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Office of Postsecondary Education
Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

RE: Docket Number ED-2018-OPE-0076

To whom it may concern:

Americans United for Separation of Church and State submits the following comment in response to the Federal Register announcement, "Negotiated Rulemaking Committee; Public Hearings," Docket Number ED-2018-OPE-0076, which was published on July 31, 2018.

The announcement asks for comments on the topics that should be considered for action by the negotiating committee. We write to object to consideration of topic ten: "revisions to the various provisions of the regulations regarding the eligibility of faith-based entities to participate" in various programs under Title IV of the Higher Education Act, and "the eligibility of students to obtain certain benefits under those programs."

Religious colleges and universities have been part of higher education in this country since before the founding of our nation. The existing regulations are grounded in core constitutional principles that have not been altered by a recent Supreme Court ruling and, thus, should not be changed. These regulations protect religious freedom by safeguarding the autonomy of these institutions while at the same time ensuring the government does not impermissibly favor them or promote religion.

The committee should not spend its limited time and resources reviewing the topic.

Americans United's Interest in the Rulemaking

Americans United is a nonpartisan advocacy organization dedicated to preserving the constitutional principle of church-state separation, the foundation of religious freedom for everyone.

Since its founding in 1947, Americans United has participated as a party, counsel, or amicus curiae in many of the leading church-state cases decided by the U.S. Supreme Court and

federal and state appellate and trial courts across the country. We file comments on proposed federal regulations that would affect church-state separation and religious freedom. We weigh in on relevant legislation in Congress and in the states. Americans United represents more than 125,000 members and supporters.

Americans United supports the constitutional protection that guarantees that no one is forced to pay for another person's religious activities. Ensuring that religion is supported solely by private funds is the best way to protect the religious freedom of taxpayers, to preserve the independence of religious institutions, and to sustain the diversity of faiths and beliefs that makes our country strong.

Moreover, we have long supported religious exemptions where they relieve real and substantial burdens on religious exercise and do not cause harm to others.

Trinity Lutheran Does Not Change the Controlling Supreme Court Precedent

In *Trinity Lutheran Church of Columbia v. Comer*, the Supreme Court held that the state of Missouri violated the Free Exercise Clause by denying a church-operated preschool a grant to buy a new surface for its playground.[1] The decision, which was based on a determination that the school was denied the grant solely because of its religious status, was extraordinarily narrow: the Court expressly limited its holding to "discrimination based on religious identity" and only "with respect to playground resurfacing."[2] This limited decision has no impact on existing Department of Education regulations that apply to aid for religious education and activities. Instead, the Department should rely on the cases directly on point: *Locke v. Davey* and *Mitchell v. Helms*.

The *Trinity* decision reaffirmed *Locke v. Davey*. In *Locke*, the Court held that a Washington state regulation prohibiting the use of state scholarship funds to pursue theology degrees did not violate the Free Exercise Clause.[3] The Supreme Court rejected the argument that government must fund religious activity if it funds comparable secular activity and explained that "[t]he State ha[d] merely chosen not to fund a distinct category of instruction."[4]

As the Court in *Trinity* explained, *Locke* differs from *Trinity* because the plaintiff there "was not denied a scholarship because of who he was"—his religious status; rather "he was

[1] 137 S. Ct. 2012, 2017-18, 2024-25 (2017).
[2] *Id.* at 2024 n.3. Though this footnote was joined by only four Justices, it is controlling because it set forth narrower grounds for the judgment than did the two Justices who joined the body of the majority opinion but not the footnote. *See id.* at 2025-26 (concurring opinions of Thomas, J., and Gorsuch, J.); *Marks v. United States*, 430 U.S. 188, 193 (1977). In addition, Justice Breyer, who did not join any of the majority opinion, wrote a concurrence expressing views similar to those in the footnote. *See Trinity Lutheran*, 137 S. Ct. at 2026-27.
[3] 540 U.S. 712, 720-21; 725 (2004).
[4] *Id.* at 720-21.

denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry."[5] Moreover, the funding denial in *Locke* was based on a state "interest in not using taxpayer funding to pay for the training of clergy" that "lay at the historic core of the Religion Clauses."[6] The Court added, "Nothing of the sort can be said about a program to use recycled tires to resurface playgrounds."[7]

Not only does the Free Exercise Clause allow the state to refuse to fund religious activities, the Establishment Clause requires it. In the controlling opinion in *Mitchell v. Helms*, the Court explained that it had "long been concerned that secular government aid not be diverted to the advancement of religion" and reaffirmed that religious schools could receive government funds as part of a program that distributes aid to religious and non-religious schools alike, so long as it is not put to religious use.[8]

Locke and *Mitchell*, not *Trinity Lutheran*, are relevant to setting the rules on how students and religious colleges may access federal student aid dollars. *Trinity Lutheran*, therefore, does not provide a justification for reopening the regulations.

Eligibility
Topic ten identifies existing regulations in parts 628, 674, 675, 676, 682, 685, 690, 692, and 694. All of these reflect the current state of the law and place appropriate and necessary protections on those seeking access to federal student aid dollars. For instance, existing regulations:

- prohibit funds given directly to educational institutions from being used for religious purposes, like religious worship or a department of divinity;[9]
- ensure that work-study and loan forgiveness programs may not be used for work on religious activities, such as support for religious worship or instruction;[10] and
- make clear that federal financial aid may not be used to pay for the studies of a member of a religious order that directs his or her course of study and requires him or her to forego outside monetary support.[11]

Because none of the limitations in these regulations are based on a religious status, but rather on use of funds, *Trinity Lutheran* is irrelevant.

[5] *Trinity Lutheran*, 137 S. Ct. at 2023.
[6] *Id.*
[7] *Id.*
[8] 530 U.S. 793, 840-41, 857-58 (2000) (O'Connor, J., controlling opinion).
[9] *E.g.*, 34 C.F.R. §628.45
[10] *E.g.*, 34 C.F.R. §675.20.
[11] *E.g.*, 34 C.F.R. §34 C.F.R. §674.9.

Accreditation

The announcement also states that the rulemaking will examine the accreditation system, including requirements to "honor institutional mission." Accrediting agencies have an obligation to oversee the quality of education at institutions of higher education. Current regulations already include a religious exemption for accreditation to ensure both that an institution's religious mission is honored and the accrediting agency's standards that ensure quality are satisfied.[12] Thus, religious schools are not excluded in any way from the accreditation process, and *Trinity Lutheran*, which only addressed exclusions from a particular grant program based on religious status, does not apply.

Moreover, adopting a broader exemption could allow religious colleges to skirt essential accreditation standards—including those that bar discrimination—and would undermine the accreditation process.[13] This runs the risk of violating the Constitution. The Establishment Clause of the First Amendment prohibits granting religious exemptions that would detrimentally affect any third party.[14] When crafting such a religious exemption, the Department "must take adequate account of the burdens" that it "may impose on nonbeneficiaries" and must ensure that any exemption is "measured so that it does not override other significant interests."[15]

The Department Must Include Religion Clause Legal Experts on the Committee

The announcement outlines a very broad array of issues that the Negotiated Rulemaking committee will address. But it is impracticable that the committee will be able to adequately discuss and negotiate the disparate topics.

This is especially true for topic ten. Even though the announcement says the committee must reflect the "diversity among program participants,"[16] it is unlikely that the group would have specific expertise on the relevant constitutional law for the proposed changes under this topic.

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[12] 34 C.F.R. §600.11.

[13] We also have concerns with topic five because it could open the door to institutions broadly outsourcing to unaccredited education providers.

[14] *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not "impose unjustified burdens on other[s]"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (may not "impose substantial burdens on nonbeneficiaries").

[15] *Cutter*, 544 U.S. at 720, 722; *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

[16] The Higher Education Act states that committees should be comprised of "students, legal assistance organizations that represent students, institutions of higher education, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies." 20 U.S.C. §1098a(a)(1).

If the Department goes forward with consideration of topic ten, we recommend that the Department include experts in the Constitution's religion clauses.

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Because the regulations identified in the announcement do not need to be changed, we recommend that the committee not consider these topics in its negotiated rulemaking.

Thank you for the opportunity to provide comments. If you should have further questions, please contact Dena Sher, (202) 466-3234 or sher@au.org.

Sincerely,

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