AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

March 24, 2023

Office of Postsecondary Education
U.S. Department of Education
Room 2C185
400 Maryland Ave., S.W.
Washington, DC 20202

Re: Direct Grant Programs, State-Administered Direct Grant Programs, Docket ID ED-2022-OPE-0157

To Whom It May Concern:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking regarding "Direct Grant Programs, State-Administered Formula Grant Programs," which the Department of Education's Office of Postsecondary Education published in the Federal Register on February 22, 2023. We write to support the Proposed Rule because it would rescind a 2020 Rule that wrongly requires public colleges and universities to allow religious student organizations to discriminate in their practices, policies, membership, and leadership.[1]

The 2020 Rule threatens to revoke federal grant funding from public universities unless they exempt religious student groups from nondiscrimination rules that apply to all other student groups. It forces universities to choose to either shield students from discrimination and lose federal grant funding *or* allow discrimination and keep federal financial assistance. This is wrong—discrimination has no place on our public university campuses.

The Proposed Rule would rescind the 2020 Rule and thus remove the religious exemption. This ensures equity and fairness, reduces confusion, restores religious freedom for all students and groups, and brings the Department's policy back into line with U.S. Supreme Court precedent and civil rights laws.

[1] Final Rule, Direct Grant Programs, State-Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program, 85 Fed. Reg. 59,916 (Sept. 23, 2020).

Americans United for Separation of Church and State's Interest in the Rule
With a national network of more than 300,000 supporters, Americans United has been safeguarding the foundational American principle of separation of church and state since 1947. Our nation promises everyone the freedom to believe as they want, but our laws cannot allow anyone to use their religious beliefs to discriminate or harm others.

In 2021, Americans United along with American Atheists challenged the 2020 Rule in federal court on behalf of the Secular Student Alliance and Declan Galli, a California Polytechnic State University student.[2] This federal lawsuit asserts that the 2020 Rule violates both the U.S. Constitution and the Administrative Procedure Act by:

- exercising authority that Congress did not give and the Department does not have;
- failing to follow existing law;
- failing to adequately follow the rulemaking process or address public comments that explained the harms that the rule would cause to students and universities;
- granting preferential treatment to organizations because of their religious viewpoint; and
- granting religious exemptions that harm students and universities.

We welcome the Department's actions to rescind the 2020 Rule.

The Value of Student Clubs That Are Open to All
The opportunity to both join and lead student groups is an essential part of the educational experience that should be open to all. Student groups contribute to the breadth and quality of collegiate life. They allow students to expand their knowledge and build their resumes, and to explore different ideas and identities. Research shows that student clubs contribute to overall student satisfaction and success—they provide opportunities for peer-to-peer connection, reduce isolation, develop leadership skills, and relieve stress.[3]

Because of their value, universities provide significant benefits to recognized groups: funding, meeting space, promotion in school media, advertising space, inclusion on student organization fairs, and use of school communication platforms. Students are usually charged a mandatory activity fee in order to help fund these functions. And, to ensure that every student can experience the myriad benefits of joining student groups, public universities often adopt "all-comers" policies. These policies prohibit all student groups from rejecting students from membership or leadership positions on the basis of race, religion, sex, sexual orientation, disability, gender identity, or other protected characteristics.

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[2] *Secular Student Alliance v. U.S. Dep't of Educ.,* Complaint, No. 21-cv-00169 (D.D.C. Jan. 19, 2021).
[3] *See, e.g.,* Foubert J.D. and Grainger L.U., Effects of Involvement in Clubs and Organizations on the Psychosocial Development of First-Year and Senior College Students, Vol. 43, No. 1, *NASPA J.* (2006), *available at* https://bit.ly/39E30KJ.

By allowing religious groups to discriminate, the 2020 Rule undermines the value of student clubs to all students and undercuts the critical interest colleges and universities have in all-comers policies.

The Proposed Rule Ensures Equity and Fairness

The Proposed Rule advances equity by ensuring that discrimination is not subsidized with tax dollars and tuition fees. It ensures that students of all backgrounds have the opportunity to experience the benefits of joining and leading student groups. And it furthers the legitimate interests of colleges and universities in fostering inclusionary policies on their campuses.

In promulgating the 2020 Rule, the Trump administration failed to adequately consider the harms that the Rule would cause to students, especially those who are most likely to experience discrimination: particularly, students who are LGBTQ, students of color, religious minorities, or nonreligious students.[4] Yet the 2020 Rule made the astounding assertion that it "will help, not harm, LGBTQ+ students, women, religious minorities, and student organizations of all kinds," because they could partake in discrimination too.[5] Allowing *all* groups to discriminate is never the answer. But even if it were, that still isn't what the 2020 Rule does. Instead, it gives preference to *religious groups*—it doesn't apply to any other groups.

Rescinding the 2020 Rule would remedy these harms. First, under this Proposed Rule, no students will be forced to fund a student group through tuition and activity fees that would reject them—marginalized students should never be forced to subsidize their own discrimination.[6] Second, it allows the restoration of all-comers policies. The Proposed Rule would enable universities to return to encouraging and enabling all students to enjoy the benefits of participating in student groups while declining to subsidize discrimination with taxpayer dollars and student activity fees. By ending favorable treatment for certain groups, all will play by the same rules. Groups that want to discriminate can still do so, but without school support.

The Proposed Rule Restores All Students' Religious Freedom Rights Under the First Amendment

Despite asserting that its aim was to reinforce students' religious freedom,[7] the 2020 Rule misunderstands the protections of the First Amendment. The Free Exercise Clause does

[4] 85 Fed. Reg. at 59,941.
[5] *Id.*
[6] This aligns with the Biden administration's government-wide aim of advancing equity and removing barriers to opportunity for people of color and other underserved groups. *See* E.O. 13895, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 25, 2021).
[7] 85 Fed. Reg. at 59,917.

not require this kind of religious exemption from general requirements by a public institution.[8] Indeed, the Establishment Clause prohibits the government from granting religious exemptions that would detrimentally affect any third party.[9] As described above, the 2020 Rule imposes substantial harm on third parties—many students face discrimination and universities are blocked from pursuing their legitimate, inclusionary missions and policies.

Rescinding the 2020 Rule ensures that some students will not have to bear the costs of others' religious exercise and thus restores all students' rights to religious freedom. Religious freedom is a fundamental American value that protects everyone's right to believe, or not, as long as they don't harm others. It does not give people or organizations a free pass to ignore civil rights protections and discriminate.

The Proposed Rule Reduces Confusion

The Proposed Rule eliminates disparities between the 2020 Rule's stated intent and its effects. First, the 2020 Rule's preamble asserted that the Rule's goal is to treat all student organizations *equally*,[10] but in actuality, it singles out religious organizations and treats them *specially*. The 2020 Rule gives a preference to religious organizations—exempting them, and only them, from nondiscrimination requirements.[11]

Second, the 2020 Rule's preamble also asserts that universities may maintain "neutral, generally applicable rules" for all student groups without risking loss of federal grant funds.[12] Yet it is precisely these "neutral, generally applicable rules"—all-comers policies—that the 2020 Rule subverts. Perplexingly, the 2020 Rule claims that it is "consistent" and "permissible" with all-comers policies while at the same time threatening loss of federal funds if those universities enforce them.[13] Rescinding the 2020 Rule provides much-needed clarity to universities that the Department will permit them to enforce their all-comers policies and to treat all student organizations the same.

The Proposed Rule Ensures that Universities May Comply with U.S. Supreme Court Precedent and Civil Rights Laws

Rescinding the 2020 Rule allows universities to bring their policies back into compliance with the rulings of the Supreme Court, and with federal, state, and local civil rights laws.

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[8] *See, e.g.*, *Christian Legal Society v. Martinez*, 561 U.S. 661, 694 n.24, 697 n. 27 (2010).
[9] *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not "impose unjustified burdens on other[s]"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (may not "impose substantial burdens on nonbeneficiaries").
[10] 85 Fed. Reg. at 59,942.
[11] This is despite the fact that student organizations at public universities constitute a public forum and universities may not discriminate based on viewpoint, nor may they favor some viewpoints. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).
[12] 85 Fed. Reg. at 59,943.
[13] *Id.*

The 2020 Rule conflicts with the Supreme Court's ruling in *Christian Legal Society v. Martinez*, which made clear that public colleges and universities may enforce all-comers policies and refuse to recognize student groups that do not agree to them. The Court held that such policies do not violate the free speech, expressive association, and free exercise rights of the students.[14] Rejecting the argument that such policies are not neutral but rather target religion, the Court explained that exempting religious groups from all-comers policies would provide them "preferential, not equal, treatment."[15] Yet this is exactly what the 2020 Rule sought to do here. In short, the Court has held that the First Amendment does not even *allow* the exemptions that the 2020 Rule insists the Constitution *requires*.

The 2020 Rule also interferes with public universities that want to "advance state-law goals through the school's educational endeavors."[16] By rescinding the 2020 Rule, the Department again permits public universities to have robust nondiscrimination policies in place that apply neutrally to all student organizations—and to advance the goals of these civil rights laws.

The Proposed Rule Resolves the 2020 Rule's Problem of Overreach of the Department's Authority

The 2020 Rule used the guise of enforcing the First Amendment to bar public colleges and universities from requiring religious student organizations to comply with nondiscrimination requirements. It asserted that the Department has authority and discretion to enforce public colleges and universities' compliance with the Rule, which necessarily means compliance with the Department's view of the First Amendment's requirements with respect to religious student organizations.

But the Department has only the authority that Congress has given it, and Congress has never delegated to the Secretary of Education any power to enforce the First Amendment, a fact that the Department has officially recognized on multiple occasions.[17]

The Proposed Rule acknowledges that "the Department's Office for Civil Rights (OCR) has expertise and responsibility for investigating claims of discrimination under the federal civil rights statutes it is authorized to enforce" and that "no office in the Department has

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[14] *CLS*, 561 U.S. at 697 & n.27 (explaining that its decision in *Employment Division v. Smith*, which held that neutral and generally applicable laws do not violate the Free Exercise Clause, "forecloses that argument.").

[15] *Id.* at 697 n. 27 ("In seeking an exemption from Hastings' across-the-board all-comers policy, CLS . . . seeks preferential, not equal treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.").

[16] *Id.* at 690.

[17] *See, e.g.*, Off. for Civil Rights, Dep't of Educ., Case Processing Manual, § 109 (Aug. 26, 2020); Dear Colleague Letter (October 26, 2010), at 2 n.7; Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004).

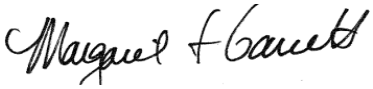
historically been responsible for investigating First Amendment violations."[18] But it fails to acknowledge that no office within the Department has ever been responsible for *enforcing* the First Amendment, because to do so would exceed the Department's statutory authority.

The Proposed Rule is correct to dial back this overreach of authority in the 2020 Rule, while at the same time restating the Department's strong commitment to both religious freedom and nondiscrimination.

Conclusion

By removing a harmful religious exemption, this Proposed Rule advances equity and fairness, reduces confusion, restores religious freedom for all students and groups, and brings the Department's policy back in line with U.S. Supreme Court precedent, civil rights laws, and authority delegated to it by Congress. For the many reasons explained above, we urge the Department to finalize this rule as proposed.

Respectfully submitted,



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[18] Proposed Rule, Direct Grant Programs, State-Administered Formula Grant Programs, 88 Fed. Reg. 10,857, 10,861 (Feb. 22, 2023).