National Association of Independent Colleges and Universities
1025 Connecticut Ave. N.W.
Suite 700
Washington, DC 20036-5405
Tel: (202)785-8866
Fax: (202)835-0003
www.naicu.edu

VIA REGULATIONS.GOV

November 3, 2026

Internal Revenue Service
CC:PA:01:PR (REG–119986–25), Room 5503
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: *Racial Nondiscrimination in Private Schools*,
REG–119986–25, RIN 1545–BS05, 91 Fed. Reg. 56,811 (Sept. 4, 2026)

Dear Secretary Bessent and Mr. Bisignano:

The National Association of Independent Colleges and Universities (NAICU) respectfully submits these comments urging the Department of the Treasury and the Internal Revenue Service (IRS) to withdraw the proposed regulations governing racial nondiscrimination in private schools. These comments also include a formal request to testify on REG-119986-25 at the IRS/Treasury hearing on December 2, 2026. An outline of the NAICU testimony can be found at the conclusion of this comment letter.

NAICU and its member institutions share Treasury's commitment to equal educational opportunity and the enforcement of federal civil rights laws, including the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023). But the proposal would place the foundational element of private, nonprofit institutions—tax-exempt status—at risk under an undefined standard that expressly reaches conduct "regardless of . . . legality." A sanction of this magnitude requires clear statutory authority and legal boundaries, fair and predictable enforcement, meaningful procedural protections, and a careful assessment of institutional and student impacts. The proposal does not provide them.

NAICU serves as the unified voice for approximately 1,700 private, nonprofit colleges and universities educating more than 5 million students nationwide. Its member institutions reflect the spectrum of private, nonprofit higher education in the U.S. NAICU's member institutions include major research universities, faith-based colleges, Historically Black Colleges and Universities, Hispanic-Serving Institutions and other Minority-Serving Institutions, art and design colleges, conservatories of music, traditional liberal arts and science institutions, women's colleges, work colleges, two-year colleges and schools of law, medicine, engineering, business and other professions. These institutions advance research and innovation, expand student choice, and serve communities through distinct educational missions. Together, during FY 2024, these institutions employed approximately 2 million people and generated $839 billion in economic output nationally. The private, nonprofit sector is deeply committed to complying with applicable civil rights laws and to creating learning environments in which students of all backgrounds can thrive.

The private, nonprofit sector is deeply committed to complying with applicable civil rights laws and to creating learning environments in which students of all backgrounds can thrive. The threshold question is not whether colleges and universities should comply with federal civil rights laws: they must and they do. Virtually all private, nonprofit institutions are already subject to Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin in federally assisted programs and activities. Rather, the question is whether Treasury should impose an additional civil rights enforcement framework via the tax code—with potentially devastating consequences for institutions and the students that they serve—without a new statutory directive from Congress, clear standards tied to established civil rights law, or adequate procedural protections. Those distinctions matter to the institutions, students, and charitable supporters who depend on consistent application of federal law.

The proposal's reach is broad, but breadth alone is not the central problem: existing civil rights requirements already govern much of campus life. The more serious concern is that Treasury does not adequately define what constitutes disqualifying "discrimination" for purposes of § 501(c)(3). Indeed, the proposal contemplates action "regardless of…legality" under other laws, leaving institutions uncertain about the treatment of otherwise lawful policies or practices. Tax-exempt status should not turn on an undefined standard that institutions cannot reasonably apply.

The proposal is also effectively all-or-nothing in its consequences. It identifies no explicit safe harbors, notice-and-cure period, corrective action process, or intermediate sanctions before an institution's exemption is jeopardized. Fundamental enforcement questions remain unanswered: would the IRS independently determine that discrimination occurred or rely on another agency or a court? What evidence and standards would govern? What notice would an institution receive, and what opportunity would it have to respond, correct an alleged deficiency, or seek administrative and judicial relief? Such safeguards are especially important when the possible penalty is the loss of federal charitable status rather than a remedy directed at the particular practice in dispute.

The uncertainty would have consequences well before any final Treasury determination. Facing an existential threat, colleges and universities would feel pressure to curtail lawful educational programs or avoid activities that could generate a complaint. Even a disputed allegation or investigation could unsettle students and families, discourage charitable giving, consume scarce institutional resources, and chill protected speech. The risk is particularly acute for institutions whose academic, charitable, or religious missions require independent judgments about curriculum, student support, and campus life. A regulation presented as advancing educational opportunity should not create incentives to narrow those opportunities, absent a clearly established violation of federal law.

The proposal would also impose substantial operational costs and disrupt longstanding commitments. Institutions would have to review nearly every aspect of campus life—classes and academic programs, campus speakers, housing, athletics, student organizations, cultural activities, and scholarships—and obtain legal guidance on each. Where restricted gifts or other legally binding arrangements are affected, institutions may also need to negotiate changes and, in some cases, seek judicial approval. Such work would be especially burdensome for smaller and less-resourced institutions, diverting funds and staff time from financial aid, teaching, and student services. Institutions and donors have structured charitable commitments in reliance on

longstanding federal tax guidance. The proposal offers no sufficiently clear transition or reliance protections for those commitments, even when institutions cannot unilaterally change them.

Treasury has not established that these costs and risks are necessary or proportionate to its stated objective. The rulemaking record does not identify a gap in existing civil rights enforcement that warrants such a draconian sanction, and it leaves significant compliance costs unmeasured. Treasury suggests that revised eligibility criteria could yield "substantially similar outcomes" for scholarship beneficiaries and donors. That prediction does not account for the cost of revising binding arrangements, the legal obstacles to doing so, or the uncertainty imposed on students whose support depends on them. A sound regulatory analysis should identify the problem to be solved, evaluate practical alternatives, and account for the consequences to students and institutions.

These deficiencies are not merely practical concerns; they go to Treasury's obligation under the Administrative Procedure Act to engage in reasoned decision making. Under *Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29 (1983), an agency must consider important aspects of the problem, examine relevant evidence, and provide a reasoned explanation for its chosen approach. Here, Treasury has not adequately established the need for an additional tax-exemption enforcement regime, assessed the full consequences for affected institutions and students, addressed reliance on longstanding guidance, or meaningfully evaluated less disruptive alternatives. These defects go to the foundation of the proposed rule and cannot be resolved simply by asserting that its objectives are important.

The proposal also raises larger concerns about statutory authority and the stability of federal nonprofit law. Neither *Bob Jones University v. United States*, 461 U.S. 574 (1983), nor *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*), 600 U.S. 181 (2023), authorizes Treasury to establish new national policies through the tax laws. Section 501(c)(3) status underpins virtually every aspect of the function and operations of private nonprofit colleges and universities, from institutional governance, financing, and endowments to federal and state tax treatment, charitable giving, and even student eligibility for state need-based grant aid. Tax-exempt treatment must be stable and predictable, not a political pendulum through which successive Administrations may impose their policy preferences. Past controversies involving IRS administration reinforce the need for clear, neutral standards and safeguards against selective enforcement.

NAICU therefore urges Treasury to withdraw the proposed regulations. If the agency proceeds, any revised proposal should address four areas at a minimum:

- Definitions. Define disqualifying conduct by reference to established civil rights law and identify the specific practices that would place an exemption at risk.

- Procedural protections. Provide specific notice of the challenged conduct, a meaningful opportunity to respond and cure, and a clearly defined administrative appeals process.

- Proportionate enforcement. Specify the enforcement provisions that will govern, make graduated sanctions short of revocation available, preserve exemption until appeals are exhausted and any underlying discrimination is established by a final judicial judgment,

and provide workable transition provisions for modifying existing gifts and other legally binding commitments.

- Complete cost assessment. Provide an evidence-based estimate of the costs and consequences for students and institutions before finalizing any rule.

The comments that follow address these legal and practical concerns in greater detail and identify constructive alternatives. NAICU remains ready to work with Treasury to advance equal educational opportunity while preserving the stability, independence, and charitable missions of independent higher education.

If you have any questions about these comments, please contact Tim Powers, Vice President for Government Relations & Policy Development, at tim@naicu.edu.

Respectfully submitted,



Barbara K. Mistick
President
National Association of Independent Colleges and Universities

On behalf of:

Alabama Association of Independent Colleges and Universities
Associated Colleges of the Midwest
Association for Biblical Higher Education
Association of Catholic Colleges and Universities
Association of Independent California Colleges and Universities
Association of Independent Colleges & Universities in Massachusetts
Association of Independent Colleges & Universities of Rhode Island
Association of Independent Colleges and Universities of Pennsylvania
Association of Independent Colleges of Art & Design
Association of Independent Kentucky Colleges and Universities (AIKCU)
Association of Jesuit Colleges and Universities
Association of Presbyterian Colleges and Universities
Association of Vermont Independent Colleges
Commission on Independent Colleges & Universities
Conference for Mercy Higher Education
Connecticut Conference of Independent Colleges
Council for Christian Colleges & Universities
Council of Independent Colleges
Council of Independent Colleges in Virginia, Inc.
Council of Independent Nebraska Colleges

Federation of Independent Illinois Colleges and Universities
General Board of Higher Education and Ministry, University Senate
Geogia Independent College Association
Great Lakes Colleges Association
Independent Colleges and Universities of Florida (ICUF)
Independent Colleges and Universities of Missouri
Independent Colleges and Universities of New Jersey
Independent Colleges and Universities of Texas
Independent Colleges of Indiana
Independent Colleges of Washington
Kansas Independent College Association
Louisiana Association of Independent Colleges & Universities
Mississippi Alliance of Independent Colleges and Universities
Maine Independent Colleges Association
Maryland Independent College and University Association
Michigan Independent Colleges & Universities
Minnesota Private College Council
Network of ELCA Colleges and Universities (NECU)
New Hampshire College & University Council
North Carolina Independent Colleges and Universities
Oklahoma Independent Colleges & Universities
Oregon Alliance of Independent Colleges and Universities
Tennessee Independent Colleges & Universities Association
Wisconsin Association of Independent Colleges and Universities
Women's College Coalition

DISCUSSION

I. The proposed rule is unlawful and unconstitutional

A. Treasury cannot turn *Bob Jones* into authority to establish new national policies.

The proposal would give Treasury a power Congress did not confer: to decide which otherwise lawful educational practices are incompatible with charitable status.[a] Section 501(c)(3) identifies exempt purposes and expressly imposes restrictions on private inurement, lobbying, and political campaign activity. It does not authorize Treasury to add disqualifying conditions whenever an Administration declares a policy sufficiently important. Treasury's authority to enforce the Code does not include authority to rewrite those conditions.[b]

Bob Jones does not supply that power. The case enforced the settled national policy against racial segregation. The Court upheld denial of tax-exempt status to two private religious schools: one excluded Black students, and the other prohibited interracial dating and marriage. Those institutional policies directly contradicted decades of judicial decisions, legislation, and executive action rejecting racial segregation.[c]

The Court insisted on exceptional clarity before permitting that consequence. An institution could be declared ineligible for charitable status "only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[d] The Court repeated that limitation when describing the IRS's authority and emphasized that the position of all three branches of the Federal Government was "unmistakably clear."[e]

Treasury cannot establish a comparably settled national policy against the conduct its proposed rule would reach. The national rejection of segregation and racial exclusion does not resolve every question about programs that consider race to expand educational opportunity or remedy discrimination. Treasury now proposes to disqualify covered practices for any purpose, even when otherwise lawful. It must show that this broader prohibition itself reflects the settled national consensus that was decisive in *Bob Jones*. The existing legal framework defeats that claim.

For fifty years, the IRS's own guidance distinguished racial exclusion from measures intended to establish and maintain a nondiscriminatory educational environment. It expressly permitted certain minority-favoring admissions, programs, and financial assistance, and assured institutions that qualifying minority scholarships would not jeopardize exemption.[f] Treasury may now disagree with those distinctions, but its changed position does not establish a settled national consensus against conduct it previously accepted.

SFFA does not bridge that gap. The decision addressed particular admissions systems under the Equal Protection Clause and Title VI. It did not interpret § 501(c)(3), establish new conditions

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[a] *Racial Nondiscrimination in Private Schools*, 91 Fed. Reg. 56,811 (Sept. 4, 2026).

[b] 26 U.S.C. §§ 501(c)(3), 7805(a).

[c] *Bob Jones University v. United States*, 461 U.S. 574, 580–83, 592–602 (1983).

[d] *Id.* at 592.

[e] *Id.* at 598.

[f] Rev. Proc. 75-50, §§ 3.02, 4.05, 1975-2 C.B. 587; *see* 91 Fed. Reg. at 56,813, 56,819.

on charitable status, or resolve the legality of every scholarship, academic program, or school-supported activity that Treasury's language could reach. The Court also preserved consideration of applicants' individual experiences involving race.[g] Yet Treasury's undefined prohibition could reach even that individualized consideration.

Federal law has likewise distinguished among uses of race in other settings. The Supreme Court has sustained certain voluntary remedial employment measures under Title VII. Congress reinforced that distinction in 1991, expressly providing that its amendments would not affect "court-ordered remedies, affirmative action, or conciliation agreements" that are "in accordance with the law."[h] The Supreme Court's approval of remedial employment measures and Congress's preservation of lawful affirmative action defeat Treasury's claim of a settled national consensus against race-conscious practices regardless of their purpose or legality.

Treasury needs clear congressional authorization to impose new substantive conditions on exemption across thousands of private, nonprofit educational institutions.[i] Neither § 501(c)(3) nor Treasury's general rulemaking authority supplies it. Courts must independently determine what authority Congress conferred; Treasury's interpretation cannot fill that gap.[j] Those principles also bear on the reasoning of *Bob Jones* itself, which derived a public-policy limitation on exemption from general statutory language. At a minimum, the Court's modern approach counsels against extending *Bob Jones* beyond the settled policy against segregation and racial exclusion that it enforced.

B. The proposal threatens constitutional limits on agency power and protected college and university activity.

Treasury's interpretation would leave its policymaking power without a meaningful statutory limit. If Treasury may identify a contested policy as fundamental and deny exemption to institutions whose otherwise lawful conduct conflicts with it, the theory supplies no stopping point. It does not explain which policies qualify, how much national agreement is necessary, or what prevents the next Administration from imposing different conditions. Calling a policy "fundamental" constrains nothing if Treasury decides for itself what the term means.

Congress must supply an intelligible principle that guides and constrains delegated authority.[k] *Bob Jones*'s requirement of an established national policy whose application is beyond doubt limits Treasury's role. The proposal would discard that constraint. Reading the Code to permit that result would raise a serious nondelegation problem. The statute should instead be read to preserve Congress's responsibility for deciding the substantive conditions on exemption.

The proposal would also burden the academic freedom that the First Amendment protects. Academic freedom is a "special concern of the First Amendment," which does not tolerate a

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[g] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 230–31 (2023).

[h] *See United Steelworkers of America v. Weber*, 443 U.S. 193, 208–09 (1979); *Johnson v. Transportation Agency*, 480 U.S. 616, 641–42 (1987); Civil Rights Act of 1991, Pub. L. No. 102–166, § 116, 105 Stat. 1071, 1079 (1991).

[i] *See West Virginia v. EPA*, 597 U.S. 697, 721–24 (2022).

[j] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024).

[k] *See FCC v. Consumers' Research*, 606 U.S. 656, 673 (2025) (requiring Congress to identify the general policy an agency must pursue and the boundaries of its delegated authority).

"pall of orthodoxy over the classroom."[l] That protection encompasses independent academic judgments and the freedom of faculty and students to question prevailing ideas. Treasury would intrude on those judgments by making undefined assessments of otherwise lawful educational activity potential grounds for revoking an institution's entire exemption. It supplies no standard separating prohibited discrimination from teaching about race, color, or national or ethnic origin, examining inequality, or supporting cultural expression. As § II.B.1 documents, institutions would have reason to restrict protected activities rather than risk their exemptions defending them.

The same problem reaches student speech and association. Government may not deny recognition to a campus organization simply because it disagrees with the organization's philosophy.[m] Nor does institutional funding necessarily convert independent student expression into the institution's own speech.[n] By leaving "school-supported" undefined, Treasury would pressure institutions to withdraw meeting space, recognition, or funding from groups whose activities might provoke a complaint. Independent student expression would become a potential liability for the institution that makes room for it.

The proposal would also give officials leverage over expression unrelated to the alleged violation. Officials may not use regulatory authority to suppress disfavored advocacy, including by pressuring other activities or relationships.[o] Yet Treasury supplies neither clear substantive boundaries nor safeguards against using an exemption investigation to pressure an institution over its teaching, research, or public positions.

Religious institutions face a further constitutional problem. The preamble states that religious institutions may select students based "solely" on religion rather than shared ancestry or ethnic characteristics, but the operative regulatory text contains no corresponding exception.[p] Even the preamble's assurance leaves substantial uncertainty. Where those aspects of identity overlap, applying that distinction could require tax officials to decide which membership criteria are genuinely religious. The First Amendment protects religious institutions against governmental resolution of ecclesiastical questions.[q] Treasury cannot assume authority to decide them by calling the inquiry tax administration.

The proposal's undefined standards also raise due process concerns. Regulations must give fair notice of the conduct they forbid or require, and that requirement applies with particular force where the regulated activity implicates First Amendment freedoms and the consequences are severe.[r] Treasury would condition an institution's entire exemption on undefined terms such as "educational policy" and "school-supported," and on an additional prohibition reaching otherwise lawful conduct, without identifying where the line falls.

These constitutional concerns reinforce the limits of Treasury's statutory authority. Section 501(c)(3) should not be read to give tax officials open-ended power over lawful teaching,

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l *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

m *Healy v. James*, 408 U.S. 169, 180–88 (1972).

n *See Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 834–35, 841–42 (1995).

o *See National Rifle Association of America v. Vullo*, 602 U.S. 175, 188–94 (2024).

p 91 Fed. Reg. at 56,815.

q *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 185–89 (2012).

r *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012).

expression, association, and religious practice. *Bob Jones* does not supply that power. Treasury has neither justified the broader authority it claims nor explained how its proposed rule would respect the freedoms it threatens.

II. The proposal is arbitrary and capricious

A. Treasury has shown no problem requiring this proposed rule, and its asserted benefits—including clarity—do not withstand examination.

Treasury would upend fifty years of policy and threaten institutions' entire tax exemptions without showing any need for the change or any benefit it would produce. Claiming to solve a problem without "evidence demonstrating that there is in fact [a] . . . problem is not reasoned decisionmaking."[s] An agency must identify a "genuine proble[m] . . . warrant[ing] the rule"[t] and overcome a "presumption . . . *against* changes in current policy that are not justified by the rulemaking record."[u]

Treasury identifies no gap in civil rights enforcement and no concrete harm that this proposed rule would address. For postsecondary institutions, its own premise is that schools have "*already* changed their admissions policies" following *SFFA*.[v] For private primary and secondary schools, Treasury admits that it is "not aware of any data" establishing the extent of racial discrimination in admissions.[w] Treasury thus assumes compliance in one setting and acknowledges that it cannot establish the extent of any problem in the other. It never explains what additional problem requires this proposed rule or why existing civil rights protections are insufficient.[x] Treasury's prediction that an additional draconian sanction will improve matters must rest on "some logic and evidence, not sheer speculation."[y]

Treasury's scholarship estimate does not establish a problem requiring this proposed rule. The proposed rule estimates that 750,000 students "may qualify for scholarships allocated on the basis of racial, ethnic, or national identity." That figure measures potential eligibility, not how many students receive those awards or what harm the awards cause. Nor does Treasury disclose the calculation producing that figure: its footnote identifies the GAO survey but provides no arithmetic connecting that source to the asserted total.[z] Treasury cannot establish a need for

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[s] *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (Kavanaugh, J.).

[t] *Chamber of Commerce v. SEC*, 85 F.4th 760, 777 (5th Cir. 2023).

[u] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983); *see also New York Stock Exchange LLC v. SEC*, 962 F.3d 541, 556–57 (D.C. Cir. 2020) ("Rules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address.").

[v] 91 Fed. Reg. at 56,816 (emphasis added).

[w] *Id.* at 56,817.

[x] *See Business Roundtable v. SEC*, 647 F.3d 1144, 1154 (D.C. Cir. 2011) (faulting the agency for failing to "adequately address" existing protections in assessing the "benefit to be had from" additional requirements); *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010) (holding the agency's analysis "incomplete because it fail[ed] to determine whether, under the existing regime, sufficient protections existed" to achieve the rule's stated benefits).

[y] *Sorenson Communications Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).

[z] 91 Fed. Reg. at 56,816 & n.5.

regulation merely by counting the people potentially affected, particularly when it does not explain how it counted them.[aa]

Treasury also relies on scholarship data more than thirty years old without explaining why those data remain reliable after the very changes *SFFA* has brought about.[bb] The cited report, moreover, describes *benefits* rather than harm: minority-targeted scholarships accounted for a small share of awards and dollars, and officials at a majority of the schools GAO visited considered them "valuable tools" for recruiting and retaining students.[cc] Treasury never explains how those findings supply "evidence of a real problem" warranting its sweeping response.[dd]

Treasury's claim that the proposed rule would "eliminate ambiguity and ensure consistent application across all private schools" does not establish a benefit either.[ee] Treasury cites "*zero* evidence" that ambiguity in its existing guidance has caused inconsistent treatment of schools.[ff] And an agency cannot justify its chosen rule "based solely on the assertion that the existence of a rule provides greater clarity."[gg] Treasury could provide equal clarity by confirming its longstanding guidance. A clear rule can still be harmful, burdensome, or unnecessary; Treasury must explain why this "*specific rule*" would improve matters.[hh] It does not.

The record confirms that the proposal would create uncertainty rather than eliminate it. It withdraws longstanding assurances about permissible programs, expressly reaches otherwise lawful conduct, and leaves the boundaries of institutional responsibility undefined. Commenters warn that the proposal does not provide enough clarity about the specific activities that would trigger loss of exemption.[ii] Even supporters cannot identify the boundaries: one warns that schools designing compliant scholarships "may be left guessing," while another requests express confirmation that income, first-generation status, and neighborhood criteria remain permissible even when correlated with race.[jj] Treasury's own preamble reflects the same uncertainty. "For the avoidance of any doubt," it assures schools that they may maintain a religious "mission, curriculum, or program of observance."[kk] The proposed text contains no corresponding

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[aa] *See Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530–31 (D.C. Cir. 1982) ("To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.").

[bb] *See* 91 Fed. Reg. at 56,816 & n.5 (citing GAO, *Higher Education: Information on Minority-Targeted Scholarships*, GAO/HEHS–94–77 (Jan. 14, 1994), https://www.gao.gov/assets/hehs-94-77.pdf); *see also Natural Resources Defense Council, Inc. v. Herrington*, 768 F.2d 1355, 1408 (D.C. Cir. 1985) (explaining that reliance on "data half a decade old" would be "patently unreasonable" where relevant conditions had changed).

[cc] GAO, *Higher Education*, *supra* note **Error! Bookmark not defined.**, at 1, 11.

[dd] *National Fuel*, 468 F.3d at 843.

[ee] 91 Fed. Reg. at 56,815.

[ff] *National Fuel*, 468 F.3d at 843.

[gg] *American Equity Investment Life Insurance*, 613 F.3d at 177–78.

[hh] *Id.* at 178.

[ii] Comment of Goldey-Beacom College, Comment ID IRS-2026-1189-0015 (Sept. 9, 2026), https://www.regulations.gov/comment/IRS-2026-1189-0015.

[jj] Comments on Racial Nondiscrimination in Private Schools, Comment IDs IRS-2026-1189-1009 and IRS-2026-1189-0867, https://www.regulations.gov/comment/IRS-2026-1189-1009 and https://www.regulations.gov/comment/IRS-2026-1189-0867.

[kk] 91 Fed. Reg. at 56,815.

limitation. Treasury's need to supply that reassurance outside the operative text confirms that its sweeping language does not explain its own limits.

Worse, Treasury predicts that its sweeping intervention may leave the results substantially unchanged. The proposed rule explains that substitute criteria such as income, geography, and first-generation status correlate with race, so "the change in the recipient population may be limited" and donors may achieve "substantially similar outcomes."[ll] Treasury never explains why disrupting longstanding programs and threatening institutions' entire tax exemptions is justified if the results remain substantially the same. An agency cannot ignore the possibility that its rule will produce "no net benefit"—much less its own prediction that the results will remain substantially unchanged.[mm]

Treasury's analysis contradicts its justification for the proposed rule. Treasury invokes *Bob Jones* and the Government's "fundamental, overriding interest in eradicating racial discrimination in education."[nn] That case concerned schools that excluded Black applicants or prohibited interracial dating and marriage. Imagine if the Government had assured those schools that they could adopt supposedly neutral rules designed to continue excluding Black applicants or interracial couples. That would have offered a way to perpetuate the very exclusion invoked to justify revocation. Yet Treasury now declares covered discrimination incompatible with exemption "for any purpose," even when otherwise lawful, while explaining how criteria correlated with race can preserve substantially the same scholarship outcomes.[oo] Treasury "cannot have it both ways."[pp] It must explain why the practices it targets are so contrary to fundamental public policy that they warrant threatening an entire institution's exemption, while its own suggested alternatives may preserve substantially the same results.

Treasury also fails to reconcile its reasoning with DOJ's assertion that lawful, race-neutral criteria—such as income, geography, and first-generation status—become legally problematic when "selected because they correlate with, replicate, or are used as substitutes for protected characteristics."[qq] Treasury relies on racial correlation to explain why its substitutes will work;[rr] DOJ identifies selection for that correlation as a reason those substitutes may be unlawful. Treasury never explains how institutions can use the racial substitutes on which its analysis depends without triggering the very objection DOJ identifies.[ss]

The uncertainty also reaches individualized consideration that *SFFA* expressly permits. Colleges and universities may consider how race affected an applicant's life when evaluating the

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ll *Id.* at 56,817–18.

mm *Business Roundtable*, 647 F.3d at 1156.

nn *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983).

oo 91 Fed. Reg. at 56,815, 56,817–19.

pp *Chamber of Commerce*, 85 F.4th at 778.

qq U.S. Department of Justice, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination* 5 (July 29, 2025).

rr *See* 91 Fed. Reg. at 56,817–18 (explaining that, "[t]o the extent" substitute criteria "are correlated with race and ethnicity, the change in the recipient population may be limited," and that donors may achieve "substantially similar outcomes").

ss *Cf. Granados Benitez v. Wilkinson*, 987 F.3d 46, 55–56 (1st Cir. 2021) (holding that an agency abused its discretion by disregarding another agency's contrary position, which was a "significant factor" requiring consideration).

applicant's character, abilities, and potential contributions.[tt] Yet Treasury's undefined prohibition could reach even that individualized consideration, putting institutions' exemptions at risk for conduct the very decision Treasury invokes expressly permits.

B. The proposed rule would suppress education, distort ordinary disputes, and conflict with binding legal obligations.

Treasury not only fails to show what its proposed rule would accomplish; it also fails to confront the harm the proposed rule would cause. The proposal largely confines its analysis to financial aid and dismisses other school-supported activities as a "relatively narrow, miscellaneous group" whose economic effects would be "insignificant."[uu] But the proposed rule reaches across campus life. It would chill protected activity, divert resources from education, disrupt binding commitments, and give ordinary disputes institution-wide stakes. Treasury cannot impose a sweeping prohibition while dismissing the consequences of its reach. An agency acts arbitrarily when it "entirely fail[s] to consider an important aspect of the problem."[vv]

1. The proposed rule's boundless scope and standardless enforcement regime invite selective enforcement and chill protected college and university activity.

The proposal would pressure colleges and universities to abandon lawful educational activities because the threatened sanction puts their survival at risk. Loss of exemption would jeopardize the charitable support and financing that sustain teaching, financial aid, facilities, and payroll. The consequences would reach every student, employee, and program, regardless of which activity prompted the dispute. Faced with that exposure, administrators would have reason to restrict activities even when they reasonably believe those activities are lawful. Treasury's undefined standards would magnify that pressure, while the risk of selective enforcement would extend it to teaching and research unrelated to any alleged discrimination.

a. The uncertainty documented above would make ordinary educational activity a source of institutional risk. The prohibition reaches "any policy or practice" across educational policies and school-administered or school-supported programs, including otherwise lawful conduct. Colleges and universities must decide which activities to support before an enforcement official supplies the boundaries Treasury has left undefined.

Proponents already envision enforcement across ordinary academic and student life. Supporting comments identify affinity groups, heritage dinners, orientation programs, hiring, promotion, compensation, vendor selection, employee training, student discipline, and institutional boycotts as subjects for scrutiny.[ww] Supportive commentary reads school-provided meeting space as

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[tt] *SFFA*, 600 U.S. at 230–31.

[uu] 91 Fed. Reg. at 56,817.

[vv] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983); *see also Michigan v. EPA*, 576 U.S. 743, 752–53 (2015) (explaining that "reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions").

[ww] *See, e.g.*, Comment of Anonymous, Comment ID IRS-2026-1189-0051 (Sept. 17, 2026), https://www.regulations.gov/comment/IRS-2026-1189-0051 ("race based affinity groups, heritage dinners, preference in admittance and hiring"; DEIJ hiring statements; teacher training; early-arrival program); Comment of Myles Mendoza, Comment ID IRS-2026-1189-0695 (Sept. 21, 2026), https://www.regulations.gov/comment/IRS-

sufficient to bring student affinity groups within the prohibition and extends its reading to medical-school teaching about racial concordance.[xx] The enforcement demands thus reach decisions about whom to support, what to teach, how students associate, and what positions institutions take.

Opening activities to everyone has not prevented accusations of discrimination:

- **Cultural celebrations.** An amicus brief in *SFFA* called cultural graduation celebrations "segregated ceremonies" while acknowledging that they were voluntary and open to any student.[yy]

- **Mentoring and academic support.** A complaint challenged an open-to-all program providing mentoring, leadership development, and academic support because its emphasis on Black and Latino men would allegedly discourage others from participating.[zz]

- **Residential communities.** Another complaint challenged housing organized around cultural interests, arguing that an express statement welcoming all students did not answer allegations of unlawful racial steering.[aaa]

The Government's own guidance has warned schools that open participation does not resolve the inquiry. The Education Department's initial 2025 guidance instructed schools to consider whether programming "discourages members of all races from attending," even after acknowledging that cultural and heritage programs may be open to everyone.[bbb] DOJ likewise cautions that an "identity-based focus" can create a "perception of segregation" "[e]ven if access

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2026-1189-0695 (urging express coverage of "programs, spaces, or activities limited to or separated by race; race-based preferences in admissions, hiring, promotion, compensation, or vendor selection; and trainings or disciplinary systems"); Comment of the Louis D. Brandeis Center for Human Rights Under Law, Comment ID IRS-2026-1189-0057, attachment (Sept. 17, 2026), https://www.regulations.gov/comment/IRS-2026-1189-0057 (institutional "boycott activity may be relevant" to exemption).

[xx] Breccan F. Thies, *New IRS Rule to Strip Private Schools at All Levels of Tax-Exempt Status for Using DEI*, The Federalist (Sept. 3, 2026), https://thefederalist.com/2026/09/03/new-irs-rule-to-strip-private-schools-at-all-levels-of-tax-exempt-status-for-using-dei/.

[yy] Brief of Southeastern Legal Foundation as Amicus Curiae in Support of Petitioner at 17–18, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (U.S. May 4, 2022), https://www.supremecourt.gov/DocketPDF/20/20-1199/222496/20220504151521316_20220504%20SLF%20Amicus%20Brief%20Merits.pdf.

[zz] Equal Protection Project, *Civil Rights Complaint Against the City University of New York and the City of New York* 6 & n.18 (May 31, 2026), https://equalprotect.org/wp-content/uploads/2026/06/Complaint-Re-City-University-New-York-and-New-York-City.pdf.

[aaa] Equal Protection Project, *Civil Rights Complaint Against the University of Minnesota* 7–10, 16–17 (July 9, 2026), https://legalinsurrection.com/wp-content/uploads/2026/07/HUD-UMN-Complaint.pdf; Equal Protection Project, *Civil Rights Complaint Against the University of Connecticut* 2–3, 6, 11–12 (July 9, 2026), https://legalinsurrection.com/wp-content/uploads/2026/07/HUD-UConn-Complaint.pdf.

[bbb] U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act* 6, Question 8 (released Mar. 1, 2025), https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf. The original agency PDF is also available at https://www.ednc.org/wp-content/uploads/2025/03/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf.

is technically open to all."[ccc] Those warnings require schools to anticipate how officials might characterize an activity's focus or message, beyond examining its eligibility rules.[ddd]

That reasoning invites accusations against the substance of college and university teaching and expression. The First Amendment protects independent academic inquiry into those subjects.[eee] Yet a course examining racial inequality, an African American studies department, or a seminar on slavery could be accused of stigmatizing students of a particular race.[fff] A lecture on immigration or American foreign policy could be said to make some students feel unwelcome.[ggg] A mascot, building name, statue, or historical portrait could be characterized as creating a racially hostile atmosphere.[hhh] Treasury never explains what separates those accusations from grounds for threatening an institution's exemption.[iii] The threat is particularly acute for private, nonprofit Historically Black Colleges and Universities (HBCUs), whose historic and continuing mission of educating Black Americans federal law expressly recognizes.[jjj] That mission is not discriminatory. Yet an undefined prohibition could invite scrutiny of recruitment, mentoring, cultural programs, and other lawful activities advancing it. An institution could face pressure to curtail those activities to protect the exemption on which its continued operation depends. Treasury never examines how that pressure could undermine the very institutions federal policy seeks to strengthen.

Institutions of higher education can also face opposing civil rights demands over the same events. At one university, the Justice Department sued over alleged discrimination against Jewish and Israeli students during a pro-Palestinian encampment and sought policies requiring cooperation with police in arresting protesters who unlawfully obstruct access or occupy campus spaces after dispersal orders. Students and faculty sued the same university for suppressing protected expression by dispersing the encampment and arresting demonstrators.[kkk] The

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ccc Memorandum from the Attorney General, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination* 6 (July 29, 2025), https://www.justice.gov/ag/media/1409486/dl.

ddd *See infra* notes **Error! Bookmark not defined.**–**Error! Bookmark not defined.**.

eee *See Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

fff *See* U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act*, *supra* note **Error! Bookmark not defined.**, at 6–7, Question 9; Memorandum from the Attorney General, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination*, *supra* note **Error! Bookmark not defined.**, at 7–8 & n.6.

ggg *See supra* notes **Error! Bookmark not defined.**, **Error! Bookmark not defined.**–**Error! Bookmark not defined.**.

hhh *See* U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act*, *supra* note **Error! Bookmark not defined.**, at 6–7, Question 9; Memorandum from the Attorney General, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination*, *supra* note **Error! Bookmark not defined.**, at 6–8.

iii 91 Fed. Reg. at 56,819 (proposed § 1.501(c)(3)–2(b)); *see infra* Section II.D.2.

jjj *See* 20 U.S.C. § 1061(2); Exec. Order No. 14,283, §§ 2–3, 90 Fed. Reg. 17,543, 17,543–44 (Apr. 28, 2025).

kkk Complaint ¶ 148(a), (d), *United States v. Regents of the University of California*, No. 2:26-cv-05589 (C.D. Cal. May 26, 2026), https://www.justice.gov/crt/media/1442381/dl; First Amended Complaint ¶¶ 124–145, 157–165, 287(a), (c)–(d), *Blair v. Regents of the University of California*, No. 24STCV27623 (Cal. Super. Ct., L.A. Cnty. Dec. 9, 2024), https://www.aclusocal.org/app/uploads/drupal/sites/default/files/2024_12_09_first_amended_complaint.pdf.

proposal would give those competing accusations potential consequences for the institution's entire exemption.[lll]

Institutions will have reason to restrict activities they reasonably believe the proposal permits. When a mistaken interpretation could threaten the entire institution, even a small risk gives administrators reason to narrow or cancel a program they would otherwise preserve. Confidence that the institution would ultimately prevail does not eliminate the disruption an investigation could cause. The predictable response is to stay well clear of an uncertain boundary, abandoning worthwhile First Amendment-protected activities to reduce exposure. Administrators need not conclude that an activity discriminates—only that defending it is not worth risking the institution's exemption.[mmm]

Professional guidance already anticipates expanding review across ordinary campus life. Advisers recommend examining school-supported student groups, affinity programs, orientation tracks, athletics, extracurricular activities, and donor arrangements.[nnn] Because faculty, departments, and student organizations make decisions throughout an institution, that review would reach activities traditionally entrusted to their judgment. One institution reported to NAICU that counsel could be drawn into continuing review of academic programs, student organizations, faculty initiatives, and outside partnerships. Educational decisions would

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[lll] Proposed § 1.501(c)(3)–2(b), 91 Fed. Reg. at 56,819 (reaching "any policy or practice," in "any . . . school-administered or school-supported program," "for any purpose"); *see supra* note **Error! Bookmark not defined.** (Brandeis Center comment requesting a standing complaint portal through which either accusation could be submitted).

[mmm] The literature identifies overcompliance as a rational response to uncertain legal standards, including among parties that are not risk averse. *See* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. Econ. & Org. 279, 279–80 (1986), https://doi.org/10.1093/oxfordjournals.jleo.a036912. The authors' related analysis explains that larger penalties strengthen the incentive to overcomply and that risk aversion further increases precautionary expenditures. Richard Craswell & John E. Calfee, *Incentives to Comply with Uncertain Legal Standards* 12, 41–42 (FTC Bureau of Economics Working Paper No. 123, Apr. 1985), https://www.ftc.gov/sites/default/files/documents/reports/incentives-comply-uncertain-legal-standards/wp123.pdf. Universities have responded to comparable pressure under federal civil-rights oversight. Gersen and Suk describe institutions creating compliance bureaucracies and adopting policies beyond what statutes or binding regulations required to avoid threatened funding losses. Jacob E. Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Calif. L. Rev. 881, 884, 908–09, 934 (2016), https://jeanniesukgersen.com/wp-content/uploads/2014/02/SSRN-id2750143.pdf.

[nnn] *See, e.g.,* Brownstein, *Racial Nondiscrimination in Private Schools: Notice of Proposed Rulemaking* (Sept. 8, 2026), https://www.bhfs.com/insight/racial-nondiscrimination-in-private-schools-notice-of-proposed-rulemaking/ (advising a broader review extending from school-supported student groups to athletics); Greenberg Traurig, *IRS Proposes Regulations Addressing Race-Based Programs in Tax-Exempt Private Schools* (Sept. 11, 2026), https://www.gtlaw.com/en/insights/2026/9/irs-proposes-regulations-addressing-race-based-programs-in-tax-exempt-private-schools (identifying affinity groups and identity-based orientation tracks for evaluation because they may be viewed as jeopardizing exemption); Crowell & Moring, *IRS Takes Aim: Proposed Rule Threatens Tax-Exempt Status of Private Schools* (Sept. 8, 2026), https://www.crowell.com/en/insights/client-alerts/irs-takes-aim-proposed-rule-threatens-tax-exempt-status-of-private-schools (recommending review of donor-directed aid arrangements and athletic and extracurricular programs); BDO, *Proposed Racial Nondiscrimination Regulations Could Jeopardize Tax-Exempt Status for Private Schools* (Sept. 11, 2026), https://www.bdo.com/insights/tax/proposed-racial-nondiscrimination-regulations-could-jeopardize-tax-exempt-status-for-private-schools (recommending restricted-fund audits, legal consultation, changes to admissions and financial-aid criteria, and preparation for future examinations).

increasingly require advance legal approval, giving the risk of an exemption dispute greater influence over what colleges and universities teach, sponsor, and support.

Other broadly worded restrictions have already prompted institutions to curtail expression out of caution. At one university, staff instructed students to remove "Black" from Black History Month flyers; university leadership later corrected the instruction.[ooo] At another, a Native American author withdrew from a symposium after receiving prohibited words and concepts, including "bias" and "racial privilege."[ppp] Treasury never considers how threatening an institution's entire exemption would magnify the pressure to restrict educational activity before any violation is established.

b. Selective scrutiny would discourage even expression unrelated to alleged discrimination. Officials who object to an institution's views could search its operations for another practice to challenge and use the threat to exemption as leverage. Colleges and universities could hesitate to publish research questioning federal climate policy, host a pro-life or pro-choice conference, or support a gun-rights organization simply to avoid attracting that attention. Supporters already seek a dedicated complaint portal, and one public advocate describes exemption loss as necessary to produce a "depoliticized and redeemed higher education sector."[qqq] No official would need to demand changes to teaching or research. The prospect of an exemption investigation could produce restraint on its own.

Fear of selective scrutiny is already discouraging institutions from speaking publicly. The docket itself supplies concrete evidence. Institutions publicly participate in other rulemakings affecting them.[rrr] Yet this proposal, which threatens their entire tax exemptions, has drawn almost no comments from schools in their own names. Presidents and general counsel have described the concern to NAICU: criticizing the proposal individually could draw scrutiny of campus activities, with consequences for every student, employee, and program the institution supports. Public reporting confirms that concern. As one higher-education representative told Politico, "They're all scared to comment."[sss] With the threat to exemption hanging over them, institutions are already limiting what they are willing to say.

[ooo] Tylisa Hampton, *After News 6 Report, FAMU Acknowledges "Staff-Level Error" in Black History Month Flyer Dispute*, ClickOrlando (Feb. 9, 2026), https://www.clickorlando.com/news/local/2026/02/09/after-news-6-report-famu-acknowledges-staff-level-error-in-black-history-month-flyer-dispute/.

[ppp] PEN America, *PEN America Condemns Use of Forbidden Words List to Censor Native American Author* (Dec. 5, 2025), https://pen.org/press-release/pen-america-condemns-use-of-forbidden-words-list-to-censor-native-american-author/.

[qqq] *See* Comment of the Louis D. Brandeis Center for Human Rights Under Law, Comment ID IRS-2026-1189-0057, attachment (Sept. 17, 2026), https://www.regulations.gov/comment/IRS-2026-1189-0057 (requesting a dedicated complaint portal); The National News Desk, *Trump Admin Moves to Tie Schools' Tax-Exempt Status to Racial Nondiscrimination Rules* (Sept. 17, 2026), https://kmph.com/news/nation-world/trump-admin-moves-to-tie-schools-tax-exempt-status-to-racial-nondiscrimination-rules-zachary-marschall-campus-reform-supreme-court-president-trump-irs-treasury-department-education-college-federal-funding-dei (quoting Zachary Marschall).

[rrr] Letter from Businesses, Educational Institutions, and Other Organizations to Secretary Kristi Noem 3–4 (Sept. 16, 2025), Comment ID ICEB-2025-0001-8627, https://www.aau.edu/uploads/files/general/ICEB-2025-0001-8627_attachment_1.pdf.

[sss] Brian Faler, *Colleges Seek Answers Amid Trump Push to Cancel Tax Exemptions Over Diversity Programs*, Politico (Oct. 7, 2026), https://www.politico.com/news/2026/10/07/college-tax-exempt-trump-regulations-01105427.

The same perceived exposure would affect institutions' finances before any enforcement action begins. Investors price the possibility of future losses, and insurers price the expense of defending covered claims and investigations. Neither needs to await an IRS determination before demanding higher interest rates or premiums. The documented repricing of private nonprofit institutional bonds amid federal threats demonstrates that markets respond before exemption is revoked.[ttt] Those financial pressures would reinforce administrators' incentive to avoid activities that might attract scrutiny, even if the Administration never follows through.[uuu]

The IRS's own history highlights the risk of selective enforcement. In 2013, the agency singled out exemption applicants with names such as "Tea Party" and "Patriots," screened applications based on policy positions, subjected applicants to prolonged delays, and demanded unnecessary information.[vvv] In responding to those failures, Treasury and the IRS identified unclear standards as a source of confusion and proposed more definitive rules to "reduce the need to conduct fact-intensive inquiries."[www] Yet Treasury now proposes similarly open-ended judgments about campus speech and conduct, backed by the threat of institution-wide revocation. It never explains why the uncertainty and discretion it previously sought to reduce are acceptable here. Treasury is recreating the conditions it sought to correct, and that unexplained inconsistency is a further failure of reasoned decisionmaking.[xxx]

2. The proposed rule would transform ordinary discrimination disputes into existential threats to colleges and universities.

The proposed rule would pressure colleges and universities to settle even weak discrimination claims by putting their entire tax exemptions at risk. Discrimination complaints are a predictable risk for employers,[yyy] and most EEOC and OCR charges end without a finding of reasonable cause.[zzz] Defending a claim can nevertheless be expensive regardless of its merit. The Supreme

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[ttt] *See* § II.C.2.d–e, *infra*.

[uuu] *Cf. First Choice Women's Resource Centers, Inc. v. Davenport*, 608 U.S. 174, 192 (2026) ("[T]he value of a sword of Damocles is that it hangs—not that it drops.").

[vvv] Proposed Consent Order ¶¶ 5, 40, *Linchpins of Liberty v. United States*, No. 1:13-cv-00777-RBW (D.D.C. Oct. 25, 2017), ECF No. 140-1, https://www.courthousenews.com/wp-content/uploads/2017/10/LINCHPINS-OF-LIBERTY-CONSENT-ORDER.pdf.

[www] Internal Revenue Service, Treasury, *IRS Will Issue Proposed Guidance for Tax-Exempt Social Welfare Organizations*, IR-2013-92 (Nov. 26, 2013), https://content.govdelivery.com/accounts/USIRS/bulletins/96d671; *see also* Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535, 71,536–37 (Nov. 29, 2013) (identifying unclear standards as a significant challenge in exemption review and proposing more definitive rules to provide greater certainty and reduce detailed factual analysis).

[xxx] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016).

[yyy] Hiscox, *The 2017 Hiscox Guide to Employee Lawsuits* 4, 7 (2017), https://www.hiscox.com/documents/2017-Hiscox-Guide-to-Employee-Lawsuits.pdf (estimating that U.S. companies faced at least a 10.5 percent chance of an employment-discrimination charge in 2016, using federal and state charges and establishments with more than ten employees).

[zzz] U.S. Equal Employment Opportunity Commission, Table E1c. *Charge Receipts and Resolutions by Type (All Statutes), FY 1997–FY 2025*, fiscal year 2024 column, https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0. Of 87,219 charges resolved in fiscal year 2024, 1,813—approximately 2.1 percent—resulted in reasonable-cause findings. *See also* U.S. Department of Education, Office for Civil Rights, Fiscal Year 2024 Annual Report: Report to the President and Secretary of Education (2025), https://www.ed.gov/media/document/ocr-report-president-and-secretary-of-education-2024-109012.pdf (reporting a record 22,687 complaints received in fiscal year 2024).

Court has recognized that litigation costs can push defendants to settle "even anemic cases."[aaaa] Treasury would increase that pressure by giving a dispute over an individual decision potential consequences for the whole institution. An institution confident that it acted lawfully would still have to weigh the cost of settlement against the risk of an exemption investigation. That added risk would give even a weak claim substantial settlement value.

A person challenging a scholarship decision, disciplinary action, or access to a campus program could demand concessions backed by a threat to refer the allegations to the IRS. Settlement demands could reflect what the institution stands to lose rather than what the alleged injury warrants.

Treasury's undefined standards would magnify that leverage. The proposal supplies no clear threshold separating an isolated violation from a practice warranting revocation and no clear protection for prompt corrective action.[bbbb] Nor does Treasury explain what weight the IRS would give a complaint, an administrative finding, a judgment subject to appeal, or a settlement without an admission of wrongdoing. A person seeking concessions would not need to establish grounds for revocation; the threat of an uncertain IRS inquiry could be enough.

The proposed rule would therefore encourage marginal claims and increase defense costs and settlement demands without assuring institutions that settlement would end their exposure. An institution could pay to resolve the underlying dispute and still face a separate proceeding over its tax status. Treasury never considers those costs or the educational resources they would consume. The threat to an institution's entire exemption should not become a means of extracting concessions in every dispute that can plausibly be framed as discrimination.

3. The proposed rule would create conflicts with other legal obligations.

The proposal would force colleges and universities to choose between preserving their exemptions and obeying binding legal obligations. Treasury prohibits covered conduct "for any purpose," including otherwise lawful conduct undertaken for remedial purposes.[cccc] Yet a court order or binding consent decree may require race-conscious measures to remedy identified discrimination. Treasury never explains how an institution could satisfy both requirements or what would protect its exemption while it seeks clarification or modification. An institution cannot disregard a court order because Treasury adopts a different view of the required conduct.

Donor restrictions can create a similar conflict. A school that accepts a gift for a specified purpose may be legally bound to use it for that purpose. Changing the restriction may require donor consent, judicial approval, or another procedure prescribed by state law. A new tax rule does not itself amend the gift's terms. Institutions may therefore need permission to change arrangements that Treasury would require them to abandon.

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aaaa *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

bbbb *See* 91 Fed. Reg. at 56,819 (proposed § 1.501(c)(3)–2(a)–(b)).

cccc *Id.* at 56,815, 56,819 (proposed § 1.501(c)(3)–2(b)).

C. The proposed rule's economic analysis is defective on its own terms, and the record shows that its costs would overwhelm any demonstrated benefit.

1. Treasury's economic analysis is incomplete, internally inconsistent, and illogical.

Treasury repeatedly treats its inability to measure the proposed rule's effects as a reason to dismiss them. It acknowledges gaps in the data needed to assess affected schools, students, donors, and compliance costs, yet concludes that important effects will be insignificant or negligible. Those conclusions do not follow from the information Treasury presents. The analysis omits entire categories of costs, relies on figures that do not measure the burdens at issue, and offers conflicting accounts of how much conduct the proposed rule would change.

Treasury's repeated use of "to the extent" avoids the predictions its economic analysis must make. It says compliance costs will be minimal "to the extent" schools have already adjusted their practices and "to the extent" low-cost compliance options are available.[dddd] But it does not establish how widely either condition holds. The D.C. Circuit has required an agency confronting uncertainty to determine "as best it can the economic implications of the rule it has proposed" and to "make tough choices" among competing estimates—even to "hazard a guess" when an estimate will be imprecise.[eeee] Treasury offers no estimate of how many schools have completed the necessary changes, which inexpensive alternatives actually exist, or what the remaining work will cost. It describes conditions under which costs would be small without determining whether those conditions exist.

The analysis also narrows the proposed rule's economic reach by assumption. Because postsecondary institutions have already changed admissions policies following *SFFA*, Treasury anticipates that "all economic effects" on those institutions will arise from scholarship and loan policies.[ffff] It dismisses other school-supported programs and educational policies as a "relatively narrow, miscellaneous group" whose effects it assumes will be insignificant.[gggg] But the operative prohibition reaches those activities expressly. As explained above, determining whether they comply will require legal review, staff time, and continuing oversight even where institutions ultimately make no changes. Treasury cannot omit those costs merely by labeling the affected activities miscellaneous.

Its treatment of restricted scholarships makes the same error. Treasury acknowledges that modifying donor restrictions "will incur administrative and legal costs" and that it lacks the parameters or models to assess their extent.[hhhh] It then points to the fact that restricted endowments fund no more than 16 percent of total scholarship dollars. That percentage does not measure compliance costs. Reviewing and modifying a fund requires work regardless of the size of its annual distributions. An institution may administer many small funds, each requiring separate analysis, negotiations, or proceedings. An aggregate share of scholarship dollars reveals

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[dddd] *Id.* at 56,817–18.

[eeee] *Chamber of Commerce v. SEC*, 412 F.3d 133, 143–44 (D.C. Cir. 2005); *Business Roundtable v. SEC*, 647 F.3d 1144, 1150 (D.C. Cir. 2011) (quoting *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209, 1221 (D.C. Cir. 2004)).

[ffff] 91 Fed. Reg. at 56,816.

[gggg] *Id.* at 56,817.

[hhhh] *Id.*

neither the number of agreements requiring review nor the burden on the institutions holding them.

Treasury's assumptions about compliance are also unreconciled. The economic analysis predicts that "almost all private schools" will adjust their scholarship and loan criteria.[iiii] The Regulatory Flexibility Act certification nevertheless relies on the premise that affected entities "likely already comply with" the relevant legal requirements.[jjjj] Treasury never explains how those premises fit together or identifies the changes small institutions will actually need to make. Compliance with existing law also cannot establish compliance with a proposal that expressly reaches otherwise lawful conduct. The certification assumes away the very change Treasury proposes.

The certification further reasons that, because scholarship-endowment income is restricted, eliminating or transferring affected funds would have minimal effects on operating budgets and investment assets.[kkkk] That does not follow. Restricted funds pay for student support the institution would otherwise have to replace, reduce, or discontinue. Their loss does not become economically insignificant because the money cannot be spent on other purposes. Nor does the absence of a new information-collection requirement establish that legal review, fund modification, training, and administration will be inexpensive. Treasury offers no institution-level analysis showing how smaller schools could absorb those burdens.

Treasury also discounts donor disruption using a relationship it has not measured. It predicts that substitute criteria will produce "substantially similar outcomes" while acknowledging that it cannot precisely assess their correlation with race. That unmeasured relationship cannot support its conclusion that the effect on donors will be negligible.

Treasury has failed to connect its conclusions to evidence. Missing data become minimal costs; a small share of scholarship dollars becomes an insignificant compliance burden; compliance with existing law becomes compliance with a broader prohibition. None of those inferences supplies a sound basis for adopting the proposed rule.

2. The record evidence shows that the proposed rule's costs would overwhelm any demonstrated benefit.

The work Treasury leaves unmeasured would consume billions of dollars in educational resources even where institutions expect their practices to comply. Schools cannot responsibly leave that conclusion untested when a mistaken interpretation could threaten their entire exemptions. Even a small risk of that consequence makes expenditures to identify and resolve potential problems a rational response.[llll] Institutions must examine their agreements and operations to determine whether changes are necessary, and that examination consumes resources even where it confirms that no changes are needed. The following calculations

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[iiii] *Id.*

[jjjj] *Id.* at 56,818.

[kkkk] *Id.*

[llll] *See supra* Section II.B.1.a & note **Error! Bookmark not defined.** (discussing precautionary compliance u nder uncertain standards and universities' responses to threatened funding losses).

identify the tasks, professional time, and financial consequences involved, using deliberately conservative inputs. Treasury supplies no competing calculations.

a. Reviewing and modifying restricted gifts would require approximately $6 billion in professional work. Treasury itself predicts that "almost all private schools" will change their scholarship and loan criteria to retain their exemptions if the proposed rule is finalized.[mmmm] Institutions have already been reviewing and revising scholarship criteria in light of *SFFA* and their existing legal obligations. But those efforts do not exhaust the work the proposed rule would generate. The rule would also prompt institutions to review restrictions that existing law permits, both because its requirements extend beyond existing prohibitions and because uncertainty about its reach would encourage institutions to err on the side of caution to preserve their tax exemptions. An institution might, for example, seek to modify a gift supporting an African-American studies living center open to all students, even though the gift excludes no one on the basis of race. Reviewing such gifts and determining whether and how to modify their restrictions requires counsel, advancement personnel, financial-aid staff, and institutional leadership. Where modification is pursued, institutions must also obtain any necessary donor consent or other approval.

As institutions already engaged in this work have found, identifying affected funds requires an examination of agreements throughout the institution. Staff must locate the original gift instruments, collect amendments and related records, and determine how the restrictions operate today. Some agreements date to the nineteenth century. The inquiry cannot stop at scholarships whose names refer to race. Restrictions may concern ethnicity, ancestry, national origin, or particular communities, and older instruments may use language whose treatment under the proposal is unclear. Treasury's own data confirm the need to examine the governing terms: they group together endowments restricted by "race, ethnicity or any other criterion," without identifying which restrictions apply to a particular gift.[nnnn] Institutions cannot determine which funds require changes without reading their terms.

The review would reach well beyond a college's financial-aid office. Colleges accept restricted gifts for undergraduate and graduate programs, academic departments, research, faculty positions, and other activities. For purposes of this estimate, we conservatively count 500 potentially relevant instruments per college and 25 per K–12 school, reflecting their smaller range of programs and fundraising operations. Across approximately 1,700 colleges and 16,300 K–12 schools,[oooo] those figures produce approximately 1.25 million instruments, rounded down.

[mmmm] 91 Fed. Reg. at 56,817. Treasury cites no evidence that covered institutions have already completed the document review, donor negotiations, or judicial proceedings necessary to modify affected restrictions. Its statement that colleges have "already changed their admissions policies" concerns admissions, not restricted gifts. *Id.* at 56,816. Its separate qualification that costs diminish "[t]o the extent" schools have already adjusted scholarship criteria does not identify how many institutions have done so or what work remains. *Id.* at 56,818. Instead, Treasury acknowledges that modifying donor restrictions "will incur administrative and legal costs." *Id.* at 56,817.

[nnnn] 91 Fed. Reg. at 56,817 & n.8.

[oooo] *Id.* at 56,816, 56,818; National Association of Independent Colleges and Universities, *Research*, https://www.naicu.edu/research/. The calculation uses Treasury's approximately 18,000-school total and NAICU's approximately 1,700 private-college-and-university figure, allocating the remaining 16,300 institutions to the K–12 category. The proposed rule does not separately report that K–12 count.

Large institutions administer far more: one university reports more than 14,000 individual endowment funds, about 80 percent restricted to specific purposes by donors.[pppp]

Reading and evaluating those instruments alone would consume approximately $994 million. An allowance of 1.5 hours per instrument covers retrieving the governing documents, examining their restrictions, assessing them under the proposed rule, and recording a conclusion. At a blended professional rate of $530 per hour, that work costs $795 per instrument.[qqqq] Missing records, amendments, and ambiguous terms require additional time. One NAICU member administers approximately 8,000 restricted funds. Applying the same calculation to that inventory produces 12,000 hours and $6.36 million in review costs—before contacting a donor, modifying an agreement, or filing a petition.

Changing restrictions in even a small share of the reviewed funds would require approximately $2.5 billion more. Institutions may seek changes even where they reasonably believe existing restrictions are lawful, simply to avoid an exemption dispute under the proposal's uncertain standards. To keep the calculation conservative, we count only 15 percent—187,500 funds—as requiring modification and assign no modification expense to the remaining 85 percent.[rrrr] Institutions must determine how each affected restriction can be modified, locate donors or other

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[pppp] Harvard University, *The Harvard Endowment 101* 1 (2023), https://www.alumni.harvard.edu/sites/default/files/2023-12/FAS%2024-8774%20Endowment%20101_F2%20FINAL-ua.pdf.

[qqqq] The $530 blended rate combines outside counsel at $750 per hour and institutional professional time at $200 per hour, weighted 60 percent and 40 percent to reflect the legal character of the work: (0.60 × $750) + (0.40 × $200) = $530. Both components use conservative benchmarks. The outside-counsel rate falls below the $774 hourly rate for attorneys with ten years' experience in the U.S. Attorney's Office for the District of Columbia's 2026 Fitzpatrick Matrix. *See* U.S. Attorney's Office for the District of Columbia, *The Fitzpatrick Matrix* 1 (2026), https://www.justice.gov/usao-dc/media/1449156/dl. For senior institutional professionals, we use a corporate in-house legal compensation benchmark. ACC's 2025 survey reports median annual base pay of $234,000 for a sole general counsel, excluding bonuses and other incentive compensation. Association of Corporate Counsel & Empsight International, *2025 Law Department Compensation Survey: Executive Summary* 9 (2025), https://www.acc.com/sites/default/files/resources/upload/ACC-2025-Law-Department-Compensation-Survey-Executive-Summary.pdf. Applying a 1.50 benefits multiplier and spreading that annual compensation over 1,740 productive hours for purposes of this calculation produces approximately $202 per hour, which we round down to $200. *Cf.* 85 Fed. Reg. 78,932, 78,933 n.10 (Dec. 7, 2020).
Larger institutions and matters requiring specialized counsel would face substantially higher costs. LexisNexis's analysis of actual paid invoices found that median partner rates at firms with more than 750 lawyers exceeded $1,000 per hour in 2024, with some partners billing more than $2,300 per hour. LexisNexis, *CounselLink Releases 2025 Trends Report Showing Large Law Command of Partner Rates, Share of Wallet* (Apr. 22, 2025), https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-counsellink-releases-2025-trends-report-showing-large-law-command-of-partner-rates-share-of-wallet.

[rrrr] The calculation counts 15 percent of the instruments selected for review as requiring modification and assigns no modification expense to the remaining 85 percent. Treasury reports that restricted endowments fund up to 16 percent of scholarship dollars. 91 Fed. Reg. at 56,817 & n.8. Compliance costs attach to each instrument rather than each dollar distributed. GAO's graduate-school data show that certain restricted scholarship awards skew small: race- or ethnicity-exclusive awards represented more than twice the share of minority-targeted awards as of minority-targeted dollars. GAO, *Higher Education*, *supra* note **Error! Bookmark not defined.**, at 63 tbl. III.8. U sing that roughly two-to-one relationship as a proxy, we double Treasury's 16 percent figure to estimate the share of restricted instruments. We then assume institutions would pursue changes for only half of those instruments, whether to address a perceived conflict with the proposal or to avoid uncertainty about its application. That calculation produces 16 percent, which we round down to 15 percent, assigning no modification expense to the remaining 85 percent of reviewed instruments.

appropriate parties, negotiate revised terms, obtain approvals, and update award criteria and administration. To avoid overstating the time involved, we calculate the cost using just 25 additional hours per fund—slightly more than three combined workdays spread among counsel and institutional staff. Even that limited amount of time, at the same $530 blended rate, produces $13,250 per fund and approximately $2.5 billion in total.[ssss] The calculation adds nothing for protracted negotiations, difficult legal questions, or changes affecting multiple programs.

Obtaining judicial approval for even a small share of reviewed funds would add approximately $2.5 billion. Again, to keep the calculation conservative, we count only one-quarter of the funds requiring modification as needing judicial approval—46,875 funds, or just 3.75 percent of all instruments reviewed. Institutions must assemble an evidentiary record, research the applicable legal standard, prepare petitions and declarations, provide notices, address inquiries, and obtain orders permitting the changes. We calculate that additional work using 100 hours of combined professional time per fund—two and a half workweeks—at the same $530 blended rate, producing $53,000 per fund and approximately $2.5 billion in total. This amount covers judicial work separately from the initial review and donor negotiations already counted and assigns no judicial expense to the remaining 96.25 percent of reviewed instruments.

b. Reviewing other operations and maintaining compliance would require another $2.8 billion over ten years. Schools cannot responsibly ignore a proposed rule that puts their entire tax exemptions at risk. Faced with that threat, they must devote time and resources to determining whether their operations comply. The review would reach admissions, athletics, academic programs, student organizations, partnerships, and other school-supported activities. That review would require institutions to identify potentially covered activities, collect the governing policies, assess compliance, and make any necessary changes. Existing civil rights compliance would not eliminate that work: because the proposal expressly reaches otherwise lawful conduct,[tttt] institutions must reassess practices they already reviewed and approved.

An initial college-wide review would require substantial coordination across departments and programs. To keep the calculation conservative, we count only 500 hours of combined professional time per college—roughly twelve and a half workweeks spread among counsel, administrators, and staff. At the same $530 blended rate,[uuuu] that produces $265,000 per college, or $450.5 million across approximately 1,700 institutions. A large university could require considerably more time simply to identify the activities requiring examination.

K–12 schools would face meaningful costs even for a smaller review. We count only 50 hours per school and use a lower blended professional rate of $300 per hour. That produces $15,000 per school, or $244.5 million across approximately 16,300 schools. Combined with the college review, the initial expenditure totals approximately $695 million.

Continuing compliance would impose recurring expenses as schools establish programs, recognize student organizations, enter partnerships, and revise policies. Institutions must train responsible personnel, evaluate new activities, and address routine compliance questions. We

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ssss 187,500 funds × 25 hours × $530 = $2,484,375,000.

tttt 91 Fed. Reg. at 56,815.

uuuu *See supra* note **Error! Bookmark not defined.**.

assume annual work equal to only 30 percent of the initial college review and 40 percent of the smaller K–12 review. That represents 150 hours per college and 20 hours per K–12 school annually, costing approximately $233 million across the covered institutions. The initial review and nine subsequent years of compliance total approximately $2.8 billion.

Smaller institutions would have fewer resources to absorb these expenditures. Many lack dedicated legal or compliance personnel and must purchase outside assistance or redirect existing employees. Smaller enrollment does not eliminate the need to collect policies, examine programs, train personnel, and evaluate new activities. Those tasks consume staff time even when salaries are already budgeted, displacing work focused on educating and supporting students.

c. Uncertainty about tax status would put billions of dollars in educational support at risk. Donors seeking to preserve the tax benefits of their gifts may postpone contributions or direct them elsewhere if they cannot be confident that a covered institution will retain its tax-exempt status. That uncertainty could affect giving even to institutions committed to complying with the rule, as they assess its reach and pursue any necessary changes. The resulting disruption would extend beyond gifts subject to particular restrictions, potentially reducing support for financial aid, academic programs, and other educational purposes.

Changes in tax incentives have already produced substantial reductions in giving. The 2017 Tax Cuts and Jobs Act nearly doubled the standard deduction, prompting approximately 23 million households to stop itemizing and lose the separate federal income-tax deduction for charitable contributions. Researchers attributed approximately $20 billion in reduced first-year giving to that change—an amount equivalent to nearly 5 percent of total charitable contributions in 2018. Approximately $4 billion reflected gifts shifted into the preceding year; the remaining $16 billion represented a continuing annual reduction, equivalent to nearly 4 percent of that year's giving.[vvvv]

Even a small reduction in giving to private, nonprofit schools would deprive students of billions of dollars in support. To keep this calculation conservative, we use just 2 percent—roughly half the continuing reduction associated with the TCJA. For private, nonprofit colleges and universities, we count half of the $78.8 billion contributed to higher education in fiscal year 2025, producing $39.4 billion.[wwww] Participating independent K–12 schools received another

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[vvvv] Xiao Han, Daniel M. Hungerman & Mark Ottoni-Wilhelm, *Tax Incentives for Charitable Giving: New Findings from the TCJA* (NBER Working Paper No. 32737, July 2024), https://doi.org/10.3386/w32737; Indiana University Lilly Family School of Philanthropy, *Tax Law Change Caused U.S. Charitable Giving to Drop by About $20 Billion in Law's First Year, New Study Shows* (July 29, 2024), https://philanthropy.indianapolis.iu.edu/news-events/news/_news/2024/tax-law-change-caused-us-charitable-giving-to-drop-by-about-20-billion-new-study-shows.html; Indiana University Lilly Family School of Philanthropy, *Giving USA 2019: Americans Gave $427.71 Billion to Charity in 2018 Amid Complex Year for Charitable Giving* (June 2019), https://philanthropy.indianapolis.iu.edu/news-events/news/_news/2019/giving-usa-2019-americans-gave-42771-billion-to-charity-in-2018-amid-complex-year-for-charitable-giving.html.

[wwww] CASE, *CASE Insights on Voluntary Support of Education (United States): 2025 Key Findings* 5 (Apr. 2026), https://www.case.org/system/files/media/inline/CASE%20Insights%20on%20VSE,%202025%20%20Key%20Findings.pdf. The 50 percent private-institution allocation uses CASE's historical public/private breakdown as a benchmark: private institutions received approximately 51.5 percent of contributions reported by the 833 institutions providing complete data for fiscal year 2020. CASE, *Voluntary Support of Education: Key Findings,*

$5.87 billion that year.[xxxx] Together, those amounts exceed $45 billion, which we round down to $45 billion. A sustained 2 percent reduction therefore represents $900 million in lost support annually, or $9 billion over ten years. The calculation holds the annual giving baseline constant and adds nothing for private K–12 schools outside the survey.

The disruption would extend beyond the schools counted here. Treasury's asserted authority to attach new public-policy conditions to exemption is not confined to education. Donors making long-term commitments to hospitals, religious organizations, and other charities would face uncertainty about whether future Administrations would permit institutions to honor their gifts. The calculation includes none of that additional disruption.

d. Higher borrowing costs would divert additional resources from education, even if no school loses its exemption. Schools finance facilities through bonds whose favorable tax treatment depends on their exempt status. Making that status less secure gives investors reason to demand higher interest rates. Markets have already responded to threats alone: reported spreads on one university's tax-exempt bonds widened by more than 30 basis points, or 0.30 percentage points, amid federal threats to its funding and exemption.[yyyy]

Even a gradual increase in borrowing costs would add approximately $1.1 billion to $2.3 billion over ten years. Private, nonprofit colleges and universities held more than $152 billion in long-term debt in 2022.[zzzz] To avoid treating all existing debt as immediately more expensive, we count only 5 to 10 percent of that original debt as refinancing each year. We apply the additional 0.30 percentage points only after refinancing. With refinancing occurring halfway through each year, the first year's refinanced debt bears the additional expense for 9.5 years, the second year's for 8.5 years, and so on. That produces $1.14 billion to $2.28 billion in additional interest over the decade.[aaaaa]

The calculation leaves substantial financing expenses uncounted. It includes no borrowing for new facilities, no private K–12 debt, and no bond-redemption, refinancing, or other transaction costs. Nor does it count other consequences of losing exempt status, such as the cost to institutions and employees of moving retirement savings out of § 403(b) plans, which are available only to exempt and public educational employers.

e. Higher insurance costs would divert still more resources from education. The proposal would increase the stakes of discrimination disputes and add the expense of

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2019–20 8 fig. 8 (Feb. 2021), https://www.case.org/system/files/media/file/VSE%20Research%20Brief%20Key%20Findings%202019-20.pdf.

[xxxx] CASE & NAIS, *CASE Insights on Philanthropy in Independent Schools (United States): 2025 Key Findings* 7 (July 2026) (reporting $5.87 billion received by 1,944 participating independent schools), https://files.eric.ed.gov/fulltext/ED682257.pdf.

[yyyy] *Harvard Muni Bonds a Buy Amid Battle with Trump White House, Barclays Says*, InvestmentNews (Apr. 25, 2025), https://www.investmentnews.com/fixed-income/harvard-muni-bonds-a-buy-amid-battle-with-trump-white-house-barclays-says/260285; *see also* Christina Baker, *Higher Education Bonds Keep Flowing Amid Threats to Sector*, The Bond Buyer (May 8, 2025), https://www.bondbuyer.com/news/higher-education-bonds-keep-flowing-amid-threats-to-sector.

[zzzz] American Association of University Professors, *The Annual Report on the Economic Status of the Profession, 2023–24*, at 94 fig. 12 (2024), https://www.aaup.org/sites/default/files/2024Bulletin_ARES.pdf.

[aaaaa] $152 billion × 5 percent × 0.003 × (9.5 + 8.5 + … + 0.5) = $1.14 billion; substituting 10 percent produces $2.28 billion.

exemption investigations. Insurers would have additional exposure to price or exclude. Other increases in institutional litigation risk have already produced higher premiums and stricter terms: Gallagher reports that antitrust claims have increased management-liability premiums, while United Educators increased premiums by an average of 30 percent during the 2021 education-insurance market correction.[bbbbb]

Even a much smaller increase would impose substantial recurring costs. United Educators alone reported $422 million in premiums in 2024.[ccccc] Because United Educators insures public as well as private nonprofit institutions, we count only half—$211 million—toward relevant private-institution coverage. A sustained increase of 5 to 10 percent would add approximately $10.6 million to $21.1 million annually, or approximately $106 million to $211 million over ten years.

Higher premiums would not capture the full expense. Institutions would also bear costs through deductibles, retentions, and coverage exclusions, including legal expenses for matters their policies do not cover. The calculation adds nothing for those expenditures. Treasury examines neither the likely insurance response nor the additional costs schools would absorb themselves.

The proposed rule would impose particular burdens on institutions serving historically underserved communities and on religious schools. Historically Black Colleges and Universities (HBCUs), Hispanic-Serving Institutions (HSIs), and other schools serving historically underserved communities would have to review scholarships, recruitment, mentoring, and donor commitments central to their educational work, including programs open to everyone. Religious schools would face an additional burden in determining whether faith-based scholarships, recruitment, academic programs, and donor restrictions satisfy Treasury's unresolved distinction between religion and ancestry. Resources devoted to reviewing, restructuring, or defending those activities would be diverted from the students they serve. Treasury never considers those concentrated burdens.

Taken together, these conservative estimates identify approximately $19.8 billion to $21.3 billion in compliance costs, lost charitable support, and increased financing and insurance expenses over ten years. Those amounts do not include the additional tax liabilities institutions could face if they lose their exemptions, including federal and state income taxes and, where applicable, state and local sales and property taxes. The full consequences for institutions and their students could therefore be substantially greater. Treasury does not account for these burdens or explain what benefits could justify them.

[bbbbb] Gallagher, *Higher Education Property and Casualty Market Update* (Nov. 2025), https://www.ajg.com/news-and-insights/higher-education-property-and-casualty-market-update-november-2025/; Risk Placement Services, *2022 Mid-Year State of the Education Market*, https://www.rpsins.com/learn/2022-mid-year-state-of-the-education-market/ (describing the 2021 market correction).

[ccccc] United Educators, *2025 Renewal* (Mar. 2025), reproduced in University of Wyoming Board of Trustees, Fiscal and Legal Affairs Committee, *Open Session Agenda Packet* 36 (Nov. 19, 2025), https://www.uwyo.edu/trustees/_files/docs/committees/2025/11-2025/2025-nov-flac-open-session-final-agenda-packet.pdf. The calculation allocates 50 percent of the insurer's $422 million premium base to relevant private-institution coverage. Calculations: $422 million × 50 percent × 5 percent × 10 years = $105.5 million; substituting 10 percent produces $211 million.

D. Treasury disregards reliance interests and has not shown how institutions can comply or the IRS can administer the proposed rule.

1. Treasury ignores the reliance interests created by fifty years of guidance.

Treasury would threaten institutions' exemptions for maintaining arrangements its own guidance expressly assured them were permissible. For fifty years, that guidance has informed scholarships, restricted gifts, and educational commitments designed to last for decades. An agency changing course must account for the "serious reliance interests" its longstanding policy has created.[ddddd] The proposed rule acknowledges the reversal but never meaningfully examines the commitments Treasury induced.

The guidance gave institutions specific assurances on which to structure those commitments. Revenue Procedure 75–50 provided that policies favoring racial minority groups in admissions, facilities, programs, and financial assistance would not constitute discrimination when their purpose and effect were to promote a school's racially nondiscriminatory policy. It separately assured schools that qualifying minority-favoring scholarship and loan programs "will not adversely affect the school's exempt status."[eeeee] Institutions and donors thus had affirmative guidance on which to structure their arrangements. The proposal would delete those provisions and make the conduct they addressed potential grounds for revocation.[fffff]

Applying the proposed rule to future taxable years would still disrupt completed gifts and binding commitments. Donors transferred property, institutions accepted enforceable restrictions, and students planned around promised support under Treasury's published assurances. Institutions would now have to change or abandon those arrangements to preserve their exemptions. The D.C. Circuit reviews such "secondary retroactivity"—rules governing future conduct that impair the value of past transactions—for reasonableness under the APA.[ggggg] Treasury must justify imposing those consequences on existing arrangements, including the expense of undoing commitments its own guidance encouraged. A future applicability date does not supply that justification.

Treasury must assess those reliance interests and weigh them against its reasons for changing course.[hhhhh] Its invocation of *SFFA* does not eliminate that duty, particularly where the proposal withdraws assurances specific to tax exemption and expressly reaches otherwise lawful conduct.[iiiii] Yet the proposed rule does not examine how many existing commitments would be affected, which can lawfully be modified, or what happens to students and institutions while modifications are pursued. Nor does it meaningfully consider allowing additional time for legally required modifications. Treasury cannot reasonably change course without examining how to protect the commitments its prior policy encouraged.

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ddddd *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

eeeee Rev. Proc. 75–50 §§ 3.02, 4.05, *quoted in* 91 Fed. Reg. at 56,813.

fffff 91 Fed. Reg. at 56,815, 56,818.

ggggg *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588–89 (D.C. Cir. 2001).

hhhhh *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 30–33 (2020).

iiiii 91 Fed. Reg. at 56,815.

2. Treasury has not shown that it can administer the regime it proposes.

Treasury has not shown that the IRS can administer the sweeping regime it proposes. The proposed rule would require tax officials to assess classroom instruction, student activities, religious membership criteria, scholarship restrictions, and countless decisions across decentralized institutions. The proposed rule identifies neither workable standards for those judgments nor the expertise, personnel, and procedures needed to make them.[jjjjj] Nor does it consider which existing tax-administration responsibilities would suffer as resources are diverted. An agency must confront the workload and practical obstacles its policy would create; general assurances about enforcement capacity cannot supply that analysis.[kkkkk]

Treasury rests its proposal on *Bob Jones* without confronting the differences that determine whether its new regime can work. *Bob Jones* involved express institutional policies excluding Black applicants or prohibiting interracial dating and marriage.[lllll] The policies were identifiable, their institutional source was clear, and the schools defended them. This proposal would require officials to investigate disputed conduct throughout thousands of institutions and determine whose actions count, what motives matter, and when a particular practice warrants institution-wide consequences.[mmmmm] Those differences change the scale and nature of the enforcement task, the expertise required, and the discretion officials would exercise. Treasury never explains why the administrative model for the policies in *Bob Jones* can accommodate those demands. By treating fundamentally different enforcement problems as the same, Treasury assumes away the central administrative questions its proposal presents.[nnnnn]

The proposed rule leaves basic questions unanswered at every stage of enforcement—from deciding whose conduct counts to correcting a mistaken determination:

- **Treasury does not say whose conduct can jeopardize an institution's exemption.** Agencies must make eligibility standards generally known so they can be applied consistently, rather than determine eligibility through unpublished, ad hoc decisions.[ooooo] A purported standard that offers "no meaningful guidance" does not satisfy that

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[jjjjj] For example, Treasury's fiscal year 2027 budget request would reduce appropriated staffing for the IRS's Regulatory activity from 828 full-time equivalents to 653. *See* U.S. Dep't of the Treasury, *Fiscal Year 2027 Budget-in-Brief: Internal Revenue Service* 1–3 (comparing fiscal year 2026 enacted appropriations with the fiscal year 2027 request), https://home.treasury.gov/system/files/266/14.-IRS-FY-2027-BIB.pdf. The proposed rule never explains how the proposed undertaking fits within available resources or what additional capacity it would require. Justice Powell likewise emphasized the limits of the IRS's institutional expertise, observing that questions concerning religion and civil rights are "far afield from the more typical tasks of tax administrators." *Bob Jones Univ. v. United States*, 461 U.S. 574, 611 (1983) (Powell, J., concurring in part and concurring in the judgment) (quoting former IRS Commissioner Jerome Kurtz).

[kkkkk] *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821–26 & n.69 (D.C. Cir. 1983).

[lllll] *Bob Jones University v. United States*, 461 U.S. 574, 580–84 (1983).

[mmmmm] 91 Fed. Reg. at 56,815, 56,819.

[nnnnn] *Cf. Business Roundtable v. SEC*, 647 F.3d 1144, 1154–55 (D.C. Cir. 2011) (faulting the SEC for applying the same proxy-access rule to investment companies without adequately considering how their distinct regulatory protections and governance structures affected the rule's costs and benefits).

[ooooo] *Morton v. Ruiz*, 415 U.S. 199, 231–32 (1974) (requiring a generally known eligibility standard to ensure consistent application and avoid arbitrary denial of benefits).

obligation.[pppp] Treasury must specify when conduct by an employee, individual student, student organization, affiliated foundation, contractor, or outside partner is attributable to the school. It must also explain whether an isolated mistake or dormant policy can jeopardize exemption, or whether recurrence, institutional authorization, or senior-management involvement is required. Those judgments, and the protection afforded an institution that promptly corrects a problem, cannot be left to individual investigators to invent. Without those rules, investigators would determine the basic conditions on exemption as they decide which institutions to investigate.

- **Treasury does not explain when neutral criteria become discriminatory proxies.** The proposed rule anticipates that neutral criteria correlated with race can produce "substantially similar outcomes,"[qqqqq] yet prohibits covered discrimination "for any purpose."[rrrrr] It never explains whether selecting criteria for that correlation is permissible or evidence of discrimination. Institutions could follow Treasury's suggested approach only to have an enforcement official treat their reasoning as evidence against them. The uncertainty also reaches consideration of applicants' individual experiences. *SFFA* expressly permits institutions to consider how race affected an applicant's life when evaluating that applicant's character and abilities.[sssss] Treasury never explains how its prohibition preserves that distinction. Institutions could therefore face an exemption investigation for individualized consideration that the very decision Treasury invokes expressly permits.

- **Treasury's religious exception requires officials to separate religion from ancestry even when a faith's membership rules combine the two.** The preamble permits religious selection only when based "solely on religion and not on shared ancestry or ethnic characteristics," but the operative regulatory text contains no corresponding exception. Even if incorporated into the rule, that exception would create substantial uncertainty. For example, traditional Jewish law recognizes Jewish status through birth to a Jewish mother or conversion, while the Druze faith does not accept conversion and transmits membership through descent. Federal civil rights law also recognizes Jews as a protected racial group for purposes of certain statutes.[ttttt] Officials would therefore have to decide whether an institution's religious criteria satisfy Treasury's "solely" religious standard despite their overlap with ancestry. Courts have required administrative approaches that avoid examining religious doctrine and motive because "the very process of inquiry" can threaten religious freedom.[uuuuu] Treasury supplies no method for administering its exception without those inquiries.

- **Treasury does not explain how its prohibition accommodates federally authorized or required preferences for Native Americans.** Congress has expressly supported

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[pppp] *U.S. Postal Serv. v. Postal Regul. Comm'n*, 785 F.3d 740, 753–54 (D.C. Cir. 2015) (holding agency action arbitrary and capricious for failure to articulate a "comprehensible standard" and rejecting a purported standard that offered "no meaningful guidance" for future applications).

[qqqqq] 91 Fed. Reg. at 56,817–18.

[rrrrr] *Id.* at 56,819 (proposed § 1.501(c)(3)–2(b)).

[sssss] *SFFA*, 600 U.S. at 230–31.

[ttttt] *See United States v. Nelson*, 277 F.3d 164, 177–78 (2d Cir. 2002) (addressing protection of Jews as a racial group under 18 U.S.C. § 245).

[uuuuu] *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

preferences for Native Americans in education, training, and employment, and some federal contracts and grants must include such preferences.[vvvvv] For example, federal law provides grants to private nursing schools, permits those grants to fund scholarships, and requires the Secretary to give funding priority to programs that themselves favor Native Americans.[wwwww] A private, nonprofit institution administering such a program would need to know how Treasury distinguishes those congressionally supported preferences from discrimination prohibited "for any purpose." The proposal excludes tribal governmental schools, but that institutional exclusion does not resolve the treatment of programs at covered private schools.[xxxxx] Treasury should explain how its prohibition accommodates these federal policies and how institutions can satisfy applicable funding conditions without jeopardizing their exemptions.

- **Treasury does not explain how officials should reconcile the prohibition with other legal obligations.** As §§ II.B.3 and II.C.2.a explain, institutions may face conflicts involving court-ordered remedies and binding donor restrictions. The proposed rule likewise supplies no guidance on national-origin scholarships, heritage programs, tribal preferences, or demographic data collection. These are foreseeable questions schools must answer before deciding how to operate. As then-Judge Scalia explained, "the whole point of rulemaking as opposed to adjudication" is to achieve "a large increase in efficiency and predictability."[yyyyy] Treasury instead leaves schools and investigators to work out the prohibition's basic boundaries case by case, with institutions' entire exemptions at risk.

- **Treasury does not show how mistaken determinations would be corrected before serious harm occurs.** The proposed rule does not explain how the timing of a violation, its correction, and the IRS's determination would affect exemption for the taxable year.[zzzzz] The financing and donor consequences described above may arise while an institution contests that determination. Eventual administrative or judicial review does not establish that an institution can obtain relief before those consequences occur. Treasury never examines what safeguards would address that risk.

These omissions concern the basic decisions necessary to administer the proposed rule. Treasury cannot reasonably adopt an institution-wide sanction without explaining who will apply it, under what standards, and with what safeguards.

3. The proposed transition does not give institutions a workable opportunity to comply.

Treasury threatens institutions' exemptions on a schedule it has never shown they can meet. The proposal would apply to taxable years beginning after May 31, 2027. Treasury expects to finalize the proposed rule before that date and asserts that this schedule will allow schools to amend their policies.[aaaaaa] But it promises no minimum interval between finalization and

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vvvvv *See, e.g.*, 25 U.S.C. §§ 5307(b), 1616g(c)(2)(C), (E).

wwwww *See* 25 U.S.C. § 1616e(a)(1), (b)(2), (d)(1).

xxxxx 91 Fed. Reg. at 56,819 (proposed § 1.501(c)(3)–2(c)).

yyyyy *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 745 F.2d 677, 689 (D.C. Cir. 1984) (Scalia, J.).

zzzzz 91 Fed. Reg. at 56,819 (proposed § 1.501(c)(3)–2(a), (d)).

aaaaaa *Id.* at 56,815–16, 56,819 (proposed § 1.501(c)(3)–2(d)).

applicability, and it never assesses how long compliance will take. Depending on when Treasury acts and an institution's taxable year, schools could have little time to complete changes affecting operations throughout the institution.

Compliance would require substantial work even where institutions control the necessary changes. The reviews and modifications described in § II.C.2 require collecting records, evaluating programs and practices, obtaining institutional approvals, and implementing changes across academic and administrative units. Treasury has neither measured that work nor guaranteed a minimum interval in which to complete it.

Some necessary changes would depend on people and processes institutions cannot control. Treasury acknowledges that modifying endowed scholarships may require working with donors or their heirs to establish alternative eligibility criteria. Other modifications may require involvement by state officials or judicial proceedings. As NAICU's members have experienced, those modification processes can take years. Institutions cannot dictate when donors will respond, whether they will consent, or when a court will act. Nor can they disregard binding restrictions while those processes remain pending. A deadline that leaves no room for those steps can make lawful compliance impossible even for an institution that acts diligently.

An unachievable deadline would force rushed decisions with consequences for students and programs. A school unable to complete review in time would have reason to suspend an activity rather than risk its exemption. Suspending scholarship awards could interrupt promised student support without resolving the status of the underlying fund. Continuing awards could invite a claim that the institution is maintaining a prohibited practice. Treasury never explains how schools should navigate those conflicts or whether diligent efforts to obtain required approvals will protect them.[bbbbbb]

Institutions need at least three years after publication of a final rule to complete the required review and lawfully modify affected arrangements. That work includes examining operations and gift instruments, negotiating with donors, obtaining institutional approvals, and pursuing proceedings that NAICU members report can take years. Treasury should therefore make the proposed rule applicable no earlier than taxable years beginning after May 31, 2030, and guarantee at least three years between publication and applicability. Institutions diligently pursuing required donor consent or judicial approval must also retain their exemptions while those processes remain pending. A workable transition must account for the time lawful compliance requires, including steps institutions cannot accelerate themselves.[cccccc]

4. Treasury fails to consider obvious, less disruptive alternatives.

Treasury threatens institution-wide loss of exemption without explaining why narrower measures would not address its stated concerns. It never seriously considers relying on existing enforcement mechanisms, limiting the conduct covered, providing an opportunity to correct

[bbbbbb] *Cf. International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 641–43 (D.C. Cir. 1973) (requiring a reasoned basis for EPA's prediction that manufacturers could meet statutory emissions standards and considering the consequences of an erroneous feasibility determination in evaluating the showing required to support it).

[cccccc] *See Ohio v. EPA*, 603 U.S. 279, 292–97 (2024) (granting a stay because challengers were likely to establish that EPA acted arbitrarily by failing to provide a reasoned response to comments questioning an assumption underlying its regulatory plan).

violations, or protecting commitments made under its longstanding guidance. These alternatives directly address the problems Treasury invokes while avoiding many of the proposal's costs and collateral consequences. Reasoned decisionmaking requires their consideration.[dddddd]

- **Rely on existing civil rights enforcement.** Treasury should first consider whether Title VI, § 1981, Title VII, applicable state civil rights laws, private litigation, agency enforcement, and the IRS's existing nondiscrimination requirements adequately address the conduct it seeks to prevent. The Administration itself reports that existing authorities support extensive investigations and institutional reforms, including enforcement directed specifically at admissions and scholarship criteria.[eeeeee] Treasury never reconciles that account of effective enforcement with its supposed need for a parallel regime carrying broader coverage and more sweeping consequences.[ffffff] The proposed rule identifies no

[dddddd] *See Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 46–51 (1983); *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 30–33 (2020).

[eeeeee] The Administration repeatedly describes existing enforcement as securing sweeping institutional reforms and changing practices across higher education. Secretary of Education Linda McMahon called the Columbia agreement a "seismic shift" and a "roadmap for elite universities." She credited it with securing a $200 million payment and changes to admissions, hiring, student discipline, and DEI programs, and predicted that those reforms would "ripple across the higher education sector" and "change the course of campus culture for years to come." U.S. Dep't of Educ., *Secretary McMahon Statement on Columbia University Deal* (July 23, 2025), https://www.ed.gov/about/news/press-release/secretary-mcmahon-statement-columbia-university-deal.
DOJ likewise reports extensive investigations and negotiated reforms under existing authorities. Assistant Attorney General Harmeet K. Dhillon testified that the Civil Rights Division had opened admissions investigations involving 50 universities, 16 law schools, and seven medical-school programs and was engaged in "collaborative resolution efforts" with public and private institutions. Harmeet K. Dhillon, *Statement Before the Senate Judiciary Committee's Subcommittee on the Constitution* 2 (July 23, 2025), https://www.judiciary.senate.gov/download/2025-07-23_-testimony_-dhillonpdf?download=1. HHS has expressly invoked Title VI to investigate scholarship criteria, declaring that "OCR will enforce Title VI to ensure equality of opportunity and fundamental fairness in scholarship programs." U.S. Dep't of Health & Hum. Servs., *HHS' Civil Rights Office Launches Investigation into Alleged Civil Rights Violations in Legal Scholarship Program Operated Nationwide* (Sept. 16, 2025), https://www.hhs.gov/press-room/ocr-investigates-alleged-bias-in-legal-scholarship-program.html.
The Administration also describes existing law as providing substantial additional financial deterrence. Announcing DOJ's enforcement position, then-Deputy Attorney General (now Attorney General) Blanche called vigorous False Claims Act enforcement "[o]ne of the most effective ways" to enforce federal civil-rights laws, specifically identified universities as potential defendants, and emphasized treble damages and significant penalties. His memorandum established a coordinated enforcement initiative involving DOJ's Civil and Civil Rights Divisions, directed each of the 93 U.S. Attorneys' Offices to designate an attorney for that effort, and encouraged private enforcement suits. Memorandum from Deputy Att'y Gen. Todd Blanche, *Civil Rights Fraud Initiative* 1–2 (May 19, 2025), https://www.justice.gov/dag/media/1400826/dl.
Other agencies likewise report substantial results under existing law. The EEOC secured a $21 million university settlement under Title VII, and HHS OCR announced Title VI violation findings concerning medical-school admissions. *See* EEOC, Press Release (July 25, 2025), https://www.eeoc.gov/newsroom/largest-eeoc-public-settlement-almost-20-years-columbia-university-agrees-pay-21-million; HHS, Press Release (Sept. 8, 2026), https://www.hhs.gov/press-room/hhs-ocr-duke-school-medicine-civil-rights-admission.html.

[ffffff] *Cf. Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (explaining that an "unexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice").

enforcement gap and never explains why the mechanisms the government already invokes cannot resolve its concerns.

- **Use established substantive standards and procedural protections.** Any additional requirements should be tied to established standards governing unlawful discrimination, including applicable Title VI definitions, procedures, and protections. Treasury should abandon its attempt to reach otherwise lawful conduct through an undefined additional prohibition. Using established standards would reduce uncertainty, conflicting interpretations, and the need for tax officials to develop a separate body of civil rights rules.

- **Limit the proposed rule to specifically identified conduct.** Treasury should identify the particular practices it seeks to prohibit and explain why they warrant loss of exemption. *Bob Jones* addressed express institutional policies, including a ban on interracial dating and marriage. If Treasury believes a particular admissions or scholarship practice warrants extending that regime, it should say so. Sweeping references to every "educational policy" or "school-supported" activity leave institutions guessing. Treasury should eliminate or narrow those terms, clearly define when conduct is attributable to an institution, and distinguish institutionally authorized practices from isolated or unauthorized acts.

- **Require a final judicial determination before imposing adverse institutional consequences.** Treasury should consider preserving exemption unless and until a final judicial judgment establishes the underlying unlawful discrimination, following completion of appellate review. Allegations, settlements without admissions, and contested preliminary findings should not place an institution's exemption at risk. A final judgment should not automatically require revocation; Treasury would still need to assess attribution, materiality, corrective action, and the justification for an institution-wide sanction. This approach would reduce the risk that tax officials prejudge disputes, engage in selective enforcement, or impose consequences before the underlying conduct has been adjudicated.

- **Provide notice, correction, and graduated enforcement.** Treasury should evaluate mechanisms, consistent with existing statutory authority, that secure compliance before threatening revocation. These include specific notice of the challenged conduct, a meaningful opportunity to respond, reasonable cure periods, prospective compliance agreements, and intermediate sanctions legally available under the tax code and civil rights law. Institutions that promptly identify and correct a problem should have clear protection.

- **Provide time to bring existing commitments into compliance.** Treasury should consider preserving exemption while institutions diligently pursue donor consent or judicial modification. It should also provide a transition period based on the time those processes actually require. These measures would protect reliance and give institutions a lawful path to bring existing commitments into compliance without jeopardizing their exemptions.

- **Provide workable protections for religious institutions.** Treasury should clarify and strengthen protection for religious missions, membership criteria, admissions practices, curricula, and observance. It should expressly address traditions in which religious identity and ancestry are intertwined and establish safeguards against tax officials second-guessing religious doctrine. The proposed rule's requirement that selection be based "solely" on

religion does not resolve those concerns.[ggggggg] Treasury must consider an approach that preserves applicable religious protections without requiring institutions to defend their understanding of their faith before the IRS.

- **Protect the lawful missions and programs of HBCUs, HSIs, and other Minority-Serving Institutions (MSIs).** Congress has expressly recognized HBCUs' mission of educating Black Americans and has long supported the work of MSIs in educating the students and communities they serve.[hhhhhh] The President's 2025 executive order likewise directs federal support for HBCUs and their educational capacity.[iiiiii] Treasury should explain how covered private, nonprofit institutions can pursue those missions through lawful recruitment, mentoring, academic support, and cultural programs without jeopardizing their exemptions. Treasury should expressly protect lawful activities advancing these institutions' missions and clarify that their historical identities, student demographics, and participation in congressionally authorized programs do not themselves establish disqualifying discrimination, so that these institutions can continue to fulfill their missions and support the students they serve.

These alternatives would address discrimination while reducing uncertainty, preserving reliance, and limiting harm to students and institutions. Treasury may not reject them merely because it prefers a broader prohibition or a more severe sanction. It must compare their likely effectiveness and costs and explain why any asserted advantage of its chosen approach justifies the additional disruption. The proposed rule contains no such analysis.

III. The Department cannot adopt a final rule on this record.

Treasury has not supplied the factual or analytical foundation needed to adopt this proposed rule. The deficiencies identified above concern why the proposed rule is necessary, what it prohibits, how it would operate, and whether its benefits justify its consequences. Filling those gaps would require substantial analysis that Treasury has not performed or exposed to public scrutiny. Treasury cannot supply a new foundation for its decision for the first time when announcing the final rule.

Notice and comment requires disclosure of the critical factual material supporting an agency's action so that the public can test it. An agency may not rely on new material to repair a deficient economic analysis while denying interested parties an opportunity to comment on that material.[jjjjjj] Nor may it withhold the studies and data on which its conclusions depend.[kkkkkk] Here, institutions cannot meaningfully assess Treasury's claims of minimal costs, adequate transition time, and manageable enforcement without the evidence and methods supporting those claims.

Treasury should withdraw the proposal. If it elects to proceed, it must develop the missing analysis, disclose the critical supporting evidence and methodologies, and provide a meaningful opportunity to comment on that basis for action. Any materially revised proposal must likewise

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ggggggg 91 Fed. Reg. at 56,815.

hhhhhh *See* 20 U.S.C. §§ 1061(2), 1101a(a)(5), 1101b(a).

iiiiii *See* Exec. Order No. 14,283, §§ 2–3, 90 Fed. Reg. 17,543, 17,543–44 (Apr. 28, 2025).

jjjjjj *Chamber of Commerce v. SEC*, 443 F.3d 890, 899–903 (D.C. Cir. 2006).

kkkkkk *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236–39 (D.C. Cir. 2008).

receive the notice and opportunity for comment the APA requires. Treasury cannot use finalization to complete the essential work that should inform public participation in the first place.

CONCLUSION

Treasury should withdraw the proposal. It has not shown why the proposed rule is needed, what benefit it would produce, or how institutions could comply with its uncertain demands. Yet the proposed rule would threaten their entire tax exemptions, discourage lawful educational activity, and disrupt commitments made under Treasury's own longstanding guidance. Neither the authority Treasury invokes nor the record it has developed justifies those consequences.

NAICU and its member institutions remain committed to equal educational opportunity and compliance with civil rights law, and welcome continued engagement with Treasury on those shared goals. If Treasury proceeds, it must address the defects identified in these comments, consider less disruptive alternatives, and give the public a meaningful opportunity to examine the evidence and analysis on which any revised proposal rests.

Request to Testify Telephonically at the Hearing on REG–119986–25

NAICU respectfully requests to testify telephonically at the December 2, 2026, IRS/Treasury hearing on the proposed regulations addressed in these comments.

Outline of Testimony

I. Overview of NAICU and its member institutions

II. Legal and constitutional concerns, including the proposal's justification and scope

III. Precedential implications and unintended consequences

IV. Compliance costs and potential disruption to student services

V. Considerations for small and faith-based private, nonprofit institutions

VI. Effects on charitable giving and institutional financial stability