RE: Public Comment on Document No. ED-2022-OPE-0157

The Wisconsin Institute for Law & Liberty (WILL) is a non-profit public-interest law and policy organization dedicated to the rule of law, individual liberty, constitutional government, and a robust civil society. WILL urges the Department of Education ("Department") not to rescind as proposed portions of 34 CFR sections 75.500 and 75.600 related to Direct Grant Programs and State-Administered Formula Grant Programs.

In 2020, the Department published a rule which added provisions related to free inquiry, making it a material condition of Department grants that public institutions of higher education (IHEs) receiving the grants comply with the First Amendment. Importantly, the 2020 rule prohibits public IHEs from denying to any religious student group any right, benefit, or privilege that is otherwise afforded to other student groups because of the beliefs, practices, policies, speech, membership standards, or leadership standards informed by the sincerely-held religious beliefs of the group.

The Department has taken the position that the current regulations which protect students' First Amendment rights to free speech and free exercise of religion are "not necessary." The Department states that students should resolve disputes at the institutional level and ultimately use the courts *after* their First Amendment rights have been violated.

Religious liberty is one of the most essential of those freedoms protected by the federal constitution. *See, e.g., Michael W. McConnell, Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1244 (2000) ("defend[ing] the idea of religious freedom as our first freedom—both in chronological and logical priority"); *State v. Yoder*, 49 Wis. 2d 430, 434, 182 N.W.2d 539 (1971) (opinion of Hallows, C.J.) ("No liberty guaranteed by our constitution is more important or vital to our free society than is a religious liberty protected by the Free Exercise Clause of the First Amendment."), *aff'd*, 406 U.S. 205 (1972).

Rescinding the 2020 rule and leaving students with litigation as an alternative is not an adequate solution for religious students whose groups are suppressed by public IHEs just as it would not be adequate to rescind rules preventing race and sex discrimination by IHEs because students can always "take it to court." The existing rule allows student groups to obtain redress without going through the costly and lengthy litigation process. It also serves a preventive role by signaling to public IHEs that the Department is committed to religious freedom.

The Department in its Notice of Proposed Rulemaking states that the 2020 rule could be interpreted to allow universities to permit religious student groups to discriminate against vulnerable and marginalized students. Not only is this unsupported—of course religious student groups form an identity around a shared faith and are comprised of members and leaders who share that faith—but the fact is that many religious student groups provide a welcoming environment for students of all backgrounds to grow both spiritually and intellectually. Keeping the current rule in place

would dissuade universities from violating religious student groups' rights. Rescinding the rule would do the opposite.

Religious student groups are a vital part of campus communities in Wisconsin and across the nation. WILL respectfully requests that the Department preserve the legal protections provided in the current regulations 34 CFR sections 75.500(d) and 76.500(d).