VIA REGULATIONS.GOV

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

Re: Federal Perkins Loan Program, Federal Work-Study Programs, Federal Supplemental Educational Opportunity Grant Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, Teacher Education Assistance for College and Higher Education Grant Program, Federal Pell Grant Program, Leveraging Educational Assistance Partnership Program, and Gaining Early Awareness and Readiness for Undergraduate Programs—RIN 1840-AD40, 1840-AD44; Docket ID ED-2019-OPE-0081

Dear Mr. Gaina:

Alliance Defending Freedom (ADF) submits the following comment on the Notice of Proposed Rulemaking (NPRM) regarding federal regulations governing federal student aid programs authorized by Title IV of the Higher Education Act of 1965. ADF enthusiastically supports eliminating provisions that needlessly discriminate against religious students, religious activities, and religious educational institutions. We also encourage the Department to make a small number of additional changes that would better reflect: (1) the demands of the First Amendment's Free Exercise Clause, the Free Speech Clause, and the Religious Freedom Restoration Act; (2) the current understanding of the First Amendment's Establishment Clause; and (3) genuine neutrality towards religion.

ADF is an alliance-building legal organization that advocates for the right of people to freely live out their faith. It pursues its mission through litigation, training, strategy, and funding. Since its launch in 1994, ADF has handled countless matters involving the religious freedom principles addressed by the Notice of Proposed Rulemaking. ADF routinely advises and represents non-profit organizations—including churches and faith-based schools— and individuals facing religious discrimination stemming from state and federal regulations. ADF represented the petitioner in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

A. 34 C.F.R. Part 674 (Federal Perkins Loan Program)

1. *34 C.F.R. § 674.9(c)*

The current regulation's assumption that members of certain religious orders have no financial need for purposes of the Federal Perkins Loan Program violates the Free Exercise Clause as interpreted in *Trinity Lutheran*, 137 S. Ct. at 2021-25. By excluding members of orders that have as their primary objective the promotion of ideals and beliefs regarding a Supreme Being, the provision also violates the Free Speech Clause and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ADF accordingly agrees that the Department should delete this provision.

2. *34 C.F.R. § 674.35(c)(5)(iv)*

This provision denies deferment of repayment for Federal Perkins Loans borrowers working as volunteers if their volunteer duties include giving religious instruction, conducting worship services, proselytizing, or fundraising to support religious activities.

The Department rightly proposes to delete this provision, which violates the Free Exercise Clause as interpreted in *Trinity Lutheran*, as well as the Free Speech Clause and the Religious Freedom Restoration Act. The Department correctly observes that many religious organizations' provision of "secular" services is inextricably intertwined with what one might call "inherently religious" activities like worship. 84 FR at 67784.

Yet this is not the only justification for deleting the language in question. The provision is rooted in an outdated and incorrect understanding of the First Amendment's Establishment Clause. The federal government simply will *not* violate the Establishment Clause if, through the application of religiously neutral criteria, it permits volunteers engaged in religious activities to defer loan repayment. *See generally Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

ADF supports the deletion of the language in question.

3. *34 C.F.R. § 674.36(c)(4)(iv)*

This provision—and the Department's proposed changes to it—are essentially the same as discussed in the previous section. ADF accordingly favors the proposed deletion of the similarly problematic language.

B. 34 C.F.R. Part 675 (Federal Work-Study Program)

1. *34 C.F.R. § 675.9(c)*

The current regulation's assumption that members of certain religious orders have no financial need for purposes of the Federal Work-Study Program (FWSP) violates the Free Exercise Clause as interpreted in *Trinity Lutheran*, 137 S. Ct. at 2021-25. By excluding members of orders that have as their primary objective the promotion of ideals and beliefs regarding a Supreme Being, the provision also violates the Free Speech Clause and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ADF accordingly agrees that the Department should delete this provision.

2. *34 C.F.R. § 675.20(c)(2)(iv)*

This regulation purports to implement one of the Higher Education Act (HEA) provisions governing the FWSP. Section 443(b)(1)(C) of the HEA states that work performed under the auspices of the FWSP may "not involve the construction, operation, or maintenance of so much of any facility as is used or is to be used for sectarian instruction or as a place for religious worship." 20 U.S.C. § 1087-53(b)(1)(C).

The implementing regulation's language slightly differs, stating that FWSP employment may not "involve the construction, operation, or maintenance of any part of a facility used or to be used for religious worship or sectarian instruction." 34 C.F.R. § 675.20(c)(2)(iv). The Department suggests that this language is more restrictive (reaching employment in "*any* part" of a facility) and less clear than the statutory language.

It is not obvious how the statutory language is clearer than the regulatory language. The Department correctly observes that the regulation does not provide much guidance regarding a common situation on college campuses—one in which a facility is used for many purposes *including* (but not limited to) religious worship or sectarian instruction. But the statute is little better, especially with regard to scenarios in which the very same spaces within a single facility are used for multiple purposes.

Both the statute and the regulation suffer from an additional (and identical) interpretive difficulty—the meaning of "sectarian instruction." The term is undefined and is thus amenable to differing understandings. The term "sectarian instruction" might refer exclusively to single-viewpoint teaching about topics on which various denominations (*e.g.*, Baptist and Presbyterian) within a single religion (*e.g.*, Christianity) disagree (*e.g.*, modes and timing of baptism). Or the term might be understood simply as a synonym for "religious instruction." But even the meaning of that term is debatable. Does "religious instruction" refer exclusively to instruction on inherently religious topics (*e.g.*, the character of God, the means of salvation)? Or does it include the very common efforts of faith-based institutions to integrate religious convictions and perspectives into the teaching of *every* subject, including the humanities, the social sciences, and the hard sciences?

In any event, the exclusion of work on and in such facilities from the FWSP is both constitutionally suspect and constitutionally unnecessary. Were the federal government to allow work-study students to choose employment that involves the maintenance, operation, or construction of facilities used for religious purposes, it would not violate the Establishment Clause. *Cf. American Atheists, Inc. v. City of Detroit Downtown Devel. Auth.*, 567 F.3d 278 (6th Cir. 2009). Given this, there is no apparent rationale for the religious exclusion in the work-study regulation. The exclusion thus amounts to unjustified discrimination against religion, religious individuals, religious activities, and religious institutions, in violation of the Free Exercise Clause, the Free Speech Clause, and the Religious Freedom Restoration Act.

The Department might respond that it is obliged to follow the statutory language. While that is of course true as a general matter, federal agencies have both the authority and an independent duty to obey the Constitution and the Religious Freedom Restoration Act.

C. <u>34 C.F.R. Part 676 (Federal Supplemental Educational Opportunity Grant)</u>

1. *34 C.F.R. § 676.9(c)*

The current regulation's assumption that members of certain religious orders have no financial need for purposes of the Federal Supplemental Educational Opportunity Grant Program (FSEOG) violates the Free Exercise Clause as interpreted in *Trinity Lutheran*, 137 S. Ct. at 2021-25. By excluding members of orders that have as their primary objective the promotion of ideals and beliefs regarding a Supreme Being, the provision also violates the Free Speech Clause and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ADF accordingly agrees that the Department should delete this provision.

D. <u>34 C.F.R. Part 682 (Federal Family Education Loan Program)</u>

1. *34 C.F.R. § 682.210(m)(1)(iv)*

This provision denies deferment of repayment for Federal Family Education Loan Program (FFEL) borrowers working as volunteers if their duties include giving religious instruction, conducting worship services, proselytizing, or fundraising to support religious activities.

As the Department notes, it proposes the simple deletion of similar restrictions in other contexts, such as the Federal Perkins Loan Program. For some unidentified reason, the negotiated rulemaking process did not generate a similar consensus in the FFEL context. 84 FR at 67785. Instead, the Department proposes merely to curtail the scope of the restriction, denying deferment of repayment for FFEL borrowers working as volunteers *only* for that portion of their duties spent participating in religious instruction, worship services, or any form of proselytizing. *Id.*

ADF urges the Department to simply delete the restriction, as it has proposed to do in other contexts. As the Department correctly observed in other contexts, this sort of provision violates the Free Exercise Clause as interpreted in *Trinity Lutheran*, as well as the Free Speech Clause and the Religious Freedom Restoration Act.

As in the Federal Perkins Loan Program context, the provision is rooted in an outdated and incorrect understanding of the First Amendment's Establishment Clause. The federal government simply will *not* violate the Establishment Clause if, by applying religiously neutral criteria, it permits volunteers engaged in religious activities to defer loan repayment. *See generally Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

2. *34 C.F.R. § 682.301(a)(2)*

This provision reflects an assumption that members of certain religious orders have no financial need for purposes of the FFEL Program. The Department correctly observes that the exclusion based on this assumption violates the Free Exercise Clause as interpreted in *Trinity Lutheran*, the Free Speech Clause, and the Religious Freedom Restoration Act, and rightly proposed that it be deleted.

E. 34 C.F.R. Part 685 (Direct Loan Program)

1. *34 C.F.R. § 685.200(a)(2)(ii)*

The current regulation's assumption that members of certain religious orders have no financial need for purposes of the Direct Loan Program violates the Free Exercise Clause as interpreted in *Trinity Lutheran*. By excluding members of orders that have as their primary objective the promotion of ideals and beliefs regarding a Supreme Being, the provision also violates the Free Speech Clause and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ADF accordingly agrees that the Department should delete this provision.

2. *34 C.F.R. § 685.219(b) (Public Service Loan Forgiveness Program)*

This regulatory provision governs the Public Service Loan Forgiveness Program (PSLF). To be eligible for loan forgiveness, a borrower must (among other things) work at a "public service organization." 34 C.F.R. § 685.219(b). The definition of that term excludes a non-profit organization engaged in religious activities unless the qualifying activities are unrelated to religious instruction, worship services, or any form of proselytizing. The Department notes that it has not historically interpreted this regulation to prohibit borrowers who work for employers that engage in religious instruction, worship services, or proselytizing from qualifying for the PSLF Program.

In its discussion of its recommended changes to this regulation, the Department recounts that it initially proposed to delete the religious "gloss" on the definition of "public service organization." 84 FR at 67786. That proposal was rooted in its well-grounded concern that the religious exclusion violates the Free Exercise Clause. *Id*. However, the negotiated rulemaking process failed to generate a consensus on this correct conclusion, leading to an unacceptable proposed "compromise" under which borrowers are eligible for loan forgiveness "so long as they can meet the applicable standard for full-time employment when those religious activities are excluded from their work hours." *Id*.

In soliciting comments, the Department reveals its concern that it may not be so easy for borrowers to separate their religious activities from their "secular" work. *Id*. The Department also seeks comment on whether the proposed revision will substantially burden a person's exercise of religion under the Religious Freedom Restoration Act. *Id.*

The Establishment Clause neither justifies nor requires the religious restriction on loan forgiveness. *See generally Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

The continued inclusion of the term "religious instruction" is also deeply problematic. As discussed in the FWSP context, the meaning of that term is debatable. "Religious instruction" might refer exclusively to instruction on inherently religious topics (*e.g.*, the character of God, the means of salvation), or it could include the very common efforts of faith-based institutions to integrate religious convictions and perspectives into the teaching of *every* subject, including the humanities, the social sciences, and the hard sciences. ADF has interacted with faculty members of faith-based institutions of higher education whose eligibility for the PSLF Program was unclear, precisely because of this ambiguous language.

In any event, both the existing regulation and the Department's proposal violate the Free Speech Clause, the Free Exercise Clause, and the Religious Freedom Restoration Act. Both regulations force borrowers to choose between exercising their religion and a meaningful government benefit. The Supreme Court has held that government substantially burdens a person's exercise of religion when it places him or her in such a position. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). And because the religious restrictions are not the least restrictive means of advancing any government interest (much less a compelling one), both the existing and proposed regulations violate RFRA.

ADF encourages the Department to embrace its original proposal, under which it would simply delete the religious "gloss" on the definition of "public service organization."

F. 34 C.F.R. Part 690 (Pell Grants)

1. *34 C.F.R. § 690.75(d)*

The current regulation's assumption that members of certain religious orders have no financial need for purposes of the Pell Grant Program violates the Free Exercise Clause as interpreted in *Trinity Lutheran*. By excluding members of orders that have as their primary objective the promotion of ideals and beliefs regarding a Supreme Being, the provision also violates the Free Speech Clause and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ADF accordingly agrees that the Department should delete this provision.

G. 34 C.F.R. Part 692 (Leveraging Educational Assistance Partnership Program)

1. *34 C.F.R. § 692.30(c)(5)*

The Leveraging Educational Assistance Partnership Program (LEAP) includes grants for community service-learning jobs. 20 U.S.C. § 1070c-2. It provides that these grants must be made in accordance with the requirements of the Federal Work-Study Program. *Id*. As discussed in Section B.2 above, Section 443(b)(1)(C) of the HEA states that work performed under the auspices of the FWSP may "not involve the construction, operation, or maintenance of so much of any facility as is used or is to be used for sectarian instruction or as a place for religious worship." 20 U.S.C. § 1087-53(b)(1)(C).

The regulation implementing this restriction in the LEAP community service-learning job context states that each such job must "not involve the construction, operation, or maintenance of any part of a facility used or to be used for religious worship or sectarian instruction." 34 C.F.R. § 692.30(c)(5). The Department proposes replacing the existing regulatory text with the statutory text, invoking the same rationale as in the FWSP context.

ADF has the same concerns in this context that we expressed in the FWSP context and recommends the same further revisions.

H. 34 C.F.R. Part 694 (Gaining Early Awareness and Readiness for Undergraduate Programs)

1. *34 C.F.R. § 694.6(b)*

The Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) provide services to students attending private schools. 84 FR at 67787. One of the regulatory provisions implementing the programs states that "the employee, individual, association, agency, or organization must be independent of the private school that the students attend, *and of any religious organization affiliated with the school*." *Id*. The italicized language is a targeted religious restriction.

The Department rightly observes that such a targeted restriction violates the Free Exercise Clause and proposes to delete it. ADF supports this proposal.

2. *34 C.F.R. § 694.10*

A GEAR UP program partnership must designate a local educational agency or an institution of higher education to serve as its fiscal agent. 84 FR at 67787. However, institutions of higher education that are "pervasively sectarian" may not serve as fiscal agents. *Id*.

The Department proposes to delete the exclusion of "pervasively sectarian" institutions from eligibility to serve as fiscal agents for GEAR UP partnerships. It observes that such a targeted exclusion violates the Free Exercise Clause as interpreted by the Supreme Court in *Trinity Lutheran*. ADF agrees.

There are other reasons why the Department should remove the exclusion of "pervasively sectarian" schools. First, when government attempts to determine whether a religious institution is pervasively sectarian, it inevitably engages in unconstitutionally intrusive scrutiny of religious belief and practice. *See, e.g., Colorado Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

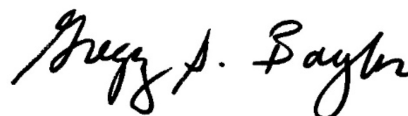
Second, as a plurality of the Supreme Court has noted, "hostility to aid to pervasively sectarian schools has a shameful pedigree," referring to the widespread anti-Catholic animus underlying the emergence of the concept. *Mitchell v. Helms*, 530 U.S. 793, 829 (2000). The opinion declares that the pervasively sectarian doctrine, "born of bigotry, should be buried now." *Id*.

ADF enthusiastically supports the proposed revision to the GEAR UP regulation.

I. Conclusion

ADF is grateful for the opportunity to comment on the proposed regulations and applauds the Department for the many salutary changes it has proposed. As discussed in more detail above, we do urge the Department to consider further revisions to 34 C.F.R. §§ 675.20(c)(2)(iv), 682.210(m)(1)(iv), 685.219(b), and 692.30(c)(5).

Respectfully submitted,



Gregory S. Baylor