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October 27, 2026

VIA ELECTRONIC SUBMISSION:
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VIA EMAIL:
Publichearings@irs.gov

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

Re: Racial Nondiscrimination in Private Schools
Docket No. IRS-2026-1189

To Whom It May Concern,

Thank you for the opportunity to provide comments on Docket No. IRS-2026-1189, *Racial Nondiscrimination in Private Schools* (REG-119986-25). While Independent Sector and its members appreciate any effort to address racial discrimination, we are deeply concerned by the proposed rule and urge the Treasury Department and the Internal Revenue Service (IRS) to withdraw it. We also request the opportunity to testify at the public hearing scheduled for December 2, 2026 at 10:00 a.m. ET. An outline of topics to be discussed and the proposed time to be devoted to each topic is included as an appendix to this comment.

Independent Sector is a national membership organization of nonprofits, foundations, and corporate giving programs, and our diverse members range from some of the largest charities in the world to all-volunteer organizations, and from major global philanthropies to small foundations, academic centers, and more. Our core aim is to support these organizations and all civil society, working toward a healthy and equitable nonprofit sector to ensure all people living in the United States thrive.

I. Importance of the Nonprofit Sector

In considering the proposed rule's impact on the nonprofit sector — which is composed of both public charities and foundations — the IRS must begin with some consideration of the sector's importance.

The nonprofit sector has been the backbone of civil society throughout the nation's history. It has helped foster our democracy and serves as an essential and trusted partner to government at all levels. Every day, nonprofit organizations work to meet community needs, providing housing, health care, nutrition, workforce development, education, disaster relief, cultural inspiration, spiritual guidance, environmental conservation, and any number of other vital services. Many nonprofits fill key gaps in the social safety net, helping both people living in poverty and those who live below the ALICE¹ Threshold of Financial Survival — the cost of household essentials (housing, childcare, food, transportation, health care, and technology, plus taxes) in their county of residence — but who earn above the federal poverty level, and do not qualify for traditional public assistance.²

While these organizations exist to serve a charitable purpose, the sheer magnitude of their work constitutes a vital part of our economy. Approximately 10% of the private workforce in the U.S. — approximately 13 million paid workers — is employed by a nonprofit organization. Nonprofits pay \$870 billion annually in wages, supporting families in communities across America. In 2023, nonprofits comprised over 5% of GDP and contributed \$1.5 trillion to the economy.³

II. Persistence of Racial and Ethnic Disparities in the United States

The nonprofit sector has a long history of delivering vital community services to populations who are disproportionately at risk. This includes low-income families, people with disabilities, seniors, and communities of color. Of particular import to this rulemaking, Americans who are Black or American Indian/Alaska Native are more than twice as likely to live below the official poverty line as their non-Hispanic white compatriots, while Hispanic Americans are 85% more likely.⁴ Regarding education, approximately 53% of white American adults age 25 and older had attained an associate's degree or higher as of 2022, compared to 32% of American Indians or Alaska Natives, 39% of Black Americans, and 30% of Hispanic Americans.⁵ Limiting nonprofit organizations' ability to target services at these communities only makes our sector's vital work less effective.

III. Summary of the Notice of Proposed Rulemaking (NPRM)

¹ Asset Limited, Income Constrained, Employed. *ALICE in the Nonprofit Workforce: A Study of Financial Hardship* (Independent Sector and United For ALICE, Sep. 2024) at 2.

² *Id.*

³ *Health of the U.S. Nonprofit Sector, Annual Review* (Independent Sector, Dec. 2025) at Economy & Finance.

⁴ *Poverty in the United States: 2025* (U.S. Census Bureau, Sep. 2026) at 4.

⁵ *Race and Ethnicity in Higher Education: 2024 Status Report* (American Council on Education, May 2024) at 9.

As proposed, new Treas. Reg. § 1.501(c)(3)-2 would provide that a “private school”—any section 501(c)(3) organization classified as an educational organization under section 170(b)(1)(A)(ii)—is not “operated exclusively for exempt purposes” if it “adopts, maintains, or enforces any policy or practice that discriminates on the basis of race, color, or national or ethnic origin in the administration of any educational policy, admissions policy, scholarship or loan program, athletic program, or other school-administered or school-supported program.”⁶ The proposed rule specifies that such discrimination includes discrimination “for any purpose,” and the preamble explains that the rule reaches all racial discrimination in education “regardless of the intent behind or the legality of such discrimination,” including where it is defended as serving “remedial or diversity-related objectives.”⁷

The proposed rule would also delete the sentences of Rev. Proc. 75-50 that, for more than fifty years, have confirmed that policies and financial assistance programs favoring racial minority groups do not jeopardize a school’s exemption when they promote the school’s racially nondiscriminatory policy.⁸ In short, the proposed rule would prohibit schools from engaging in or supporting any policy or program intended to remedy the lasting effects of the long history of racial discrimination in education in the United States.

IV. Analysis of the proposed rule

The proposed rule unreasonably limits the rights of nonprofit organizations and donors under the First Amendment, misapplies the “fundamental public policy” doctrine, is overbroad and vague such that it would chill a wide range of critical charitable services, and opens the door to further redefinition of “charitable” purposes under section 501(c)(3), jeopardizing the tax exempt status of any charitable organization that works to remedy racial discrimination in America. In sum, the proposed rule would set an alarming precedent that threatens the independence of American civil society.

- a. *The proposed rule would unreasonably limit the fundamental freedom of nonprofit organizations to pursue lawful missions and of nonprofit organizations and individuals to donate funds to causes consistent with their values.*

One of the hallmarks of the charitable sector in the United States is its pluralistic nature – the sector comprises organizations holding a wide range of missions and using an equally wide range of means to pursue them. The charitable sector is an invitation for individuals to look right outside their own doors, identify problems and opportunities that impact them or their communities, and participate in developing solutions to those problems or strategies for pursuing independence.

⁶ *Racial Nondiscrimination in Private Schools*, 91 Fed. Reg. 56,811, 56,819 (Sept. 4, 2026) (“NPRM”).

⁷ *Id.* at 56,815

⁸ *Id.*

These characteristics are made possible only through robust First Amendment protections. When foundations or nonprofit organizations solicit or spend funds to further their specific missions, to express points of view on social issues and causes, or to enhance core public values and services, they are engaging in expressive conduct entitled to rigorous First Amendment protection.⁹ Similarly, individuals exercise their protected rights of expression when they make decisions about which causes they give money to and how they want their funds to be used. A donor who endows a scholarship for students from a particular community is doing more than handing over money; they are expressing their view that the education of those students matters. The proposed rule would unconstitutionally limit the ability of nonprofit organizations and donors to speak and express their values.

In addition to First Amendment protections for donors' speech and expressive conduct, donor intent and restrictions on how gifts are used are protected by law. The IRS implies it would be relatively simple for schools to work with donors, "or the donors' heirs," to find new uses for these funds.¹⁰ But a donor's restriction on how a gift is used is governed by state law, which generally requires donor consent or a court's approval to use a donation for purposes inconsistent with the donor's instructions.¹¹ Doing that for every affected gift is unrealistic and overly burdensome.

Ultimately, the proposed rule would force schools to choose between their tax-exempt status and freely expressing their views and those of their donors. This unduly burdens the very expressive activity that allows nonprofits to speak, assemble, associate, serve their communities, and pursue lawful missions consistent with their values.

b. The IRS misapplies and then perverts the "fundamental public policy" doctrine to entrench discrimination rather than lessen it.

To be tax-exempt under section 501(c)(3) of the Internal Revenue Code, an organization must be organized and operated exclusively for one of several enumerated exempt purposes: charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, or preventing cruelty to children or animals. The IRS defines

⁹ See *Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 796 (1988) (holding that a North Carolina statute limiting the fees that professional fundraisers may charge violates charities' First Amendment rights); *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021) (finding that a tax exempt organization engages in expressive conduct when it decides which charities to support and includes eligibility criteria on its website); *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F.Supp. 2d 222, 262-63 (S.D.N.Y. 2006), *aff'd*, 651 F.3d 218 (2d Cir. 2011), *aff'd sub nom. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013) ("The diversity and breadth of the traditional public functions NGOs contribute to our society should rank the quality of First Amendment rights and protection they merit to no lesser degree than that accorded to editorial opinion or to universities.") (citations omitted).

¹⁰ NPRM, Special Analyses § I.E.1.

¹¹ See, e.g., Ga. Code Ann. § 14-3-190, et seq.; Kan. Stat. § 58-3621, et seq.; Ky. Rev. Stat. § 273.155; Mont. Code § 72-30-301, et seq.; see also Unif. Prudent Mgmt. of Institutional Funds Act § 6 (Unif. L. Comm'n 2006).

“charitable” purposes to include “relief of the poor and distressed or of the underprivileged,” “advancement of education and science,” and work designed to “eliminate prejudice and discrimination” and to “defend human and civil rights secured by law.”¹² Consistent with that definition and with the common understanding of charitable work predating America’s Founding¹³, charitable organizations, including schools, have long undertaken activities intended to remedy over 200 years of policies and practices, including slavery, segregation, and racial discrimination in education, that created vast and persistent racial and ethnic disparities in our nation.

When it announced the “fundamental public policy” doctrine in 1983 in *Bob Jones University v. United States*, the U.S. Supreme Court warned that “a declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.”¹⁴ In ruling that the racially discriminatory admissions policies at issue in that case were contrary to fundamental public policy, the Court noted that “[o]ver the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.”¹⁵

By contrast, this proposed rule aims to prohibit a wide range of charitable activity based principally on a single recent decision addressing admissions at two universities, *Students for Fair Admissions v. President & Fellows of Harvard College* (“SFFA”)¹⁶, a case which, by the IRS’s own admission, did not “directly affect[]” tax exemption, scholarships, or private elementary and secondary schools.¹⁷ The IRS attempts to reframe the Civil Rights Act of 1964 and court precedents starting with *Brown v. Board of Education*—acts explicitly intended to end policies barring members of marginalized racial groups from educational opportunities—as prohibiting actions to remedy the ongoing impact of those policies. Yet those policies were certainly not race-blind, and it is both unreasonable and inconsistent with the historical role of charitable organizations in American society to require organizations working to repair that damage to operate with one hand tied behind their backs.

In the absence of precedent for the assertion that remedying racial discrimination in education is contrary to the “fundamental public policy” of the United States, the NPRM points to two executive

¹² Treas. Reg. § 1.501(c)(3)-1(d)(2).

¹³ The Pennsylvania Society for the Relief of Free Negroes Unlawfully Held in Bondage, an abolitionist society, was founded in Philadelphia in 1775. <https://digitalcollections.statelibrary.pa.gov/Documents/Detail/the-constitution-of-the-pennsylvania-society-for-promoting-the-abolition-of-slavery-and-the-relief-of-free-negroes-unlawfully-held-in-bondage-begun-in-the-year-1774-and-enlarged-on-the-twenty-third-of-april-1787.-to-which-are-added-the-acts-of-the-general-assembly-of-pennsylvania-for-the-gradual-abolition-of-slavery./943155>.

¹⁴ *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).

¹⁵ *Id.* at 593.

¹⁶ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (SFFA).

¹⁷ See NPRM, Special Analyses § I.E & n.6.

orders issued in 2025. To be sure, the *Bob Jones* Court cited to executive orders as evidence of fundamental public policy; indeed, it referenced executive orders issued by Presidents Truman, Eisenhower, and Kennedy as “but a few of numerous Executive Orders over the past three decades demonstrating the commitment of the Executive Branch to the fundamental policy of eliminating racial discrimination.”¹⁸ But executive orders reflect the priorities of one administration and can be undone by the next. Two executive orders issued over the course of a single year by a single administration are a far cry from the decades-long agreement among all three branches of government and across multiple administrations that the *Bob Jones* Court relied on.¹⁹

Perhaps nothing makes the proposed rule’s misapplication of the fundamental public policy doctrine clearer than the outcome of its reasoning. It erases the line between a school that shuts its doors on students because of their race and a school that publicizes scholarship money to reach students from communities that were shut out for generations. The IRS’s own analysis shows what is at stake. The NPRM cites research showing that, in the year after *SFFA*, the share of Black, Native American, Hispanic/Latino, Native Hawaiian, and Pacific Islander students at the most selective colleges went down, and offers that finding not as a warning sign of the retrenchment of racial disparities in higher education, but as evidence that schools are complying with the *SFFA* decision.²⁰ Many of Independent Sector’s members work every day to expand the pathways by which historically excluded students reach for opportunity, and we reject a reading of the law that treats that work as the problem.

c. *The proposed rule is overbroad and vague.*

In addition to misapplying the fundamental public policy doctrine, the proposed regulation is both vague and overbroad, opening the door to effects that would reach well beyond schools. The proposed rule would conclude that a private educational institution is not “operated exclusively for exempt purposes” if it “adopts, maintains, or enforces any policy or practice that discriminates on the basis of race, color, or national or ethnic origin in the administration of any ...school-supported program”—a phrase that the NPRM never defines or explains.²¹

As currently drafted, a school would not know what conduct could jeopardize its tax-exempt status or, indeed, whether it could lose its status due to conduct in which the school itself hasn’t even directly engaged. A “school-supported program” could include allowing students to use space on campus for a club or allowing student groups or outside groups to advertise opportunities or programming to the school community. It could include merely sharing the name or information about a scholarship program. It could include accepting scholarship funds awarded by another

¹⁸ *Bob Jones University*, 461 U.S. at 594-95.

¹⁹ NPRM, Explanation of Provisions n.3 (citing Executive Order 10730 (1957), Executive Order 14173 (Jan. 21, 2025), and Executive Order 14280 (Apr. 23, 2025)).

²⁰ NPRM, Special Analyses § I.E & n.7.

²¹ NPRM, at 56,819.

organization to cover a student's tuition. Many scholarships and programs are funded by or run in partnership with foundations and community organizations, and a school whose own tax exemption is at risk may have every reason to end or reshape those relationships. The lack of clarity around what constitutes a "school-supported" program will chill an extremely broad and deep set of legitimate charitable activities for years while organizations await further guidance and legal rulings, endangering the work of any nonprofit that provides educational services or that partners with, advertises through, or provides scholarships to any educational institution.

Furthermore, if it is established that work to remedy the ongoing effects of past racial discrimination is contrary to the "fundamental public policy" of the United States and is therefore not "charitable" under section 501(c)(3), even the work of non-educational charitable organizations could soon come under threat. Job-training programs, small-business funds, housing initiatives, health clinics, legal aid groups, arts organizations, and the foundations that support them all do work meant to reach and lift up communities that have been left behind and shut out. While this proposed rule does not go that far, it portends that further redefinition of charitable activity may be ahead. This uncertainty alone could lead many organizations to scale back lawful, valuable work for fear of putting their tax exemption at risk.

- d. *The proposed rule would set a precedent that undermines the independence of American civil society.*

There will always be counter-majoritarian nonprofits in a truly democratic state, and a thriving civil society depends on the ability of minority views not just to exist, but to be capable of flourishing. Conversely, a nation that stifles nonprofit organizations voicing unpopular views is a nation whose civil society is under grave threat. Even if there were evidence of widespread disapproval of activities to remedy the effects of past racial discrimination in education, such disapproval would still be insufficient to satisfy the Court's threshold for naming a fundamental public policy for purposes of tax exemption. *Bob Jones* required a long-settled consensus among all three branches of government; indeed, in the more than 40 years since that decision, neither the courts nor Congress have applied the fundamental public policy doctrine to declare that any other issue or purpose is not "charitable" within the meaning of 501(c)(3).

If the priorities of a single administration can be declared fundamental public policy for tax purposes, then the tax-exempt status of charities everywhere depends on staying in step with whoever is in power. A nonprofit sector that must watch the political winds to keep its tax status is no longer independent, and it cannot do what the public counts on it to do: serve communities, speak up, and, when necessary, challenge government and the status quo. The agency charged with administering our nation's tax code should be actively backstopping independence, not creating a roadmap for undermining it.

V. Conclusion

For these reasons, Independent Sector respectfully urges the Treasury Department and the IRS to withdraw the proposed rule. It unreasonably limits the rights of nonprofit organizations, relying on a misapplication of Supreme Court precedent to disrupt a wide range of critical charitable services while threatening the independence of American civil society. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Akilah Watkins". The script is fluid and cursive, with the first name "Akilah" and last name "Watkins" clearly distinguishable.

Dr. Akilah Watkins
President and CEO

Appendix – Outline of Independent Sector's Testimony
Hearing for REG-119986-25, December 2, 2026, 10:00 a.m. ET

- I. Importance of the nonprofit sector (1 min)
- II. The proposed rule would unreasonably limit the fundamental freedom of nonprofit organizations to pursue lawful missions and of nonprofit organizations and individuals to donate funds to causes consistent with their values (3 min)
- III. The proposed rule misapplies the fundamental public policy doctrine and will undermine the independence of American civil society (4 min)
- IV. The proposed rule will chill legitimate charitable activities (2 min)