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March 24, 2023

U.S. Department of Education
Office of Postsecondary Education
400 Maryland Ave, SW
Washington, DC 20202

Re: Opposition to Proposed Rule on "Direct Grant Programs, State-Administered Formula Grant Programs"
Docket ID ED-2022-OPE-0157
RIN 1840-AD72

Secretary Cardona:

As a civil liberties organization committed to safeguarding the rights of all citizens, including the free exercise of religion under the First Amendment, The Rutherford Institute[1] strongly opposes the U.S. Department of Education's ("the Department") attempt through this proposed rule to encourage and enable colleges and universities to more easily obstruct and discriminate against religious student organizations.

The Department recently issued a notice for proposed rulemaking on "Direct Grant Programs, State-Administered Formula Grant Programs" ("NPRM")[2] seeking to rescind conditions on Department grants tied to First Amendment protections[3] that were needed and established for religious student organizations under the Department's previous 2020 final rule.[4] The Department estimates that "approximately 1,217 public [colleges and universities] are currently grant recipients."[5]

[1] The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals' constitutional rights and educate the public about threats to their freedoms.
[2] 88 Fed. Reg. 10857 (proposed Feb. 22, 2023); https://www.federalregister.gov/documents/2023/02/22/2023-03670/direct-grant-programs-state-administered-formula-grant-programs.
[3] 88 Fed. Reg. at 10862.
[4] 85 Fed. Reg. 59916 (effective Nov. 23, 2020); https://www.federalregister.gov/documents/2020/09/23/2020-20152/direct-grant-programs-state-administered-formula-grant-programs-non-discrimination-on-the-basis-of.
[5] 88 Fed. Reg. at 10862.

Those regulations simply require, as a material condition of receiving a grant, that public colleges and universities, or a State or public institution which is a subgrantee, "not deny any religious student organization any right, benefit, or privilege that is otherwise afforded to other student organizations because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely-held religious beliefs."[6] The fact that the Department is trying to rescind a regulation which reflects such a basic and important constitutional principle to prevent religious discrimination and hostility is shocking.

The Department's stated reasons for rescinding the current regulations are baseless and flawed.

The Department claims that some organizations "worried that [the current regulations] could be interpreted to require [public colleges and universities] to go beyond what the First Amendment mandates and allow religious student groups to discriminate against vulnerable and marginalized students."[7] But the regulations clearly and simply state nothing more than what the First Amendment requires, and it is the members of those religious student groups *who are the "vulnerable and marginalized students"* needing protection from the hostility and discrimination of university authorities who are intolerant of their religious beliefs.

The Department's three reasons for rescinding these protections are disingenuous and contradicted by its own statements in the NPRM.

First, the Department claims that the regulations imposed by the 2020 final rule "are not necessary to protect the First Amendment right to free speech and free exercise of religion."[8] However, there is a prevalent problem with schools suppressing students' First Amendment rights and discriminating against religious student groups as indicated by several cases cited in the NPRM itself.[9] Just because courts have to intervene to correct constitutional violations by colleges and universities does not mean that additional protections to help prevent those constitutional violations from happening in the first place are not needed. While waiting for a court to intervene, students are irreparably harmed from being unable to find and gather with peers who share similar beliefs in their religious groups on campus. As the Supreme Court has stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[10]

Second, the Department conclusively asserts that the current regulations "have created confusion among institutions."[11] The Department states that the universities themselves have

[6] 88 Fed. Reg. at 10859.
[7] 88 Fed. Reg. at 10859.
[8] 88 Fed. Reg. at 10857.
[9] 88 Fed. Reg. at 10861 n. 32, 36, 38.
[10] *Elrod v. Burns*, 427 U.S. 347, 373 (1976).
[11] 88 Fed. Reg. at 10857.

claimed this confusion, but nowhere in the NPRM is any specific instance of confusion or ambiguity explained. Instead the Department simply opines that the "First Amendment is a complex area of law."[12] But if the First Amendment is such a complex area of law upon which colleges and universities might disagree and misinterpret, then that further proves that the current regulations are needed to provide clarity and guidance to universities on how to comply with the First Amendment—by not discriminating against religious groups in violation of the Free Exercise Clause. Indeed, the 2020 final rule explained that the regulations "are designed to bolster these [constitutional] protections."[13]

Without the clarity which the current regulations provide, universities are bound to make costly mistakes for themselves and for their students. For example, the NPRM notes that the University of Iowa had to pay $533,508 in attorneys' fees and expenses due to its "selective enforcement of a non-discrimination policy against a religious [student] group"[14] which is exactly what the current regulations help prevent. If the University of Iowa had the benefit of the clarity and standards which the current regulations provide, then it could have avoided such a costly mistake for itself and spared its students the hardship they endured because of the University's unconstitutional discrimination.

However, the NPRM notes that colleges and universities obviously do not want this consistency or clear instruction to respect the First Amendment rights of their students, stating that "[i]nstitutional stakeholders raised concerns that . . . the Department's contemplated role would undermine individual institutions' ability to tailor their policies to best meet the needs of their student populations and campuses within existing legal constraints. They believe that the appropriate level of decision-making should remain at the institutional level."[15] This only leads to inconsistencies—and whether a student's First Amendment rights are respected should not depend on which public university the student attends.

Third, the Department claims that the current regulations "prescribe an unduly burdensome role for the Department to investigate allegations regarding [universities'] treatment of religious student organizations."[16] It is sad and pathetic that the Department characterizes protecting college students' First Amendment rights as "unduly burdensome," especially when the "Department has not received any complaints regarding alleged violations of [the current regulations from the 2020 final rule] at the time of publishing this [NPRM]"[17] (perhaps a sign that the current regulations are effectively working to protect students' First Amendment rights), "estimate[s] that [it] will receive fewer than 5 complaints annually related to alleged violations of this condition,"[18] and "the Department's Office for Civil Rights (OCR) has expertise and

[12] 88 Fed. Reg. at 10861.
[13] 88 Fed. Reg. at 10860 (quoting 85 Fed. Reg. at 59943).
[14] 88 Fed. Reg. at 10861 n. 36.
[15] 88 Fed. Reg. at 10859.
[16] 88 Fed. Reg. at 10857.
[17] 88 Fed. Reg. at 10863.
[18] 88 Fed. Reg. at 10863.

responsibility for investigating claims of discrimination."[19] Based on the Department's NPRM it is difficult to see how the current regulations could possibly be "unduly burdensome" on the Department, and this thus appears to simply be a pretext for the Department to encourage and allow public colleges and universities to violate their students' religious rights under the First Amendment.

Legal Analysis

The current regulations from the 2020 final rule clearly explain part of what is required by public colleges and universities to comply with the First Amendment, and seek to prevent blatant constitutional violations like that in *Fellowship of Christian Athletes v. San Jose Unified School District Board of Education* ("*FCA*").[20] Although *FCA* involves a public high school, the situation is the same as that facing college religious student groups.

In *FCA*, the religious student group "requires students serving in leadership roles to abide by a Statement of Faith, which includes the belief that sexual relations should be limited within the context of a marriage between a man and a woman. The [School District] revoked FCA's status as an official student club at its high schools [in 2019], claiming that FCA's religious pledge requirement violates the School District's non-discrimination policy."[21] However, the Ninth Circuit Court of Appeals directed the school district to reinstate FCA as an official student club, explaining that

> [u]nder the First Amendment, our government must be scrupulously neutral when it comes to religion: It cannot treat religious groups worse than comparable secular ones. But the School District did just that. The School District engaged in selective enforcement of its own non-discrimination policy [and its newer all-comers policy], penalizing FCA while looking the other way with other student groups. For example, the School District blessed student clubs whose constitutions limited membership based on gender identity or ethnicity, despite the school's policies barring such restricted membership. The government cannot set double standards to the detriment of religious groups only.[22]

The court found that antireligious animus pervaded the school campus by faculty and staff:

> One schoolteacher called the [FCA's] beliefs "bulls[**]t" and sought to ban it from campus. Another [who was the faculty adviser to the school's Satanic Temple Club] described evangelical Christians as "charlatans" who perpetuate "darkness" and "ignorance." And yet another teacher denigrated his own student

[19] 88 Fed. Reg. at 10861.
[20] 46 F.4th 1075 (9th Cir. 2022), *pending rehearing en banc*.
[21] *Id.* at 1081.
[22] *Id.* at 1081.

> as an "idiot" for empathizing with FCA members who faced backlash from teachers and students.[23]

And while the school district permitted other clubs to restrict their membership or leadership—like the Senior Women, Girl Talk, and Big Sister/Little Sisters groups which limited membership to female-identifying students, the Republican club which required leaders to support the Republican platform, and the South Asian Club which prioritized members who were South Asian[24]—it would not permit FCA to likewise restrict its official membership or leadership to those who affirm its statement of faith, which is a violation of the First Amendment that the current regulations from the 2020 final rule make clear.

The U.S. Supreme Court has explained that the government "cannot impose regulations that are hostile to religious . . . beliefs,"[25] and that "religious and philosophical objections to gay marriage are protected views."[26] Further, "government regulations are not neutral . . ., and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[27] Therefore, it is baffling why the Department seeks to rescind regulations which clarify and enforce these principles to provide consistency in protecting the First Amendment rights of students who seek to form or join religious student groups on campus.

The proposal for the 2020 final rule explained that the

> right to expressive association includes the right of a student organization to limit its leadership to individuals who share its religious beliefs without interference from the institution or students who do not share the organization's beliefs. Student organizations also have the right to support their membership, help members to carry out the goals of the organization in accordance with its religious mission, and define criteria for accepting new members. Student organizations at public educational institutions should be able to restrict membership and leadership in their student organization on the basis of acceptance or adherence to the religious beliefs and tenets of the organization.[28]

The current NPRM even acknowledges that the goal of the 2020 final rule was to "ensure that religious organizations as well as their student members fully retain their right to free exercise of religion."[29] Without the two provisions which the NPRM seeks to rescind, this goal will not be upheld or protected.

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[23] *Id.* at 1099 (Lee, J., concurring).
[24] *Id.* at 1086, 1097.
[25] *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).
[26] *Id.* at 1727.
[27] *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).
[28] 85 Fed. Reg. 3190, 3214.
[29] 88 Fed. Reg. at 10859.

Supreme Court cases indicate support for the current regulations

In *Widmar v. Vincent*, the Supreme Court held that a university could not exclude a religious organization from using school facilities.[30] Since the university had opened its facilities to hundreds of other student organizations, the Court determined there was not an Establishment Clause issue present in the case that would bar the group from being present on campus.[31] Thus, a public institution cannot create non-neutral policies which only adversely affect religious organizations. Policies which force religious organizations to accept anyone as a member or as a leader potentially violate this holding.

The Court has also made a distinction between a school's endorsement and a school's neutrality toward religious organizations by stating that a "school's official recognition of [a religious] club evinces neutrality toward, rather than endorsement of, religious speech."[32] It is unlikely that someone would mistakenly believe that a school endorses the viewpoint of the religious organizations simply by allowing them to exist on-campus.[33] Private speech by students which endorses religion within these organizations is protected under the First Amendment.[34]

Moreover, even in a limited public forum setting, a school cannot discriminate against a religious organization purely based on its religious teachings.[35] Therefore, a university does not have a basis in a free speech analysis to regulate a religious organization's activities by forcing them to accept members and leaders who do not share in their values.

Thus, rescinding the current regulations could present constitutional issues for universities and religious student organizations. It would leave institutions of higher education to monitor and enforce their own policies regarding membership and leadership within these organizations. This could impose a similar constitutional problem that was presented in *Rosenberger*.[36] In that case, a university attempted to bar a religious organization from accessing and using university funded printing services for their periodical, and the Court struck this down as a "course of action [that] was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the

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[30] *Widmar v. Vincent*, 102 S. Ct. 263, 277 (1981).
[31] *Id.* at 273.
[32] *Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2372–73 (1990).
[33] *See id.* (forming a religious organization at a high school)*; Widmar v. Vincent*, 102 S. Ct. 263, 276 (1981) (a religious organization meeting after-hours at a university); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2148 (1993) (screening a religious movie after-hours at a school).
[34] *Mergens*, 110 S. Ct. at 2372.
[35] *Good News Club v. Milford Central School*, 121 S. Ct. 2093, 2107 (2001) ("When Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment.").
[36] *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S. Ct. 2510 (1995).

Establishment Clause requires."[37] By allowing universities to craft their own policies, the Department risks allowing non-neutral policies, which violate the First Amendment, to be created and then litigated in the courts.

The Supreme Court has also recognized the importance in the choice of a religious group to decide its leadership. The Court ruled on the issue concerning a religious school's ability to appoint an employee with the necessary qualifications as a minister during a termination dispute and explained that

> [t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.[38]

This principle is applicable in the context of religious student organizations on college campuses as well. But the Department's NPRM threatens this First Amendment right by rescinding the provisions which protect a religious organization's right to ensure that its leaders adhere to its central beliefs and practices.

The Court has also spoken more broadly about the right of religious organizations to enjoy the same benefits as secular organizations. The Court struck down a state department's refusal to accept a church as a beneficiary of their program due solely to fact that they were a church.[39] The Court held that "the State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far."[40] If secular organizations on campus are permitted to have criteria for membership and leadership, it follows from precedent that this policy must be extended to religious organizations as well.[41]

Additionally, various state legislatures have taken up this issue and passed statutes to uphold the right for religious student organizations to restrict their membership and leadership. For example, the Louisiana legislature passed a law prohibiting institutions of higher education from withholding benefits afforded to secular organizations based on the fact that a religious organization requires "the leaders or members of the organization . . . affirm and adhere to the organization's sincerely held beliefs."[42] Other states which have enacted similar statues include Arkansas, Indiana, Iowa, Kentucky, Montana, North Carolina, North Dakota, South Dakota, and

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[37] *Id.* at 2524-24.
[38] *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012).
[39] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).
[40] *Id.*
[41] *See id.*
[42] LA. STAT. ANN § 17.3399.33 (2018).

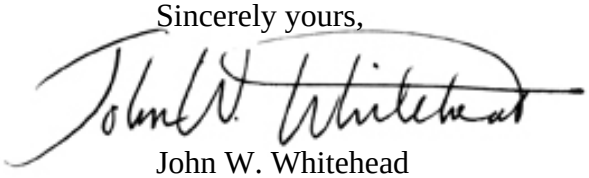
Virginia.[43] These bright line rules, like the Department's current regulation, prevent the costly litigation which the Department's NPRM will inevitably lead to in states without these protections.

Conclusion

Religious student groups are centered around adherence to a common set of beliefs and practices. Genuine community, growth, and encouragement for group members cannot exist when the groups are divided or hijacked by those who do not share a commitment to those core beliefs and practices. And when schools refuse to recognize these groups under the same standards which they provide to secular groups, and thus deny campus resources to them, these groups struggle to reach students who are searching for a like-minded community which would improve their emotional and mental well-being along with their overall college experience—and that unfortunately seems to be what some public school administrators and faculty, like those in the San Jose School District in the *FCA* case, try to thwart.

"Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."[44] Therefore, The Rutherford Institute opposes the Department of Education's proposed rule to rescind these protections, and calls on the government to abide by its obligation to respect and uphold the constitutional rights of all its citizenry, including the free exercise of religion.

Sincerely yours,



John W. Whitehead
President

[43] ARK. CODE ANN. § 6-60-1006 (2019); IND. CODE ANN. § 21-39-8-11 (2022); IOWA CODE § 261H.3(3) (2019); KY. REV. STAT. ANN. § 164.348 (4) (2019); MONT. CODE ANN § 20-25-518 (2021); N.C. GEN. STAT. § 115D-20.2; N.D. CENT. CODE § 15-10.4-02(h) (2021); S.D. CODIFIED LAWS § 13-53-52 (2019); VA. CODE ANN. § 23-9.2:12 (2013).

[44] *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring).