



March 24, 2023

Dr. Miguel Cardona  
Secretary of Education  
Attention: Ashley Clark  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
Washington, DC 20202  
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**RE: Comments of the American Center for Law and Justice Concerning ED-2022-OPE-0157-0001 – Notice of Proposed Rule Making – Direct Grant Programs, State-Administered Formula Grant Programs**

To the Department of Education,

The American Center for Law and Justice (ACLJ) submits the following comments, on behalf of itself and its supporters, opposing the proposed rule changes the Department of Education (“The Department”) intends to issue, as reported on February 22, 2023, which rescind the Department’s previous rule changes that protect First Amendment freedoms for student organizations.

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion. *See Sumnum v. Pleasant Grove*, 555 U.S. 460 (2009); *NOW v. Scheidler*, 547 U.S. 9 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987).

## **I. Background**

On September 23, 2020, the Department of Education implemented changes to its regulations to encourage academic freedom and to provide for the protection of First Amendment

rights in higher education.<sup>1</sup> The changes aimed to prevent religious discrimination on university campuses by requiring public universities to adhere to the First Amendment as a condition for receiving federal education grants. Additionally, the changes required private universities to adhere to their own policies on freedom of speech as a condition for receiving federal education grants. Finally, it obligated public universities to afford faith-based student organizations the same rights and privileges as non-faith-based student organizations as a condition for receiving federal education grants.<sup>2</sup>

These changes were lauded by religious and First Amendment advocacy groups—including the ACLJ—as welcome and necessary to protect the rights of students wishing to add their unique voice to campus discussion.<sup>3</sup> However, under the Biden Administration, the Department has proposed rescinding the portions of the 2020 rule changes that specifically protected faith-based student organizations.<sup>4</sup>

## II. Legal Analysis

According to the Free Exercise Clause of the First Amendment, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>5</sup> Furthermore, “[t]he Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’”<sup>6</sup>

Thus, the Supreme Court has generally ruled it unconstitutional to discriminate against a religious organization based solely on its religious affiliation.<sup>7</sup> The Court has also made clear that “the Constitution [does not] require complete separation of church and state; it affirmatively mandates **accommodation**, not merely tolerance, of all religions, and **forbids hostility** toward any.”<sup>8</sup>

Most recently, the Supreme Court held that the exclusion of an otherwise eligible recipient from a government grant program, solely because that entity is religious in nature, violates the

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<sup>1</sup> 85 FR 59916, 59916-17 (2020).

<sup>2</sup> *Id.* at 59918

<sup>3</sup> *See, e.g.*, ACLJ Comment Letter on Proposed Rule: Uniform Administrative Requirements for Federal Awards (Feb. 18, 2020), [https://downloads.regulations.gov/ED-2019-OPE-0080-13837/attachment\\_1.pdf](https://downloads.regulations.gov/ED-2019-OPE-0080-13837/attachment_1.pdf); The Jewish Coal. for Religious Liberty Comment Letter on Proposed Rule: Uniform Administrative Requirements for Federal Awards (Feb. 7, 2020), [https://downloads.regulations.gov/ED-2019-OPE-0080-5533/attachment\\_2.pdf](https://downloads.regulations.gov/ED-2019-OPE-0080-5533/attachment_2.pdf);

<sup>4</sup> 88 FR 10857, 10859 (2023).

<sup>5</sup> U.S. CONST. amend. I.

<sup>6</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993)).

<sup>7</sup> *Church of Lukumi*, 508 U.S. at 532-33.

<sup>8</sup> *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (emphasis added).

Free Exercise Clause.<sup>9</sup> The Court has also held that the Equal Protection Clause commands that “all persons similarly situated should be treated alike,” and that discrimination triggered by the exercise of a fundamental right – here, faith-based organizations participating in Department programs – triggers strict scrutiny under the Equal Protection Clause.<sup>10</sup> Clearly, government must protect religious exercise by essentially being “hands off,” with respect to faith-based organizations that are similar to secular counterparts in all other relevant respects.

There is no legitimate question that faith-based organizations on college campuses have not always received such a “hands off” approach and have been subjected to numerous instances of discrimination based on their sincerely-held religious beliefs.<sup>11</sup> Clearly, the mere threat of a lawsuit has not, as the Department suggests,<sup>12</sup> deterred universities from discriminating against faith-based student organizations in the past.<sup>13</sup> The 2020 rule changes add an extra layer of incentives to college administrators to respect student organizations’ First Amendment Rights by threatening to remove the university’s federal education grants if their college violates those rights. Accordingly, the Department should not rescind the portions of the 2020 rule change that provide sorely-needed protections for faith-based student organizations’ First Amendment rights.

### **III. Conclusion**

The ACLJ and its supporters oppose the proposed Rule and urge the Department to keep the current regulations in whole and without amendment. The proposed Rule is inconsistent with federal law, including the First Amendment to the Constitution, and would allow unconstitutional discrimination that discourages student groups from participating in organizations on campus. All student groups deserve to have a clear understanding of their protections under the law. The proposed Rule does away with bright line rules that ensure faith-based religious student organizations are not discriminated against by federally funded universities.

Finally, the ACLJ encourages the Department to reject the proposed Rule to ensure equal treatment under the law for all student organizations.

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<sup>9</sup> *Trinity Lutheran Church*, 137 S. Ct at 2024-25.

<sup>10</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

<sup>11</sup> *E.g.*, *Widmar v. Vincent*, 454 U.S. 263, 269, 276 (1981); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831-32, 845-46 (1995); *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 985-86 (8th Cir. 2021); *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 820-21 (E.D. Mich. 2021); David French, *Vanderbilt University Insults Our Intelligence*, NATIONAL REVIEW (March 30, 2012, 4:43 PM), <https://www.nationalreview.com/corner/vanderbilt-university-insults-our-intelligence-david-french/>.

<sup>12</sup> 88 FR 10857, 10861 (2023).

<sup>13</sup> See sources cited *supra* note 11.