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*Submitted Electronically*

U.S. Department of Education
Room 2C185
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**Subj: Direct Grant Programs, State-Administered Formula Grant Programs, RIN 1840–AD72**

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the Department of Education's notice of proposed rulemaking ("NPRM") in the above-captioned matter, The NPRM proposes to rescind the equal campus access ("ECA") provisions at 34 C.F.R. 75.500(d) and 76.500(d), as promulgated by the 2020 Religious Liberty and Free Inquiry Rule, 85 Fed. Reg. 59916 (Sept. 23, 2020) (the "2020 Rule"). We oppose the rescission for the reasons stated below.

I. Introduction

In our letters of June 1, 2021, and September 23, 2021, and in a meeting held with Deputy Assistant Secretary Cooper and other Department officials on June 21, 2021, we asked that the Department preserve the current regulations because they provide commonsense protection for faith-based student organizations that have faced discrimination on many public college campuses for nearly four decades. By protecting students of all faiths, the existing regulations ensure that students of all religious faiths will be welcome on public college campuses, thereby enhancing authentic religious diversity on those campuses. Rescission of these regulations will send a message to religious student groups that they are not welcome on public campuses.

Especially after recent years, during which students struggled to keep their organizations intact because of COVID-19-related restrictions on in-person meetings, these regulations are particularly critical to religious student organizations' efforts to rebuild. Thriving religious student organizations benefit not just those who choose to participate in their activities but their campus communities as a whole. Religious student organizations offer spiritual nourishment, emotional encouragement, and friendship to all at a time when university communities are still recovering from the physical, emotional, and spiritual toll that the pandemic wrought.

II. The Equal Campus Access provisions

The 2020 Rule established two parallel provisions, commonly referred to as the equal campus access provisions – one in a set of regulations governing public institutions that are

recipients of direct grants from the Department, and another in regulations governing States and subgrantees that are public institutions.

> (d) As a material condition of the Department's grant, each grantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.[1]

These regulations codify several Supreme Court decisions, including *Healy v. James*, 408 U.S. 169 (1972), *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and fully align with the Court's ruling in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). 85 Fed. Reg. 75,310, 75,311 (Nov. 25, 2020) ("As explained in the preamble to the Final Rule, an 'all-comers' policy as described in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), does not violate the Final Rule's requirement regarding equal treatment of religious student organizations at public institutions in 34 CFR 75.500(d) and 34 CFR 76.500(d)."). Of course, actual all-comers policies are extremely rare because, if adopted, an all-comers policy would compel all student organizations to accept any student as members or leaders, even if they bear a hostile relationship to the mission of the group. Over time, this would eliminate, or radically change the nature of, any organization which selects members based on sex (*e.g.*, sororities, fraternities, or any single-sex support groups), able-bodied status (*e.g*., athletic groups), veteran status, or political belief (*e.g*., Democratic or Republican student organizations).

## III. Reasoning in the NPRM

The NPRM's proffered justification for the proposed rescission of the ECA provisions is, in our view, flawed and fails to consider meaningful aspects of the issue.

First, the NPRM notes that the 2020 Rule may "prohibit [institutions of higher education] from applying neutral, generally-applicable nondiscrimination policies that would otherwise be compliant with the First Amendment." But the Department does not attempt to explain *why* this outcome would be better than the outcome generated by application of the current ECA provisions. That is, enforcement of "neutral, generally applicable" antidiscrimination (or other) laws does not always yield a just result, as the strong consensus to pass the Religious Freedom Restoration Act attests. It is also unclear how many universities' nondiscrimination policies, which out of practical necessity are rarely enforced without exception, would in fact comply with the First Amendment under *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021) (holding that a law is not generally applicable if it is subject to discretionary exemptions).

[1] 34 C.F.R. 75.500(d); *see also* 34 C.F.R. 75.600(d).

The NPRM also cites concerns that the 2020 Rule "may conflict with institutional and State nondiscrimination policies, and that the Department's approach reduces institutions' ability to set individualized policies that protect First Amendment freedoms and reflect the diversity of institutional contexts and missions." This suffers from the same flaws as the statement immediately above: the mere fact that some institutional and State nondiscrimination policies may conflict with the Equal Campus Access provisions is not, by itself, a reason to prefer those policies. And while diversity among our nations' universities is generally a good thing, one way in which our nation's *public* universities must be uniform is in their respect for the religious freedom of their students.

The NPRM notes stakeholders' concerns that the ECA provisions could require "preferential treatment" of religious student groups.[2] The Supreme Court refuted this concern in 1987. *See, e.g., Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987) ("Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."). Indeed, more recently the Department has successfully defended the Title IX religious exemption against a suite of similar arguments challenging its constitutionality.[3]

Further, the NPRM argues that the equal campus access provisions are unnecessary because religious student groups "can and do seek relief in Federal and State courts."[4] But the process of litigation is not an adequate solution for religious students whose groups are suppressed by their universities. For those student groups fortunate enough to be able to afford legal representation or find *pro bono* counsel, many of their members will have long since graduated by the time their rights are vindicated in court. And even where the process can run to its conclusion, and may run successfully, there is still a chilling effect in the absence of clear, regulatory protections. As the Court explained long ago in *Amos*:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."[5]

The Department cites to a few such cases as evidence that the ECA provisions are unnecessary.[6] But the fact that *some* suppressed religious groups have litigated their cases cannot

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[2] 88 Fed. Reg. at 10860.
[3] *Hunter v. United States Dep't of Educ.,* No. 6:21-CV-00474-AA, 2023 WL 172199 (D. Or. Jan. 12, 2023) (upholding Title IX's religious exemption against challenges under, inter alia, the Establishment Clause and the Equal Protection Clause).
[4] 88 Fed. Reg. at 10861.
[5] *Amos*, 483 U.S. at 336.
[6] Id at footnote 32. The list of cases has notable omissions, such as *Business Leaders In Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021), where the Eighth Circuit denied qualified immunity to university officials for their alleged conduct in revoking a religious student group's status as registered student organization for failure to comply with university's nondiscrimination policy based on the group's refusal to permit openly gay student to hold a

be used to demonstrate that *all* suppressed religious student groups have been able to do so. If anything, it suggests the opposite – the old saw is that where there is smoke, there is fire.

The Department also claims that the ECA provisions should be rescinded because investigation and enforcement of First Amendment claims would be unduly burdensome for the Department, because the Department lacks expertise in it.[7] But the ECA provisions do not require the Department to investigate universities for First Amendment violations. They require the Department to investigate universities for violations of the ECA provisions. Those investigations do not require expertise in the First Amendment because the First Amendment does not set a ceiling for public universities' protection of the rights of free exercise of religion, but rather a floor.

The Department calls First Amendment jurisprudence "a complex area of law with an intricate body of relevant case law."[8] This may be so. Indeed, it is a strength of the ECA provisions that they set out a comparatively clear and easily administrable standard. Yet the Department argues repeatedly that universities are confused about how to comply with the ECA provisions.[9] The Department does not explain why universities will be in a better position to follow the standard that will apply in the ECA's provisions' absence: the First Amendment.

The Department states that enforcement of the ECA provisions might involve "very fact-intensive"[10] Of course, many investigations of civil rights violations are very fact-intensive, and the Department can deploy its considerable resources according to its policy priorities. And again, enforcement of the relatively clear ECA provisions would entail less fact-intensive investigation than enforcement of the more complex First Amendment standards.

Finally, in the NPRM's regulatory impact analysis, the Department claims that it has "not identified that [the ECA] provisions have added material additional protections for student groups whose stated mission is religious in nature at public IHEs."[11] But two paragraphs later, it says that recission "would…allow IHEs to design and enforce policies that best serve their student bodies and that are consistent with applicable laws and regulations."[12] Rescinding the ECA provisions would only generate a change in university policies if the ECA provisions are, in fact, preventing schools from designing and enforcing policies that deny rights and benefits to

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leadership position, but not revoking the registered status of non-religious student groups that restricted access on basis of race, gender, or other characteristics protected by policy; and *Ratio Christi at the University of Colorado, Colorado Springs v. Sharkey*, Case No. 1:18-CV-02928 (D. Co. Nov. 14, 2018) (Complaint), where the university denied recognition to a Christian student group that required its leaders to share its beliefs, and the group obtained a settlement that required the university to change its policy and pay attorneys' fees.

[7] Id.

[8] Id.

[9] *E.g.*, 88 Fed. Reg. at 10859 ("Some faith-based and civil rights organizations raised concerns that §§ 75.500(d) and 76.500(d) create confusion about the interplay between these regulations and other nondiscrimination requirements").

[10] 88 Fed. Reg. at 10861.

[11] 88 Fed. Reg. at 10863.

[12] Id.

religious student groups because of their religious beliefs, practices, policies, speech, membership standards, or leadership standards. That is a material protection.

For all these reasons, we believe the proposed recission would likely be held to be arbitrary and capricious under the Administrative Procedure Act, for failure to engage in reasoned decision making.[13]

IV. Benefits of the Equal Campus Access provisions

The NPRM fails to consider any benefit to religious student groups, and how rescinding the ECA provisions would rob students and their universities of those benefits. In particular, the NPRM ignores that a vibrant and diverse religious community on campus serves the good of campuses as a whole. To be clear, this is not a claim that all religious beliefs are good because they are all true. (Some are good, because some are true.) But this is a claim about the aggregate effect of the presence of religious communities on individual health and wellbeing.

It is well documented that young people in the United States are suffering from historically high rates of mental illness, especially depression and anxiety.[14] Yet in 2020 – the heart of the pandemic – an annual Gallup poll measuring Americans' mental health found that the only demographic group with an increase in the number of individuals whose reported mental health was "excellent" was those who attend religious service weekly.[15] A 2009 review of academic literature concluded that "studies…find that religious involvement is related to better coping with stress and less depression, suicide, anxiety, and substance abuse."[16] A similar review in 2010 found that "empirical evidence supports a generally protective effect of religious involvement for mental illness and psychological distress."[17]

One study found that students with active religious lives – "those who attend religious services, pray on a regular basis, feel close to God, and emphasize the role of faith in their daily lives" – earn "significantly better grades" than "those [who] believe that a God exists but avoid religious involvement and broader issues of the relevance of religion for their life."[18]

By rescinding the ECA provisions, the Department would undermine the role that religious groups play in helping students at our nation's public universities flourish.

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[13] *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co*, 463 U.S. 29, 52 (1983) ("In this case, the agency's explanation for rescission of the passive restraint requirement is not sufficient to enable us to conclude that the rescission was the product of reasoned decision making.")

[14] *See, e.g.*, "College Students and Depression," Mayo Clinic Health System, July 19, 2022 ("Up to 44% of college students reported having symptoms of depression and anxiety.") available at https://www.mayoclinichealthsystem.org/hometown-health/speaking-of-health/college-students-and-depression.

[15] "Americans' Mental Health Ratings Sink to New Low," Megan Brenan, Dec. 7, 2020, available at https://news.gallup.com/poll/327311/americans-mental-health-ratings-sink-new-low.aspx.

[16] "Research on Religion, Spirituality, and Mental Health: A Review," Harold G Koenig. *The Canadian Journal of Psychiatry* 2009 54:5, 283-291, available at https://journals.sagepub.com/doi/epdf/10.1177/070674370905400502.

[17] "Religion and Mental Health: Theory and Research," Jeff Levin. Int. J. Appl. Psychoanal. Studies (2010), available at http://www.baylorisr.org/wp-content/uploads/levin_religion_mental_health.pdf.

[18] "Religiously engaged adolescents demonstrate habits that help them get better grades, Stanford scholar finds," April 15, 2018, available at https://ed.stanford.edu/news/religiously-engaged-adolescents-demonstrate-habits-help-them-get-better-grades-stanford-scholar.

## V. Conclusion

We respectfully repeat our request that the Department preserve the important legal protections provided in the current regulations, 34 C.F.R. §§ 75.500(d) and 76.500(d), for individual students and religious student organizations so that students of all faiths will remain free to establish and maintain communities defined by shared religious commitments on their public college campuses.