October 11, 2023

The Honorable Miguel A. Cardona
Secretary of Education
Dr. Nasser Paydar
Assistant Secretary for Postsecondary Education
U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Via USPS and email: Miguel.Cardona@ed.gov, Nasser.paydar@ed.gov

Re: Impact of recent *En Banc* Ninth Circuit Court of Appeals decision on Department of Education's proposed rulemaking of February 22, 2023, at 88 Fed. Reg. 10857 (Docket ID ED-2022-OPE-0157. RIN 1840-AD72)

Dear Secretary Cardona and Assistant Secretary Paydar:

We write to make the Department aware of a decision filed on September 13, 2023, by the Ninth Circuit Court of Appeals, sitting *en banc*, holding that a religious student group has a First Amendment right to require that its leaders affirm the group's religious beliefs and religious standards of conduct. The Ninth Circuit's 9-2 decision in *Fellowship of Christian Athletes, et al. v. San Jose Unified School District Board of Education*, --- F.4th ---, 2023 WL 5946036 (9th Cir., Sept. 13, 2023) (*en banc*) (hereinafter "*FCA v. SJUSD*"), makes clear that the Department's proposal to rescind the regulations that protect religious student groups on public university and college campuses, 34 CFR § 75.500(d) and § 76.500(d), is contrary to established federal law.

Accordingly, we ask the Department to carefully consider the impact of this *en banc* decision on its analysis undergirding the NPRM. We respectfully offer some significant considerations about how this case clarifies the First Amendment rights of religious student organizations that would be unwise to ignore. Religious student organizations must not be treated less favorably than non-religious organizations.

The Ninth Circuit's *en banc* decision in *FCA v. SJUSD* expressly overruled a 2011 Ninth Circuit decision that had allowed college administrators to deny religious student groups equal access to the same benefits enjoyed by other student groups. 2023 WL 5946036 at *15 & n. 8 (overruling *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011)). The Ninth Circuit ruled that *Alpha Delta Chi* was no longer good law under the United States Supreme Court's recent decisions protecting free speech and free exercise of religion. 2023 WL 5946036 at *15 & n. 8. Specifically, in overruling *Alpha Delta Chi*, the Ninth Circuit cited the Supreme Court's decisions in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (free speech), *Fulton v. City of Philadelphia*, --- U.S. ---, 141 S. Ct. 1868 (2021) (free exercise), and *Tandon v. Newsom*, --- U.S. ---, 141 S. Ct. 1294 (2021) (free exercise).

The Ninth Circuit's decision further demonstrates the likelihood that education administrators' attempts to implement "all-comers" policies are likely to be found unconstitutional. 2023 WL 5946036 at *21-22 ("In sum, the All-Comers Policy is neither neutral nor generally applicable under *Fulton* or *Tandon*."). The *en banc* court stressed the extreme narrowness of the 2010 decision in *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez,* 561 U.S. 661 (2010), which turned on the parties' specific fact stipulation that the specific all-comers policy at issue was facially viewpoint neutral.

By misleading college administrators into thinking that they have discretion to deny equal access to religious student groups because of their religious leadership qualifications, speech, or other sincerely held beliefs and practices, the Department's proposed rescission of 34 CFR § 75.500(d) and § 76.500(d) would result in college administrators denying access to religious student groups in violation of the clearly established constitutional right of religious student groups to have religious leadership requirements. See *FCA v. SJUSD*, 23 WL 5946036; *InterVarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021) (holding that university officials forfeited qualified immunity by derecognizing a religious student group because of its religious leadership requirements); *Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021) (same); *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006); *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 856–62 (2d Cir. 1996); see *also, InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785 (E.D. Mich. 2021). In the face of this federal caselaw, the Department cannot plausibly hope to justify its proposed rescission of 34 CFR § 75.500(d) and § 76.500(d) in a manner that courts would not regard as arbitrary and capricious.

Respect for religious student groups' right to choose their leaders according to their religious beliefs is essential to a free and truly pluralistic society. Indeed, in a 2022 poll, 73% of Americans "agree[d] that a religious student group should not be kicked off campus for requiring its leadership to be members in good standing of its faith community."[1]

Because America is a nation characterized by religious diversity, the Department must ensure that our public institutions of higher education teach and model respect for diverse religious beliefs and practices. Rescission of 34 CFR § 75.500(d) and § 76.500(d) would diminish religious diversity on public college campuses, make religious students feel unwelcome on their campuses, and mislead college administrators as to the established constitutional law that protects religious student groups' right to choose their leaders according to their religious beliefs. We urge the Department not to rescind 34 CFR § 75.500(d) and § 76.500(d).

Respectfully,

Shannon Compere

[1] Becket Fund for Religious Liberty, *2022 Religious Freedom Index: American Perspectives on the First Amendment*, 4th ed. (Dec. 2022), at 34 (finding 73% support in the university setting), https://becketnewsite.s3.amazonaws.com/20221207155617/Religious-Freedom-Index-2022.pdf (last visited Oct. 2, 2023).

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