for withholding public records about sexual misconduct by students*, STUDENT PRESS L. CTR. (May 30, 2019), splc.org/2019/05/student-journalists-sue-western-washington-university-for-withholding-public-records-about-sexual-misconduct-by-students.
[27] Adam Willis, *Bureaucrats Put the Squeeze on College Newspapers*, THE ATLANTIC (Aug. 23, 2019), theatlantic.com/ideas/archive/2019/08/death-college-newspapers/595849.
[28] *Id.*

private—conduct.[29] Although acceptance of federal funding confers some obligations upon private colleges (such as compliance with federal anti-discrimination laws), historically, compliance with the freedoms provided by the First Amendment has not been one of them.[30]

On March 21, 2019, the President issued Executive Order 13864 on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities (hereinafter "the E.O." or "E.O. 13864").[31] The order declared, in relevant part:

> It is the policy of the Federal Government to:
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> (a) encourage institutions to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions[.][32]

To effectuate the policy articulated above, the E.O. states:

> Sec. 3. Improving Free Inquiry on Campus. (a) To advance the policy described in subsection 2(a) of this order, the heads of covered agencies shall, in coordination with the Director of the Office of Management and Budget, take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies.
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> (b) "Covered agencies" for purposes of this section are the Departments of Defense, the Interior, Agriculture, Commerce, Labor, Health and Human Services, Transportation, Energy, and Education; the Environmental Protection Agency; the National Science Foundation; and the National Aeronautics and Space Administration.
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> (c) "Federal research or education grants" for purposes of this section include all funding provided by a covered agency directly to an institution but do not include

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[29] California maintains a law that applies the limitations of the First Amendment to private, nonsectarian institutions of higher education. Section 94367 of the California Education Code—the so-called "Leonard Law"—provides: "No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution." CAL. EDUC. CODE § 94367(a) (2020). The code exempts certain sectarian institutions, stating: "This section does not apply to a private postsecondary educational institution that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization." CAL. EDUC. CODE § 94367(c) (2020).

[30] We note that while the First Amendment does not apply to private institutions of higher education, some courts have concluded, relying primarily on contract law, that private institutions could not promise students and faculty free speech and academic freedom, only to set those commitments aside at their convenience. *See, e.g.*, Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145 (2010).

[31] Exec. Order No. 13864, 84 Fed. Reg. 11401 (Mar. 21, 2019).

[32] *Id.*

funding associated with Federal student aid programs that cover tuition, fees, or stipends.[33]

The formal application of First Amendment principles to private institutions through federal spending clause authority marks a sizable policy shift and could have a significant impact on the rights of students enrolled at those institutions. Because of the importance of the principles of free speech, free inquiry, and academic freedom in the academic enterprise, both in educating students and in producing credible, reliable, and thorough research, the vast majority of private institutions of higher education explicitly promise freedom of speech and academic freedom in their official policy materials. Yet of the 105 private colleges and universities FIRE surveyed in a recent report, 91.5% maintained policies that fell short of their own commitments to these freedoms.[34]

With so many institutions, both public and private, maintaining policies that are incompatible with free speech, freedom of association, freedom of assembly, freedom of the press, and academic freedom, FIRE welcomes the Department of Education's assistance in securing these crucial civil liberties.

Analysis

The proposed regulations address a variety of issues, but only two sets of provisions fall within the scope of FIRE's mission: the provision protecting the freedom of association for religious student organizations, and the provisions to implement the President's Executive Order on free speech, freedom of assembly, freedom of the press, and academic freedom on campus.

Religious Liberty and Freedom of Association

In a misguided effort to combat discrimination, some public institutions of higher education have adopted so-called "all-comers" policies or other policies that prohibit belief-based student organizations, most notably religious and political groups, from making belief-based decisions about leadership and membership. Organizations that refuse to open their membership and leadership requirements to all students—even those who hold opposing views—are denied official recognition. Official recognition as a student organization is typically a condition of applying to receive student activity fee funds, obtaining the ability to reserve campus locations for meetings, enjoying access to campus mailing lists and e-mail systems to make announcements of group activities, and other benefits.

Supporters of all-comers policies believe they are necessary to combat discrimination by preventing public dollars support of any kind from going to student organizations that might exclude students from membership or leadership positions based on protected characteristics like race, religion, or sexual orientation. Most non-belief-based organizations have no reason not to accept students based on such protected characteristics. For example, a campus chess club has no legitimate reason for excluding students based on their real or perceived membership in a protected class, or their beliefs on ideological, political, social, or religious issues. All-comers and similar policies, then, offer little obstacle to the formation and operation of such student organizations.

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[33] *Id.*

[34] SPOTLIGHT ON SPEECH CODES, *supra* note 9, at 8.

The same is distinctly not the case when such policies are applied to belief-based organizations. Indeed, applying all-comers policies, or others that prohibit belief-based decision-making, to belief-based organizations leads to absurd results. For example, at institutions with such policies, religious student organizations are unable to prohibit those of other faiths or no faith from serving in leadership positions. Likewise, College Democrats are forced into allowing Republican members, and vice-versa. An environmentalist group is required to admit those who support the expansion of hydraulic fracturing, while the College Libertarians must make room for members of the International Socialist Organization.

While it is very difficult to find, or even to imagine, a student who actually benefits from a scheme where unwilling belief-based student groups are forced to admit students who have joined a group with which they don't even agree, it is easy to find students who have been disadvantaged by it. At institutions that have all-comers policies or other policies that ban belief-based decision-making, belief-based student organizations have been forced to compromise their beliefs or be excluded from campus. Most end up choosing the former so that they may continue to exist on campus, but many have chosen the latter.[35] Neither is an acceptable outcome in our democratic and pluralistic society. Nor is it one that we accept outside the walls of campus. Churches and synagogues cannot be forced to accept non-believers as members, and political organizations need not admit opposing partisans to their meetings and conferences. Only on campus are these fundamental associational rights able to be compromised.

To ensure that religious student organizations have equal access to the benefits that official recognition offers to their secular counterparts, the proposed regulations state:

> (d) A public institution shall not deny to a religious student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including full access to the facilities of the public institution and official recognition of the organization by the public institution) because of the beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization.

The Department explained the rationale behind the provision on religious student organizations as follows:

> Finally, we propose to prohibit discrimination on the basis of religion by requiring public institutions that receive Federal research or education grants, as defined in E.O. 13864, to treat religious and nonreligious student organizations the same, by prohibiting the denial of any right, benefit, or privilege to a religious student organization that is otherwise afforded to other student organizations. We acknowledge that this proposed regulation is not a condition of participation in programs under title IV of the Higher Education Act, as amended. Student organizations enable individuals sharing common characteristics or beliefs to unite towards common goals, even if those goals are not shared by a majority of the

[35] *See, e.g.*, Michael Paulson, *Colleges and Evangelicals Collide on Bias Policy*, N.Y. TIMES (June 9, 2014), https://www.nytimes.com/2014/06/10/us/colleges-and-evangelicals-collide-on-bias-policy.html?hpw&rref=us.

> student body or the public institution's administration. This right to expressive association includes the right of a student organization to limit its leadership to individuals who share its religious beliefs without interference from the institution or students who do not share the organization's beliefs. Student organizations also have the right to support their membership, help members to carry out the goals of the organization in accordance with its religious mission, and define criteria for accepting new members. Student organizations at public educational institutions should be able to restrict membership and leadership in their student organization on the basis of acceptance or adherence to the religious beliefs and tenets of the organization. Under the proposed regulations, a public institution that fails to afford religious student organizations the same rights, benefits, and privileges provided to other student organizations would be considered in violation of a material condition of the grant, and the Department could pursue existing remedies for noncompliance, which include imposing special conditions, temporarily withholding cash payments pending correction of the deficiency, suspension or termination of a Federal award, and potentially debarment. [Internal citations omitted.]

FIRE agrees with the Department of Education's reasoning as stated above. The adoption of this provision would protect the rights of religious student organizations, and would bring federal policy in line with the fifteen states that, as of the submission of this comment, have enacted laws to this effect.[36] Rather than force diversity *within* belief-based organizations, which compromises the identity and mission of those organizations, institutions should embrace pluralism and promote diversity *among* such organizations.

Recommendations Regarding Religious Liberty and Freedom of Association

While FIRE supports this provision in its current form, we strongly recommend that language be added to clarify that it applies to *all* belief-based and ideological student organizations, whether religious or secular. This change will put all belief-based organizations on the same footing, negating the argument that the proposed regulations provide religious student groups preferential treatment. Our proposed revision (with changes in red font) reads:

> Finally, we propose to protect freedom of association and prohibit discrimination on the basis of religion by requiring public institutions that receive Federal research or education grants, as defined in E.O. 13864, to treat belief-based, religious, and nonreligious student organizations the same, by prohibiting the denial of any right, benefit, or privilege to a belief-based or religious student organization that is otherwise afforded to other student organizations. We acknowledge that this proposed regulation is not a condition of participation in programs under title IV of

[36] *See* 2019 Ala. Laws 396 (2019); ARIZ. REV. STAT. ANN. § 15-1863 (2019); ARK. CODE ANN. § 60-60-1006; (2019); IDAHO CODE § 33-107D (2019); S.F. 274, 88th Gen. Ass. 1st Sess. (Iowa 2019); KAN. STAT. ANN. § 60-5311 – 5313 (2019); KY. REV. STAT. ANN. § 164.348(2)(h)(LexisNexis 2019); LA. STAT. ANN. § 17:3399.33 (2018); N.C. GEN. STAT. § 115D-20.2, 116-40.12; OHIO REV. CODE ANN. § 3345.023 (LexisNexis 2019); OKLA. STAT. tit. 70, § 70-2119.1 (2014); H.B. 1087, 94th Leg. Assemb., Reg. Sess. (S.D. 2019); TENN. CODE ANN. § 49-7-156 (2017); S.B. 18, 86th Leg. (Tex. 2019); VA. CODE ANN. § 23.1-400 (2013).

> the Higher Education Act, as amended. Student organizations enable individuals sharing common characteristics or beliefs to unite towards common goals, even if those goals are not shared by a majority of the student body or the public institution's administration. This right to expressive association includes the right of a student organization to limit its leadership to individuals who share its ~~religious~~ beliefs without interference from the institution or students who do not share the organization's beliefs. Student organizations also have the right to support their membership, help members to carry out the goals of the organization in accordance with its ~~religious~~ mission, and define criteria for accepting new members. Student organizations at public educational institutions should be able to restrict membership and leadership in their student organization on the basis of acceptance or adherence to the ~~religious~~ beliefs and tenets of the organization. Under the proposed regulations, a public institution that fails to afford belief-based or religious student organizations the same rights, benefits, and privileges provided to other student organizations would be considered in violation of a material condition of the grant, and the Department could pursue existing remedies for noncompliance, which include imposing special conditions, temporarily withholding cash payments pending correction of the deficiency, suspension or termination of a Federal award, and potentially debarment.

This modest revision would help ensure that all belief-based student organizations, including secular and religious belief-based organizations, can be active in their campus communities without sacrificing their values and their purpose for existing in the first place.

Freedom of Speech, Freedom of Assembly, Freedom of the Press, and Academic Freedom

In deciding 1957's *Sweezy v. New Hampshire*, the Supreme Court eloquently explained why respect for free speech and academic freedom is so critical in higher education:[37]

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

The importance of an environment of free inquiry and academic freedom in ensuring the high quality and reliability of academic research, including that funded by government grants, is equally self-evident.[38] Yet despite the importance of free speech and academic freedom to higher education and our society at large, the problem of censorship on college campuses persists.

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[37] 354 U.S. 234, 250 (1957).

[38] *See, e.g.,* American Association of University Professors (AAUP), *1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretive Comments*, AAUP Reps. & Publ'ns, aaup.org/file/1940%20Statement.pdf.

Depending on whom one asks, campuses across the country are in the midst of crisis levels of censorship or nearly none at all. Neither narrative is true. There has never been a golden era of censorship-free colleges. Threats to free speech on campus are longstanding and pernicious problems that continue to present themselves in numerous forms.

Common forms of speech codes include policies that quarantine students' expressive activities to designated, misleadingly labelled "free speech zones"; overbroad anti-harassment policies; policies that unconstitutionally seek to mandate civility or regulate "hateful" speech; and policies that subject student press to prior restraints. As stated above, of the 366 public institutions across the country whose policies FIRE surveyed for our Spotlight on Speech Codes 2020 report, 319—roughly 87%—maintained policies that either restrict a substantial amount of speech protected under the First Amendment or give campus administrators the discretion to do so.[39] The numbers are even worse at private institutions, where of the 105 private college and universities FIRE surveyed in our Spotlight on Speech Codes 2020 report, 91.5% maintained policies that contradict their commitments to provide freedom of speech.[40]

Additional threats include not only formally adopted policies that restrict expression that is protected under the First Amendment, also known as "speech codes," but also censorship that occurs when schools disinvite speakers invited by community members or when community-organized events are significantly disrupted or shut down. Across the country, attempts to silence controversial speakers have included campaigns to disinvite speakers as diverse as Condoleezza Rice, Madeleine Albright, Bill Maher, Chelsea Manning, former House Speaker John Boehner, former Vice President Joe Biden, Vice President Mike Pence, Pink Floyd's Roger Waters, and even the Dalai Lama.[41] Moreover, disruptions to speakers have sometimes even turned violent.[42]

In light of the breadth of censorship on college campuses, and the fact that the problem persists despite multiple successful court cases on behalf of students and faculty—including several in the Supreme Court—FIRE welcomes the Department of Education's determination to hold public schools to their obligations under the First Amendment and private institutions to the commitments they make to their students, faculty, and accreditors. The key provision in the proposed regulations regarding these efforts as they relate to public institutions reads:

> (b) Each grantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is public (hereinafter "public institution") must also comply with the First Amendment to the U.S. Constitution, including protections for freedom of speech, association, press, religion, assembly, petition, and academic freedom. The Department will determine that a public institution has not complied with the First Amendment only if there is a final, non-default judgment by a State or Federal court

[39] SPOTLIGHT ON SPEECH CODES, *supra* note 9 at 7.
[40] *Id.* at 8.
[41] *Disinvitation Database*, FIRE, thefire.org/research/disinvitation-database (last visited Feb. 17, 2020).
[42] Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, THE ATLANTIC (Mar. 6, 2017), theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/; *see also* Phil Helsel, *Protests, Violence Prompt UC Berkeley to Cancel Milo Yiannopoulos Event*, NBC NEWS (Feb. 1, 2017 11:17 PM), nbcnews.com/news/us-news/protests-violence-prompts-uc-berkeley-cancel-milo-yiannopoulos-event-n715711.

> that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment. A final judgment is a judgment that the public institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the public institution to be in compliance with the First Amendment.
>
> (1) Each grantee that is a public institution also must submit to the Secretary a copy of the final, non-default judgment by that State or Federal court to conclude the lawsuit no later than 30 days after such final, non-default judgment is entered.

Because government actors are already obligated to follow the First Amendment, this provision imposes no new legal obligation upon public colleges and universities. It could, however, still have a substantial impact on public campuses, as there will now be an additional significant consequence (beyond liability in a lawsuit) if an institution loses a First Amendment suit in court. FIRE is cautiously optimistic that the proposed rule will alter institutions' risk-benefit analysis when setting and defending their policies and actions, which could result in a significant decrease in unlawful speech codes.

The proposal also seeks to promote free speech and academic freedom at private institutions of higher education. While the First Amendment does not apply to these institutions, courts have held private institutions that have promised robust freedom of speech and academic freedom to those commitments.[43]

Reflecting that approach, Section 20(c) of the proposed regulations states:

> Each State or subgrantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is private (hereinafter "private institution") must comply with its stated institutional policies regarding freedom of speech, including academic freedom. The Department will determine that a private institution has not complied with these stated institutional policies only if there is a final, non-default judgment by a State or Federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution, violated its stated institutional policy regarding freedom of speech or academic freedom. A final judgment is a judgment that the private institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the private institution to be in compliance with its stated institutional policies.

<u>Recommendations Regarding Freedom of Speech and Academic Freedom</u>

[43] *See, e.g., In re Awad v. Fordham Univ.,* 2019 NY Slip Op. 51418(U) (N.Y. Sup. Ct. July 29, 2019) (private university's refusal to recognize a chapter of Students for Justice in Palestine was contrary to the university's mission statement guaranteeing freedom of inquiry); *McAdams v. Marquette Univ.*, 914 N.W.2d 708 (Wis. 2018) (a private university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the 1940 AAUP Statement of Principles on Academic Freedom, the post was "a contractually-disqualified basis for discipline").

While FIRE agrees that private institutions that promise free speech and academic freedom should be held to those commitments, and we regularly work to do that through our advocacy, we recommend amending the language to avoid unintentionally incentivizing private institutions to retreat from these crucial values.

Specifically, private institutions that promise freedom of expression and academic freedom should be held to the same standards public institutions are held to under the First Amendment *unless their application for federal grants specifically details* how the institution's commitments to those principles deviate from the obligations imposed on their public counterparts by the First Amendment.

Putting the onus on those institutions that wish to be held to lesser standards to be clear, detailed, and public about their allowances for censorship may serve as a powerful disincentive to those who would water down those commitments to avoid liability.

Because the proposal relies on final, non-default court judgments, the Department should make clear in the regulations that a private institution's acceptance of federal grant money forms a contract with the Department to honor commitments to free speech and academic freedom, measured as those principles would be measured at public institutions, unless the private institution details exceptions in the application. The regulations and resulting contracts should further specifically state that students and faculty, along with the federal government, are the intended beneficiaries of this contractual term, foreclosing the argument in private lawsuits that an institution's general commitments to free speech and academic freedom are actually subject to undisclosed carve-outs that diverge from the principles of the First Amendment or the core tenets of academic freedom.

Finally, private institutions should be required to publish their certifications (and, if applicable, their lesser standards and exceptions) publicly and prominently online, in a place students and faculty are likely to visit, so prospective students and faculty can choose schools that match their values.

Our alternate language to strengthen this approach would read as follows:

> (c) Each State or subgrantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is private (hereinafter "private institution") must comply with its stated institutional ~~policies regarding~~ commitment to freedom of speech, including academic freedom, as a material condition of receiving a Direct Grant or subgrant from a State-Administered Formula Grant program of the Department. An applicant for these funds shall certify that it understands that by accepting the funds, it has contractually agreed to provide those rights to the extent as would be required under the First Amendment at a public institution, unless its application includes a clear and detailed explanation describing how the institution's commitments to those principles deviate from the obligations imposed under the First Amendment on public institutions. The applicant will further certify it understands that faculty and students are intended third-party beneficiaries of the institution's commitments to freedom of expression and academic freedom. Institutions shall publish their certifications and any explanations prominently on their websites to ensure that prospective students and faculty have the information needed to choose institutions that match their values.

> The Department will determine that a private institution has not complied with the~~se~~ stated institutional ~~policies~~ commitments certified in the grant application only if there is a final, non-default judgment by a State or Federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution, violated its stated institutional ~~policy~~ commitments regarding freedom of speech or academic freedom. A final judgment is a judgment that the private institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the private institution to be in compliance with its stated institutional policies.

Despite our cautious optimism, the proposal's provisions on free speech and academic freedom at public and private institutions are not without risk. FIRE has warned against any plan that would turn a college or university's loss in court into a catastrophic loss in federal funding, for example, because of the distorting impact it would have on the behavior of both colleges and the courts. (Universities' willingness to engage in outrageous behavior in the name of Title IX, which does carry the threat of a funding "death penalty," provides ample reason to worry.)[44] Opening the door for claims under the Federal False Claims Act could exacerbate these concerns further.

The proposed regulations reduce, but do not eliminate, these concerns by providing a range of potential sanctions and by applying only to grant programs and not federal student aid. FIRE believes that adopting our alternative language, as recommended above, would reduce these risks still further while also fulfilling the language and purpose of the Executive Order and giving the final regulations a stronger chance of success in achieving their goals.

An Alternative Framework

FIRE broadly supports the goals of the proposed regulations, but believes there are alternative approaches that present similar opportunities to combat censorship and protect freedom of speech, freedom of assembly, freedom of the press, academic freedom, religious liberty, and freedom of association, that pose less risk of unintended consequences.

To implement the free speech and academic freedom requirements of the President's Executive Order, the proposed regulations rely primarily on courts to determine whether an institution is in violation of its legal obligations to provide freedom of speech and academic freedom. Explaining this decision, the proposed regulations state (internal citations omitted):

> Both EO 13864 and these proposed regulations rely upon the judiciary as the primary arbiter of alleged violations of First Amendment freedoms concerning public institutions and free speech protections in stated institutional policies regarding private institutions. The courts have cultivated a well-developed and intricate body of case law in this area. The courts, accordingly, are well situated to serve as the primary body to "enforc[e] the First Amendment [and other free-speech protections, including those protecting academic freedom] as properly understood, '[t]he very purpose of [much of which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'"

[44] *See generally*, ROBERT SHIBLEY, TWISTING TITLE IX (2016).

[. . .]

> Under the proposed regulations, if there is a final, nondefault judgment that an institution has violated the First Amendment or stated institutional policies regarding freedom of speech, including academic freedom, the Department would consider the grantee to be in violation of a material condition of the grant consistent with its other regulations and procedures. The Department may pursue existing remedies for noncompliance, which include imposing special conditions, temporarily withholding cash payments pending correction of the deficiency, suspension or termination of a Federal award, and potentially debarment, as described in Subpart G of Part 75 and Subpart I of Part 76 of Title 34 of the Code of Federal Regulations.

The Department's reliance on judicial opinions has the benefit of depoliticizing the evaluation of whether institutions are in compliance, which is indeed critical. However, it may also alter the behavior of litigants and courts in unpredictable ways. For example, a court deciding an issue under the First Amendment may be deterred from ruling against an institution if it perceives the potential loss of federal research dollars as too grave a consequence. To avoid this risk, instead of tying the analysis to the outcome of litigation, FIRE would empower the Department to apply well-established First Amendment standards as set forth by courts, by codifying those standards into regulations.

Under this proposal, the Department would analyze institutional time, place, and manner policies against the standard for those policies provided by the Supreme Court in *Ward v. Rock Against Racism*;[45] and it would determine whether an institution's policies on student peer harassment were compliant with the Supreme Court's standard set forth in *Davis v. Monroe County Board of Education*.[46] By sticking to the areas where decades of jurisprudence have established black letter law, and by binding itself to formal, notice-and-comment regulation in how it will deal with these issues, the Department can similarly diminish the risk of politicizing the enforcement of these rights without raising the possibility of adverse effects on litigation. The Department could further guard against any potential public backlash by ensuring that the penalty for a violation was proportional to the offense, perhaps by setting the penalty on a sliding scale dependent on the number of full-time students enrolled at the institution.

Conclusion

Violations of students' rights to religious liberty, freedom of association, free speech, freedom of assembly, freedom of press, and academic freedom are too routine on college campuses. Public institutions of higher education are bound by the U.S. Constitution, including the First Amendment, and even private institutions receive billions of taxpayer dollars every year in federal

[45] 491 U.S. 781, 791 (1989). This is the same standard that has been used by numerous courts to strike down so-called "free speech zones" at public colleges. *See, e.g.*, *Shaw v. Burke*, No. 17-cv-2386, 2018 U.S. Dist. LEXIS 7584, at *22 (C.D. Cal. Jan. 17, 2018); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, Civ. No. 12-155, 2012 U.S. Dist. LEXIS 80967, at *29–30 (S.D. Ohio June 12, 2012); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 862–63 (N.D. Tex. 2004).

[46] 526 U.S. 629, 651 (1999).

grants. Federal action in this area is therefore warranted. Through careful intervention, the Department of Education can help promote those rights by holding institutions that violate those rights and promises accountable.

FIRE strongly supports the provision in the proposed regulation to protect the free association rights of students who wish to form religious student organizations, and would edit it only to clarify that its protections apply to all belief-based and ideological student organizations.

With respect to the provisions to implement the President's Executive Order, FIRE is cautiously optimistic that the proposed framework will help advance the causes of free speech, free assembly, freedom of the press, and academic freedom by imposing meaningful but not crippling penalties on institutions that violate those essential freedoms. We use the phrase "cautiously optimistic" deliberately because, while we are excited about the potential of fundamentally altering institutions' willingness to violate these rights, we also recognize that the framework could lead to unintended consequences, especially with respect to altering the behavior of litigants and courts. We urge the Department to consider our alternative proposal and those of other stakeholders so that the most effective plan possible is implemented. Because Department enforcement of these rights is new, we further urge the Department to monitor the effects of whatever regulations are implemented, with an eye towards adjusting course, should unintended adverse effects materialize.

Thank you for your attention to FIRE's analysis and suggestions. If the Department has any questions regarding our input, please do not hesitate to contact us.

Respectfully submitted,

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