March 24, 2023

Ms. Ashley Clark
U.S. Department of Education
400 Maryland Avenue, SW
Room 2C185
Washington, DC 20202.

RE: Notice of Proposed Rulemaking to rescind regulations §§ 75.500(d) and 76.500(d), Public Institutions and Religious Student Organizations, Docket ID ED-2022-OPE-0157

Dear Ms. Clark:

I write on behalf of Americans for Prosperity Foundation ("AFPF"), a grassroots educational organization that advocates for the principles of a free and open society. AFPF submits these comments in response to the Department of Education's notice of proposed rulemaking rescinding regulations §§ 75.500(d) and 76.500(d), Public Institutions and Religious Student Organizations

Protecting fundamental freedoms of expression and association is necessary for maintaining a dynamic society open to new and challenging ideas. And nowhere is this more important than on our college campuses, where the next generation should be empowered to express their views, have their arguments challenged, and understand the mutual benefit of constructive debate with those they disagree with. It is through this exchange of ideas that we can arrive at solutions for our country's biggest problems.

AFPF opposes the Department's effort to rescind these regulations, which will erode protections for free expression and association on college campuses while respecting institutional autonomy and academic freedom.

I. AFPF's Comments:

A. Voluntary association is a necessary component of liberty.

Voluntary associations—large and small, political and civil, commercial and charitable—form the foundation of a free and democratic society. Instilling the habit of voluntary association to achieve a mutual goal not only strengthens the skill of spontaneous association, but also develops other characteristics that are crucial to self-government, including the practice of speaking freely, circulating and challenging ideas, and holding government accountable. This aspect of American life is something of an historical oddity, and as such, should be nurtured if our talent for self-government is to survive.

Alexis de Tocqueville noted three critical features of the relationship between voluntary civil associations and the practice of self-government. First, associations cannot be limited to only certain aspects of life or the habit of voluntary association will be broken, in turn destroying the will of the people to undertake great things.[1]

[1] See 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 915 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835), available at https://bit.ly/36Sm7QQ (last visited July 1, 2022) ["DEMOCRACY IN AMERICA"].Tocqueville wrote: "When citizens have the ability and the habit of associating for all things, they will associate as readily for small ones as for great ones. But if they can associate only for small ones, they will not even

Second, voluntary associations provide stability in a democratic society and reduce risks to the state by allowing people to apply their skill of give-and-take in the political sphere, diffusing the risks of faction and ennui.[2]

Third, civic associations guard against tyranny by providing a font and outlet for fresh and competing ideas, allowing mediating institutions to provide the critical check against government overreach that individuals acting alone cannot.[3] These beneficial characteristics of voluntary association are imperiled by forced exclusion of certain volunteers from the public square. The give-and take among ideas and the development of skill in achieving a common goal is diminished, in turn undermining the ability of the people to sustain self-governance.

Rescinding these regulations and risking imposition of doctrinal conformity as a condition of participation as a student group, is but one example of government seeking to exclude "disfavored" viewpoints. Indeed, such exclusionary tactics have a long and storied history. After all, the "accepted wisdom" is constantly changing. As new opinions come to the fore—arising from the robust and free exchange of ideas—those who disclaim the contemporary canon should not be expunged until the state alone decrees who may participate in civic life. The myriad of cases the Supreme Court has decided in favor of students with non-conforming viewpoints has instructed generations of students that their participation in public life is not so tenuous. *See, e.g., Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021); *Tinker v Des Moines Indep. Cmty. School Dist*., 393 U.S. 503 (1969);

West Virginia State Bd. of Educ. v. Barnette,, 319 U.S. 624 (1943).

Moreover, a cursory review of the Supreme Court's association jurisprudence displays the kaleidoscope of participants in public life that overzealous enforcers have tried to exclude and the Court's consistent support for association from a variety of viewpoints:

- 1930s–1970s: Communist adherents. *E.g., De Jonge v. Oregon*, 299 U.S. 353 (1937); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Application of Stolar*, 401 U.S. 23 (1971).

- 1940s–2010s: Union representation. *E.g., Thomas v. Collins*, 323 U.S. 516 (1945); *Abood v. Detroit Bd. of Ed*., 431 U.S. 209 (1977) overruled by *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

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find the desire and the capacity to do so. In vain will you allow them complete liberty to take charge of their business together; they will only nonchalantly use the rights that you grant them; and after you have exhausted yourself with efforts to turn them away from the forbidden associations, you will be surprised at your inability to persuade them to form the permitted ones."

[2] *See id*. at 916. According to Tocqueville: "It is within political associations that the Americans of all the states, all minds and all ages, daily acquire the general taste for association and become familiar with its use. There they see each other in great number, talk together, understand each other and become active together in all sorts of enterprises. They then carry into civil life the notions that they have acquired in this way and make them serve a thousand uses. So it is by enjoying a dangerous liberty that the Americans learn the art of making the dangers of liberty smaller." Id.

[3] *Id*. at 901 ("A government can no more suffice for maintaining alone and for renewing the circulation of sentiments and ideas among a great people than for conducting all of the industrial enterprises. From the moment it tries to emerge from the political sphere in order to throw itself into the new path, it will exercise an unbearable tyranny, even without wanting to do so; for government only knows how to dictate precise rules; it imposes the sentiments and ideas that it favors, and it is always difficult to distinguish its counsels from its orders. . . . Associations, among democratic peoples, must take the place of the powerful individuals that equality of conditions has made disappear.").

- 1950s–1980s: NAACP. *E.g., Nat'l Ass'n for Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Nat'l Ass'n for Advancement of Colored People v. Claiborne Hardware Co*., 458 U.S. 886 (1982).

- 1920s–present: Families. *E.g., Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Over time, perspectives regarding who is right and who must be silenced for the common good rise and fall. If nothing else, this ever-changing landscape should teach us that what is dogma today may be anathema tomorrow.

B. Voluntary association has a long history and must be fully protected.

The history of protection for voluntary association indicates the right to form and join voluntary associations is not restricted to politics, but extends to social and religious matters as well, protecting political as well as non-political groups.

Voluntary association finds its constitutional origin and protection in the Assembly Clause. Constitutional law professor Akhil Amar has demonstrated the "Right of the People peaceably to assemble" was intended to secure the sovereignty of the people who may organize assemblies for the purposes of self-government.[4] As such, the government could not dictate the terms of assembly beyond nonviolence. It would be a contradictory protection for popular sovereignty if the government decided whether the assembling citizens were assembling for "appropriate" political purposes. Instead, the right of assembly offers "strong protection for the formation, composition, expression, and gathering of groups, especially those groups that dissent from majoritarian standards."[5]

The intent of the Assembly Clause to protect non-political groups is revealed in an exchange between John Page of Virginia and Theodore Sedgwick of Massachusetts during the debates over the First Amendment in the first Congress. Representative Sedgwick proposed striking the Assembly Clause, not because he disagreed with the right, but because "[Assembly] is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called into question; it is derogatory to the dignity of the House to descend to such minutiae."[6]

Representative Page responded that the right is obvious, like "whether a man has a right to wear his hat or not." But "such rights have been opposed . . . people have . . . been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority."[7] Scholars agree the reference to the "right to wear his hat" was a reference to William Penn's arrest in 1670 under the 1664 Conventicle Act which restricted the ability of non-conformist religious groups in England to attend religious meetings with more than five persons.[8] Page's allusion to Penn is a reference to an explicitly religious gathering with no explicit political aspect. Every lawyer in America, especially

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[4] Akhil Amar, *Bill of Rights: Creation and Reconstruction* 26 (1998) ("The right of the people to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express reservation of the collective right of We the People to assembly in a future convention and exercise our sovereign right to alter or abolish our government.").

[5] John Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 153 (2012).

[6] Neil Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 232 (2nd ed. 2015).

[7] *Id.*

[8] Inazu, *Liberty's Refuge* 24; Irving Brant, *The Bill of rights; its origin and meaning* 56, 57, 61 (1965); Ashutush Bhagwat, *Our Democratic First Amendment* 44-5 (2020).

those sitting in the first Congress, knew that story and understood its constitutional and historical ramifications. Page continued, "if the people could be deprived of the power of assembling *under any pretext whatsoever*, they might be deprived of every other privilege contained in the clause."[9] Page's argument won the day and Congress retained the Assembly Clause, forbidding government intrusion on "any pretext whatsoever" into free assemblies. The final wording includes only the requirement that the assemblies be "peaceable."

Historically, the right of assembly included a broad array of activities not limited to explicitly political activity. Democratic-Republican groups appealed to the right to exist as a dissenting group in a society dominated by Federalists, but they claimed protection for a vast array of non-political activities, including parades and feasts. One society declared, "One of our essential rights, we consider that of assembling, at all times, to discuss, with freedom, friendship and temper, all subjects of public concern."[10] As this broad right was adjudicated at the federal and state levels it protected everything from abolitionists, to suffragettes, to dancing, to singing and banging drums in a parade "to attract or call together an unusual crowd or congregation of people."[11]

C. Instead of rescinding regulations §§ 75.500(d) and 76.500(d), Public Institutions and Religious Student Organizations, the Department should expand those regulations to ensure all religious, political, and ideological student organizations are protected.

The regulations rightly affirm the protection of both free expression and the corollary right of free association. These rights are intertwined, such that free expression cannot be fully protected without ensuring protection for the right of individuals to join together around shared views. As the Supreme Court has explained, "implicit in the right to engage in activities protected by the First Amendment is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'"[12] The right to associate with others to express certain views necessarily includes the right to choose leaders who share and will advocate for those views.[13] Thus, these regulations rightly affirm that religious student groups must be afforded this right just as other political, philosophical, or ideological groups may associate around shared beliefs and ideas and choose leaders who will champion those views.

But while disputes more often arise in the context of religious student groups, and the need for protecting the rights of those groups is thus more acute, the First Amendment protects the freedom of association of all student organizations. Whether a student group is political, religious, philosophical, ideological, or academic in nature, it should have the freedom to operate and select leaders and members based on the organization's beliefs or principles. For example, an environmental group should be able to require that members and leaders affirm their commitment to protecting the environment.

Thus, AFPF encourages the Department to broaden the regulations and expressly ensure that all religious, political, and ideological student organizations are protected. As discussed above, voluntary association is broad and applies to all political, religious, and social matters. Broadening the scope of the regulations in this way would therefore more fully serve institutions of higher education, students, and

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[9] Cogan, *The Complete Bill of Rights* at 232 (emphasis added).
[10] Inazu, *Liberty's Refuge*, at 26. Philip S. Foner, *The Democratic-Republican Societies 1790–1800 (A Documentary Sourcebook*) 393 (1976), (quoting *Resolution Adopted Upholding the Cause of France*, South Carolina State Gazette, April 29, 1794.
[11] Inazu, *Liberty's Refuge*, at 42-3 (quoting Anderson v. City of Wellington, 19 P. 719, 721, 722 (Kan. 1888).
[12] *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).
[13] *Id*. at 623.

by extension, society at large. Finally, this expansion of the regulations would also track the language of the Equal Access Act, which protects "religious, political and ideological" student groups on secondary school campuses.[14]

II. Conclusion

AFPF is committed to ensuring the freedom of expression and association guaranteed by the First Amendment for all Americans, including students. Campuses are not just places where First Amendment rights should be protected; that protection is vital to their mission. They are uniquely positioned to instill in the next generation an appreciation for free speech and association. Because of this, we object to the Department's proposed rule.

Sincerely,

Cynthia Fleming Crawford
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Americans for Prosperity Foundation

[14] 20 U.S.C. § 4071(a).