

**Comments on House Bill 14-1048
Concerning Religious Freedom for Student Groups
at State Institutions of Higher Education**

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America has long valued religious freedom. On January 15, 2014, for Religious Freedom Day, President Obama said:

America proudly stands with people of every nation who seek to think, believe, and practice their faiths as they choose. In the years to come, my Administration will remain committed to promoting religious freedom, both at home and across the globe. We urge every country to recognize religious freedom as both a universal right and a key to a stable, prosperous, and peaceful future.

The Colorado legislature is considering a bill protecting religious freedom for student groups. Why does this matter? Are religious students in need of protection? According to the 2014 Pew Research Center Report,¹ Americans who are religious experience moderate social hostility.

How does this experience translate to campus life? The Institute for Jewish & Community Research did a detailed, in-depth study of higher education faculty in 2007.² To their surprise, authors Tobin and Weinberg found that faculty of higher education feel coldly towards Evangelicals and Mormons. A majority of nonEvangelical faculty have negative feelings about Evangelical Christians. A majority of faculty believes that ethnic or religious minority students are reluctant to express their views. Tobin and Weinberg conclude that their study “raises serious concerns about how Evangelical Christian faculty and students are treated or feel they are treated on campus.”³ They comment, “The prejudice against them stands out prominently in institutions dedicated to liberalism, tolerance, and academic freedom.”⁴

¹ Religious Hostilities Reach Six-Year High, *Pew Research Center*, Jan. 14, 2014.

² Gary Tobin and Aryeh Weinberg, Vol. II: Religious Beliefs and Behavior of College Faculty, *Institute for Jewish & Community Research*, 2007.

³ *Id.*, p. 86.

⁴ *Id.*, p. 87.

These studies indicate that the campus environment is an unfriendly place in some ways for students with strong religious faith. What are the alternatives? Should they be forced to change their beliefs and perspectives? Some might believe so, but that is not the pluralism that made America great. Should they leave? If people of faith do not feel safe on the public university campuses; if parents believe their children will be persecuted and pressured to lose their faith; they will leave the universities. Such a departure would be undesirable in many ways. Religious people also pay taxes and should be able to participate freely in public education. True liberalism and diversity would suffer—with reduced exchange of ideas on campus and a restricted marketplace of ideas.

On a typical university campus, hundreds of student groups meet. As recognized student groups, they can reserve meeting space and communicate with other students. Without recognition, it is virtually impossible to exist on campus. But at too many colleges, religious student groups are being told that they cannot meet on campus if they require their leaders to agree with their religious beliefs. But it is common sense and basic religious liberty—not discrimination—for religious groups to expect their leaders to share their religious beliefs.

Is it constitutional to allow religious groups to set their own standards? The Supreme Court acknowledged the importance of recognition in its landmark 1972 decision, *Healy v. James*.⁵ The Court ruled that the First Amendment required a public college to recognize the Students for a Democratic Society. The Court rejected the college's argument that it would be endorsing the SDS's sometimes violent political agenda if it recognized the group. Recognition, the Court said, is not endorsement.

In 1981, in *Widmar v. Vincent*,⁶ the Court ruled that the First Amendment protects religious student groups' right to be recognized, and the Establishment Clause does not prohibit religious groups' meetings. Again the Court ruled that recognition is not endorsement.

After the Court removed the Establishment Clause as a justification for denying religious groups recognition, university nondiscrimination policies became the new justification for denying recognition. Nondiscrimination policies are good and essential. But, at some colleges, although by no means most colleges, nondiscrimination policies are being misinterpreted and misused to exclude religious student groups.

Nondiscrimination policies are intended to protect religious students as well as other minority groups, not prohibit them from campus. Many prominent universities—including the University of Florida, University of Texas, and University of Minnesota—have strong

⁵ 408 U.S. 169 (1972).

⁶ 454 U.S. 263 (1981).

nondiscrimination policies that simultaneously respect the religious groups' religious liberty.⁷

We want to briefly discuss three recent Supreme Court decisions. The Supreme Court heard a case about one particular kind of policy in *Christian Legal Society v. Martinez*,⁸ in 2009. This “all-comers” policy took the very odd and unworkable position that no group could discriminate in its membership on any basis at all—each group must accept all comers. This meant that there could be no women’s chorale, no ethnic societies, no selection of any kind. The Court upheld this all-comers policy, but hinted strongly that a nondiscrimination policy cannot be constitutionally applied to religious groups’ choice of leaders and members.⁹

And in 2012, a unanimous Supreme Court decided *Hosanna-Tabor v. EEOC*,¹⁰ and held that nondiscrimination laws cannot be used to prohibit religious organizations from deciding who their leaders will be. The Court acknowledged that nondiscrimination laws are “undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.” This holding would apply equally to student groups, such as the Catholic Newman Center.

Another recent Supreme Court case is also relevant: *Agency for International Development v. Alliance for Open Society, International, Inc.*¹¹ This case, about the unconstitutional conditions doctrine, examined what conditions the government could impose as a requirement for receiving government funds. The Court held that the government could not require grant recipients to adopt a particular belief as a condition of funding.

These cases indicate that the government should not force religious groups to surrender their beliefs or religious autonomy rights in exchange for funding or benefits. And by making litigation of this issue in Colorado unnecessary, this law will save taxpayer money and conserve public universities’ scarce financial resources.

HB 14-1048 makes sense in the context of current law. It states that a religious student group may not be denied benefits if it chooses to require that its leaders adhere to the group’s sincerely held religious beliefs or standards of conduct. The bill doesn’t even say that all members can be required to hold certain beliefs—only the leaders. Just as a Republican group’s leaders can be Republican, and an environmental group’s leaders should be committed to recycling, so a Christian group’s leaders can be required to adhere to the group’s religious beliefs.

⁷ These model policies are attached to this testimony.

⁸ 130 S.Ct. 2971 (2010).

⁹ 130 S.Ct. at 3009-13 (2010) (Alito, J., dissenting, joined by Roberts, C.J., Scalia, J., and Thomas, J.).

¹⁰ 132 S.Ct. 694 (2012).

¹¹ 133 S. Ct. 2321 (2013).

We do have one change that we would recommend to the language. The bill provides that a religious student group shall not be denied a benefit “solely” because of its leadership requirement. Based on that single word, a university administrator might try to circumvent the statute by arguing that a religious group could be denied protection if the administrator came up with a second reason to deny a religious group a benefit. We would request that the word “solely” be removed.

Religious students already feel somewhat ostracized as a disfavored minority, so religious student groups are important. Without these groups, students may feel forced to lose their identity or may leave campus. These options are detrimental to religious students, but also harm diversity and pluralism on our campuses.

Religious student groups may not always be popular, such as when they have a different definition of sexual morality than the majority of students. The genius of the First Amendment is that it protects everyone’s speech, no matter how unpopular, and everyone’s religious beliefs, no matter how unfashionable. When that is no longer true, and when nondiscrimination policies are misused as instruments for the intolerant suppression of traditional religious beliefs, then the pluralism so vital to sustaining our political and religious freedoms will no longer exist.

About the Christian Legal Society:

The Christian Legal Society (CLS) believes that the pluralism essential to a free society prospers only when the First Amendment Rights of all Americans are protected, regardless of whether their speech is popular or not. CLS was instrumental in the passage of the Equal Access Act of 1984,¹² which protects the rights of students to meet on public secondary school campuses. The EAA has protected primarily religious and homosexual student groups, both of whose speech is disfavored in different times and places.

CLS’s Center for Law and Religious Freedom protects freedom of speech and religious liberty for all Americans. A graduate of Harvard Law School and the University of Illinois, Center Director Kim Colby has testified before the U.S. Commission on Civil Rights on the compatibility of nondiscrimination policies and religious liberty when religious conscience is respected.

About Theresa Lynn Sidebotham:

Theresa grew up in a multicultural environment, and has lived in a number of countries. She attended law school at the University of Denver and Wheaton College, and practices constitutional and religious liberties law.

¹² 20 U.S.C. §§ 4071-4074 (2013).

ATTACHMENT A



New Student Organization Registration Application

Submit completed forms to Student Activities, along with required \$10 non-refundable fee.

A student organization that wishes to use university facilities must be registered with Student Activities. A group of three (3) or more enrolled students is eligible under the university's *Institutional Rules*, Section 6-202, if:

- 1) its membership is limited to enrolled students, staff and faculty of The University of Texas at Austin;
- 2) it does not deny membership on the basis of race, color, religion, national origin, gender, age, disability, citizenship, veteran status, sexual orientation, gender identity or gender expression, except that a) an organization created primarily for religious purposes may restrict the right to vote or hold office to persons who subscribe to the organization's statement of faith; and b) an organization may restrict membership based on the provisions of Title IX of the Education Amendments of 1972;
- 3) it is not under disciplinary penalty prohibiting registration; and
- 4) it conducts its affairs in accordance with the Regents' *Rules and Regulations*, university regulations and administrative rules.

Please Note: If the registered student organization is approved, the following information (1–6) will be posted on the Student Activities Web site.

1. Name of proposed registered student organization _____

2. Type of organization: Political Educational/Departmental Honorary
 (Check one only) Student Governance Professional Social
 Recreational Religious Service
 International/Cultural Special Interest

3. State the registered student organization's official purpose _____

4. Indicate any membership requirements* beyond those stated in the *Institutional Rules* above _____

* Does your registered student organization intend to limit membership to a single gender? Yes No

For Office Use Only

Receipt Number _____

Staff Signature _____ Date _____

University of Florida's Policy (<https://www.union.ufl.edu/involvement/index.asp>)

Student Organization Registration Policy Update

The University of Florida has modified its policies relating to the registration of religious student groups as Registered Student Organizations (RSOs). The modification was made to accommodate any student group whose religious mission requires its membership to share the organization's religious beliefs, while at the same time continuing to protect the University's nondiscriminatory educational program.

More than 760 student organizations covering a wide variety of interests are registered at the University. UF has always welcomed registration of religious organizations. More than 60 religious student organizations, of which about 48 are Christian, are registered as RSOs at UF.

The University considers participation in registered student organizations to be an important educational opportunity for all of our students. The University applies its nondiscrimination in membership policy to registered student organizations to ensure that these important learning opportunities are not denied to any student due to discrimination based on race, sex, religion or certain other prohibited bases.

A small number of religious student groups have expressed a religious need to ensure that all of their members share the religious beliefs of the organization.

To the greatest extent possible-while fulfilling our nondiscriminatory educational mission and complying with the law-the University wants to be sure that a full range of religious student organizations feel just as free to register as any other type of student organization. This ensures that all of our students will find meaningful educational opportunities to participate in registered student organizations.

As we are committed to serving all of our students well, the University has carefully considered how to address the concerns expressed by some religious student groups and individuals without compromising our educational program. After doing so, the University has made the decision to modify its nondiscrimination policy as follows:

"Student organizations that wish to register with the Center for Student Activities and Involvement (CSAI) must agree that they will not discriminate on the basis of race, creed, color, religion, age, disability, sex, sexual orientation, marital status, national origin, political opinions or affiliations, or veteran status as protected under the Vietnam Era Veterans' Readjustment Assistance Act.

A student organization whose primary purpose is religious will not be denied registration as a Registered Student Organization on the ground that it limits membership or

leadership positions to students who share the religious beliefs of the organization. The University has determined that this accommodation of religious belief does not violate its nondiscrimination policy."

This modification of the University's registration policy recognizes a meaningful distinction between sincerely held current religious beliefs (which may be considered in selecting members or leaders of religious RSOs)-and religious or other status (e.g., religion of birth or historical affiliation). The modification takes effect immediately and is now reflected in the CSAI's Handbook of Student Activities as well as its registration and constitution guidelines and Web site. A letter has been sent to each religious student group that has recently sought and not received registration to ensure that it is aware of the modification and to invite its registration.

University of Minnesota's "Constitution and By-Laws Instructions" in *Student Groups Official Handbook*, available at <http://sua.umn.edu/groups/handbook/constitution.php> (last visited December 7, 2012)

3. University of Minnesota Policy: Student groups must comply with all University policies and procedures, as well as local, state, and federal laws and regulations. This includes, but is not limited to, the Board of Regents Policy on Diversity, Equal Opportunity and Affirmative Action as they relate to group membership and access to programs. Religious student groups may require their voting membership and officers to adhere to the group's statement of faith and its rules of conduct. Your constitution needs to include a statement about your group's responsibility to operate in accordance with these policies.