March 24, 2023

Ms. Ashley Clark
Management and Program Analyst
Office of Policy, Planning, and Innovation
U.S. Department of Education
400 Maryland Avenue SW
Room 2C185
Washington, D.C. 20202

RE: Protecting the Religious Liberty of Faith-Based Student Organizations (Docket ID ED-2022-OPE-0157)

Dear Ms. Clark:

The Religious Freedom Institute (RFI) is committed to achieving broad acceptance of religious liberty as a fundamental human right, the cornerstone of a successful society, and a source of national and international security. As Director of RFI's Islam and Religious Freedom Action Team, I explore religious freedom in Islamic tradition and provide a Muslim perspective on issues bearing on religious freedom and religion in public life. On behalf of RFI, I respectfully submit this comment on the referenced Notice of Proposed Rulemaking (NPRM).

In 2020, the U.S. Department of Education amended 34 C.F.R. § 76.500(d) to make it a condition of its grants to public institutions of higher education that such institutions may not deny any right, benefit, or privilege to religious student groups because of their beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs, that is otherwise afforded to other student organizations. This rule was wise, just, and necessary, because many public universities had begun to delist or refuse to recognize faith-based student organizations whose bylaws restricted leadership positions to those who shared the organization's religious beliefs and practices.

This practice of public universities was well-intentioned, in that it arose from a desire to protect students from wrongful discrimination, but it failed to recognize and respect the character of religious student organizations and their distinct contributions to the common life of those universities. Relatedly, it reflected a misunderstanding by these universities of the American constitutional order. This order, set forth by the Founders, protects the integrity of religious institutions from government interference in their leadership decisions, and in their internal affairs more generally. As the Supreme Court explained in *Hosanna-Tabor*:

> By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.[1]

Now, the Department of Education (DOE) proposes to rescind § 76.500(d) and abolish its requirement that public universities permit religious student groups to restrict their leadership to co-religionists. The agency provides several justifications for its proposed action, including (1) the rule has not meaningfully increased First Amendment protections; (2) the rule goes beyond what the First Amendment requires; and (3) the courts, not the agency, are the best means for student groups to seek redress of First Amendment violations. We address each of those justifications in turn.

1. § 76.500(d) has meaningfully increased First Amendment protections

As an initial matter, there can be no doubt that § 76.500(d) aims at a real and pervasive problem. The widespread practice of public universities punishing faith-based student organizations for restricting leadership positions to co-religionists is well-documented and has for years been the source of considerable litigation.[2] With this practice, universities targeted not only Christian student groups but groups serving students of minority faiths, such as Muslims and Jews. For example, before it was sued for violating students' First Amendment rights, the University of Iowa delisted dozens of organizations, including the Muslim Students Association, the Imam Mahdi Organization (representing Shia Muslims), the Latter-day Saint Student Association, the Chabad Jewish Student Association, and Hillel.[3]

Moreover, as the undersigned explained to Acting Assistant Secretary for Civil Rights Goldberg in a June 21, 2021, telephone call with other faith leaders, the ability of Muslim student organizations to restrict leadership to members of the Islamic faith goes to the very heart of their mission. On many campuses, such organizations provide the only religious services to which Muslim students have ready access. Their leaders lead or arrange prayers and scripture study sessions, and provide opportunities for religious fellowship and counseling. These are functions that can *only* be performed by Muslims.

So, when public universities insist that leadership offices of Muslim student organizations be open to non-Muslims, they open the door to the destruction of those organizations' mission. Conversely, when the agency enacted § 76.500(d), it protected those organizations—and student organizations of all faiths who play such a central role in the religious lives of their members—from this egregious invasion of their constitutionally-protected autonomy.

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[1] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 184 (2012).
[2] *See, e.g., InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855 (8th Cir 2021); *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969 (8th Cir. 2021); *Ratio Christi at the University of Colorado, Colorado Springs v. Sharkey*, Case 1:18-cv-02928 (D. Colo.); *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010)
[3] *Business Leaders in Christ v. University of Iowa*, Case 3:17-cv-00080-SMR-SBJ (S.D. Iowa), Doc. 101-1.

DOE now states that it "has not observed that [§ 76.500(d) has] meaningfully increased protections of First Amendment rights for religious student organizations…since the rule went into effect,"[4] and hence, rescinding it "would not have costs for students or campus communities."[5] Significantly, to support its conclusion that § 76.500(d) has had no impact on the policies of public universities towards religious student organizations, DOE cites no studies or data to that effect. Rather, for the agency, evidence of this alleged ineffectiveness consists in the fact that it "has not received any complaints regarding alleged violations" of the rule.[6]

But even if true, a dearth of reports of violations of § 76.500(d) in no way establishes that the rule fails to protect the First Amendment rights of religious student organizations. If anything, it supports a conclusion that the regulation effectively protects those rights. Indeed, while, as noted, the practice of delisting religious student groups based on their leadership policies had once generated extensive litigation, the undersigned is unaware of any lawsuits being filed after the rule was adopted in 2020. That no suits have been filed in the courts and no complaints have been received by DOE does not reasonably suggest that public universities have voluntarily and coincidentally changed their ways. Rather, it strongly suggests that § 76.500(d) has driven home to public universities, on pain of losing federal funding, their constitutional obligation to refrain from interfering in the leadership decisions of religious student organizations. A conclusion to the contrary would be justifiable only with data on the policy decisions of public universities, data which DOE does not claim to have.

2. § 76.500(d) does not go beyond what the First Amendment requires

DOE explains that § 76.500(d) must be rescinded because it believes the rule goes beyond what the First Amendment requires of public universities.[7] Specifically, the agency asserts that the First Amendment does not afford religious student groups an unqualified right to restrict their leadership to coreligionists. Rather, it believes, such a right obtains only when a public university permits secular student groups to restrict their leadership. Indeed, in the preamble to the 2020 final rule, the agency described § 76.500(d) as coextensive with the First Amendment, and hence asserted that it would not "prohibit public colleges and universities from implementing all-comers policies, nor…bar these institutions from applying neutral, generally-applicable policies to religious student organizations."[8] In other words, "withholding funds from any student organization under a neutral rule of general applicability is not constitutionally suspect or prohibited under these final regulations."[9] For example, the agency wrote, under the Constitution and § 76.500(d), "[w]ith respect to a true all-comers policy…Muslim groups could not bar leadership positions from non-Muslims[.]"[10]

DOE has now come to realize, however, that

[4] 88 FR 10861
[5] *Id.* at 10863
[6] *Id.*
[7] *Id.* at 10860
[8] 85 FR 59939
[9] *Id.* at 59940
[10] *Id.* at 59939

> the regulatory language the Department adopted in…76.500(d) does not expressly reflect that the material condition required by [that] section[] is merely a nondiscrimination requirement, nor does it specify that IHEs may apply neutral and generally-applicable rules to religious student organizations…There is nothing in the regulatory text that clarifies or guarantees that an institution may insist that such religious organizations comply with the same neutral and generally-applicable practices, policies, and membership and leadership standards that apply equally to nonreligious student organizations, including but not limited to nondiscrimination requirements.[11]

As explained below, RFI's position with respect to DOE's justification for rescinding § 76.500(d) is that the agency is mistaken now as it was in 2020 with respect to the scope of the First Amendment's protection of religious student organizations from interference in their leadership decisions, and that even if the language of § 76.500(d) could be read to exempt religious student organizations from neutral and generally-applicable nondiscrimination rules, such exemptions are in any event required by the First Amendment. Therefore, § 76.500(d) should not be rescinded or modified.

The preamble to the 2020 final rule and response to comments repeatedly cites to *Christian Legal Society* v. *Martinez*[12] for the proposition that the First Amendment permits public universities to subject religious student organizations to "neutral and generally-applicable" rules governing their leadership decisions. While the 2023 NPRM does not explicitly cite *Martinez*, it relies on that case by reference to the 2020 final rule, and its characterization of the scope of the First Amendment is clearly grounded in DOE's understanding of the *Martinez* holding. As we will explain, the agency profoundly errs in allowing its position on the scope of the First Amendment's protections for religious student organizations to be circumscribed by *Martinez*.

In *Martinez*, a sharply divided Supreme Court held that a public university did not violate a religious student organization's Constitutional rights when it refused to exempt it from neutral, generally-applicable non-discrimination rules. In rejecting the Christian Legal Society's Free Exercise claim, the Court relied on its earlier decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*.[13] In *Smith*, the Court held that the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[14] The *Martinez* court stated:

> CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in *Smith* forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not

[11] 88 FR 10860
[12] 561 U.S. 661 (2010)
[13] 494 U. S. 872 (1990)
[14] *Id.* at 879

> equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.[15]

Indeed, *Martinez* repeatedly stressed that *Smith* was the basis for its holding:

> The question here, however, is not whether Hastings *could*, consistent with the Constitution, provide religious groups dispensation from the all-comers policy by permitting them to restrict membership to those who share their faith. It is instead whether Hastings *must* grant that exemption. This Court's decision in [*Smith*] unequivocally answers no to that latter question.[16]

However, *Martinez*'s reliance on *Smith* for its rationale means that its holding cannot simply be taken in isolation as the final and definitive delineation of the First Amendment rights of religious student organizations. That is because, two years after *Martinez*, a unanimous Supreme Court recognized in the seminal *Hosanna-Tabor* that the First Amendment creates a "ministerial exception" to state lawmaking that prohibits interference with the leadership decisions of religious organizations. As the Court explained:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[17]

"This does not mean that religious institutions enjoy a general immunity from secular laws," the Court explained in *Our Lady of Guadalupe School v. Morrissey-Berru,* a subsequent ministerial exception case, "but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles."[18]

Moreover, *Hosanna Tabor* explained that *Smith* does not foreclose the ministerial exception:

> It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.[19]

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[15] 561 U.S. at 697 n. 27 (citations omitted).
[16] *Id.* at 694 n.24
[17] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-89 (2012)
[18] 140 S. Ct. 2049, 2060-61 (2020)
[19] *Hosanna-Tabor*, 565 U.S. at 190.

As explained above, many if not all religious student organizations, including the Muslim Students Association, perform a ministerial function, and therefore the ministerial exception clearly applies to public universities' attempt to subject them to nondiscrimination rules. DOE's unqualified reliance on *Martinez* for its understanding of the scope of the First Amendment's protection of religious student organizations ignores the Court's recognition two years later of the ministerial exception which clearly applies to those organizations, and it ignores that the case *Martinez* primarily relied on, *Smith*, did not foreclose that exception.

DOE worries that the language of § 76.500(d) is too sweeping, undermining its intended application as "merely a *nondiscrimination* requirement."[20] Indeed, the agency's decision to rescind the rule was prompted in part by a lawsuit filed against it in 2021 by the Secular Student Alliance, which claims that § 76.500(d) "violates the First Amendment by granting preferential treatment to religious student organizations because it allegedly bars public institutions from requiring religious student organizations to comply with nondiscrimination requirements."[21] DOE's concern reflects *Martinez*'s understanding, by way of *Smith*, that the Free Exercise Clause *itself* is merely a nondiscrimination requirement. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1916-17 (2021)(Alito, J., concurring in judgment) ("As interpreted in *Smith*, the Clause is essentially an anti-discrimination provision: It means that the Federal Government and the States cannot restrict conduct that constitutes a religious practice for some people unless it imposes the same restriction on everyone else who engages in the same conduct.")

However, this concern is baseless because, as the Supreme Court put it in *Hosanna Tabor*, "the text of the First Amendment itself…gives special solicitude to the rights of religious organizations."[22] *See also Fulton*, 1916-17 (Alito, J., concurring in judgment)(noting that "[t]he granting of an exemption from a generally applicable law is tantamount to a holding that a law is unconstitutional as applied to a particular set of facts, and cases holding generally applicable laws unconstitutional as applied are unremarkable.")(citation removed). Hence, to the extent that "[s]ome faith-based and civil rights organizations raised concerns" with the agency that § 76.500(d) "could be interpreted to require IHEs to…allow religious student groups to discriminate" against those who are not co-religionists,[23] those organizations' quibble is with the First Amendment itself, not with § 76.500(d). Therefore, the concern that the rule might allow "preferential treatment" for religious student organizations does not constitute a basis for rescinding it.

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[20] 88 FR 10860

[21] *Id.* at 10861 n. 31 (citing Complaint, *Secular Student Alliance et al. v. U.S. Dep't of Educ.*, No. 21–cv–00169 (D.D.C. Jan. 19, 2021). Tellingly, the Secular Students Alliance (SSA) itself practices the very "discrimination" it faults DOE for allegedly enabling for religious student organizations. The SSA's Code of Regulations provides that only "individual[s] who agree[] with the purpose of the Secular Student Alliance [are] eligible for organizational membership," and it requires prospective members, as a condition of membership, to swear a vow that they "affirm our values." Employing odd doublespeak, SSA claims to "embrace and welcome individuals regardless of their identity," including religious affiliation, but stipulates that those who "advocate for supernatural or pseudo-scientific phenomena, or take a neutral stance on naturalism do not meet the minimum standards of affiliation." The SSA's double standard is perhaps not so much an indicator of hypocrisy as a tacit admission of the impracticality, and indeed absurdity, of rules requiring organizations to accept members and leaders who oppose its fundamental aims and principles.

[22] 565 U.S. at 189

[23] 88 FR 10859

In sum, it is not necessary to wait for the Supreme Court to explicitly limit or overrule *Martinez* (or *Smith*, the case on which its holding is based) to grasp that *Martinez*, in isolation, does not fully adumbrate the scope of the First Amendment's protection of religious student organizations. A proper understanding of that scope requires reading Martinez in light of subsequent developments like *Hosanna Tabor* and other ministerial exception jurisprudence, as well as cases like *Fulton* that have limited *Smith*. Whatever vitality *Martinez* and *Smith* might still have and whatever their scope, they do not support DOE's view, expressed in the instant NPRM and in the 2020 final rule, that the religion clauses of the First Amendment permit public universities to dictate to religious student organizations how they may select their leaders.

The religion clauses of the First Amendment do not simply prohibit discrimination against religious student organizations: they protect those organizations from interference by the government in their internal affairs, including the imposition of non-discrimination policies that would prohibit them from restricting leadership to coreligionists. To the extent that § 76.500(d) may be read to achieve this First Amendment aim, it does not go farther than what that Amendment requires. To the extent that it may be read as DOE intended when it was promulgated in 2020 as "merely a *nondiscrimination* requirement," such a reading is consistent with the First Amendment but it is under-inclusive. It does not encompass the entire range of protection that the First Amendment provides.

3. The DOE, not the courts, is the best initial forum for student groups seeking to vindicate their First Amendment rights

DOE argues that rescinding § 76.500(d) is appropriate because, if public universities do violate the First Amendment rights of religious student organizations, "such organizations can and do seek relief in Federal and State courts."[24]

Of the innumerable reasons that this is a bad justification for recission, we focus on the fact that, for student organizations at universities with "all comers" policies, a legal anomaly renders the ministerial exception unavailable as a legal claim for relief if the university administration punishes it for restricting leadership positions to coreligionists. That is because, under current First Amendment jurisprudence, the ministerial exception cannot be asserted as an independent ground for relief but only as an affirmative defense to suit.[25] Because defending a lawsuit is not the posture of the typical student organization seeking to protect itself from interference by a public university in its leadership decisions, virtually by definition and certainly in the scenario proposed by DOE, such organizations will be unable to invoke the ministerial exception.

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[24] *Id.* at 10861

[25] *See Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 904 (S.D. Iowa 2019)("[T]he ministerial exception has traditionally been used as a defense to claims asserted against a religious organization, not as its own cause of action."). *See also Of Priests, Pupils, and Procedure: The Ministerial Exception as a Cause of Action for On-Campus Student Ministries*, 133 HARV. L. REV. 599, 599 (2019).

Although the ministerial exception is currently unavailable to religious student organizations for anomalous procedural reasons, it nevertheless exists in substance. Accordingly, to the extent that § 76.500(d) may be interpreted, as it should be, to exempt religious student organizations from a generally-applicable rule that would prohibit them from limiting leadership roles to coreligionists, the current regulatory framework is the best means by which such organizations can vindicate the rights protected by the First Amendment through the ministerial exception.

For all of the foregoing reasons, we urge DOE not to rescind § 76.500(d).

Respectfully submitted,

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