DAVE YOST
OHIO ATTORNEY GENERAL

Office of the Solicitor General
Office 614-466-8980
Fax 614-466-5087

March 24, 2023

Secretary Miguel A. Cardona
United States Department of Education
Lyndon Baines Johnson Building
400 Maryland Ave, SW
Washington, DC 20202

Nasser Paydar
Assistant Secretary for Postsecondary Education
United States Department of Education
Lyndon Baines Johnson Building
400 Maryland Ave, SW
Washington, DC 20202

Docket No: ED-2022-OPE-0157

Re: Ohio and 21 other States' comments regarding First Amendment rights of students at public universities

Dear Secretary Cardona and Assistant Secretary Paydar:

The States of Ohio, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Virginia submit these comments in opposition to the notice of proposed rulemaking entitled, "Direct Grant Programs, State-Administered Formula Grant Programs," set forth at 88 Federal Register 10857.

The proposed rule would rescind an existing regulation, which conditions Department of Education grants to public universities on those universities' compliance with the First Amendment. Under the existing regulation, universities may not deny religious student organizations "any right, benefit, or privilege that is

otherwise afforded to other student organizations at 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] This regulation provides an additional check on wayward administrators who, all too frequently, trample students' right to freely exercise their religion.

This additional check that the existing regulation imposes is quite necessary. The religious practice of student groups and individuals is under immense fire at universities; indeed, the Department itself maliciously caricatures religious student groups as seeking to "discriminate against vulnerable and marginalized students."[2] Only days ago, the Stanford Law School administration berated a federal appellate judge previously employed by a religious liberty organization because his work caused "great" harm and "denies the humanity of people."[3]

In reality, religious students have greatly enriched campus communities, through charity, service, temperance, and commitment to learning. They are owed the right to freely exercise their religion, however out of fashion with an increasingly anti-religious bureaucratic regime that might be. Instead, the proposed rule incentivizes the maltreatment of religious groups by uniquely labeling them discriminators. Ohio and 21 other States oppose the Department's proposed rule.

I. Religious student organizations are under attack, including by the Department.

Across the country, students who seek fellowship with like-minded religious colleagues—a practice fundamental to our Nation—are under attack by powerful bureaucrats and tyrannical special interest groups.

In one San Jose public high school, administrators stripped the Fellowship of Christian Athletes of recognition. The Fellowship has long required its officers to affirm the Fellowship's ministry, which included that the marital relationship exists between one man and one woman, for life.[4] High-school administrators disliked this

[1] 34 C.F.R. §75.500(d).
[2] 88 Fed. Reg. 10857, 10859 (Feb. 22, 2023).
[3] *Stanford Associate Dean for Diversity, Equity, and Inclusion, Tirien Steinbach Remarks at Event Featuring Fifth Circuit Judge Duncan*, available at https://perma.cc/7DNP-Q6UM.
[4] *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075, 1082 (9th Cir. 2022), *vacated*, 59 F.4th 997 (9th Cir. 2023).

policy; they concluded that the Fellowship's views were "bullshit" and that evangelical students are intolerant "charlatans."[5] In de-recognizing the group, administrators cited the Fellowship's lack of adherence to a nondiscrimination policy, which prohibited discrimination on the basis of, among other things, sexual orientation.[6] But the school entirely failed to apply its non-discrimination policy to groups that violated the same policy in other ways. For example, it took no action against the Big Sisters/Little Sisters group, Girls Who Code, Senior Women Club, or Girls' Circle, even though all violate the same policy by limiting their membership to one sex.[7] In other words, the school administrators invidiously targeted Christians.

The problem is not limited to high schools, as recent events at the University of Iowa make clear. There, administrators purported to review groups out of compliance with its nondiscrimination policy. But this review targeted traditional religious groups.[8] The school stripped the InterVarsity Christian Fellowship of its official recognition because its leaders had to affirm "the basic biblical truths of Christianity."[9] "The University's fervor dissipated, however, once they finished with religious [groups.] Sororities and fraternities got exemptions" as did groups who base membership on "sex, race, veteran status, and even some religious beliefs."[10] Again, administrators sought to target traditional religious groups, and them alone, as discriminators.

So when the Department says it's taking action to ensure religious groups comply with "nondiscrimination requirements,"[11] the States know what's really going on. The Department is blessing the targeting of religious groups underlying *Fellowship of Christian Athletes* and *InterVarsity Christian Fellowship*. That is wrong.

Public institutions may not act with an "official purpose to disapprove of a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). The Department, having witnessed nondiscrimination policies being weaponized against only one set of students—adherents to traditional religion—cannot claim it is acting neutrally in revoking the existing regulation.

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[5] *Id.* at 1083–84 (9th Cir. 2022), *vacated*, 59 F.4th 997 (9th Cir. 2023).
[6] *Id.* at 1084, 1094–96.
[7] *Id.*
[8] *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 864 (8th Cir. 2021).
[9] *Id.* at 861.
[10] *Id.* at 864.
[11] 88 Fed. Reg. at 10859–60.

Because the Department's proposed rule would result in official action motivated by animus toward religion, and the Department knows it, the proposed rule should be withdrawn to prevent additional abuse of students' Free Exercise rights.

II. The Department imposes irreparable harm on students for no federal benefit.

The Department says it wants to avoid the "burdensome role" of investigating discrimination against religious organizations.[12] But it never considers the alternative burden on students. The Supreme Court has held that the loss of First Amendment rights for even a short period constitutes irreparable harm.[13] Forcing students, who lack resources and experience, to litigate the unconstitutional exclusion of their student group and the infringement of their Free Exercise rights constitutes an immense burden, and yet the Department notes zero costs for "students or campus communities" in rescinding the existing regulation.[14] The Department already has a massive apparatus to monitor compliance with civil rights laws. Allowing the existing regime to receive complaints and discuss concerns with an offending university would vastly lower the burden on aggrieved students for modest, if any, federal burden.

Concerningly, the Department does not recognize how forcing religious student groups to abandon their religion is not only burdensome, but wrong. Labeling religious groups as discriminators—rather than equal members of the campus community—is only upside to the Department and its allies. This conclusion directly contradicts the Department's own assessment in 2020, which it has not revisited:

> Religious freedom, by its definition, promotes tolerance and pluralism because it protects the right of individuals and groups to obey their conscience even when their conscience is at odds with popular beliefs and practices. Additionally, religious freedom constrains State action that would otherwise seek to enforce uniformity of thought or silence dissent. Thus, requiring public institutions to recognize students' First Amendment rights to speech,

[12] 88 Fed. Reg. at 10859.
[13] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020).
[14] 88 Fed. Reg at 10863.

> association, and free exercise will foster a culture that is more welcoming of various viewpoints and lifestyles, not less. […]
>
> Rather than using religious liberty to further discrimination, institutions are using "tolerance" as an excuse to hurt religious organizations. Depriving student groups of their rights in the name of "anti-discrimination" furthers religious discrimination itself, which the Constitution does not tolerate.[15]
>
> The Department was right in 2020. It should maintain the 2020 rule.

III. Conclusion

Because the Department seeks to strip religious student organization of protections they deserve, and undoubtedly need, the States request the Department rescind the proposed rule.

Yours,

DAVE YOST
Attorney General
State of Ohio

[15] 85 Fed. Reg. 59916, 59941 (Sept. 23, 2020).

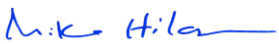
STEVE MARSHALL
Attorney General
State of Alabama

ANDREW BAILEY
Attorney General
State of Missouri

TREG TAYLOR
Attorney General
State of Alaska

AUSTIN KNUDSEN
Attorney General
State of Montana

TIM GRIFFIN
Attorney General
State of Arkansas



MIKE HILGERS
Attorney General
State of Nebraska

ASHLEY MOODY
Attorney General
State of Florida

DREW WRIGLEY
Attorney General
State of North Dakota

CHRISTOPHER M. CARR
Attorney General
State of Georgia

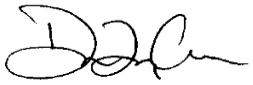
GENTNER F. DRUMMOND
Attorney General
State of Oklahoma

RAÚL LABRADOR
Attorney General
State of Idaho

ALAN WILSON
Attorney General
State of South Carolina

TODD ROKITA
Attorney General
State of Indiana

BRENNA BIRD
Attorney General
State of Iowa

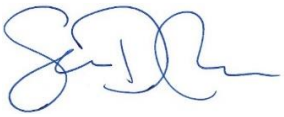


DANIEL CAMERON
Attorney General
Commonwealth of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

KEN PAXTON
Attorney General
State of Texas



SEAN REYES
Attorney General
State of Utah

JASON MIYARES
Attorney General
Commonwealth of Virginia

PATRICK MORRISEY
Attorney General
State of West Virginia