

**Comments on House Bill 15-1037
Concerning Religious Freedom for Student Groups
at State Institutions of Higher Education
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I am a Colorado attorney who practices First Amendment and religious liberties law. Unlike most of you, I was raised in a country that had neither free speech nor freedom of religion. That experience helped convince me that true pluralism is essential to a free society. Along with the Christian Legal Society, I believe that that our society prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of either their speech or their religious beliefs.

You in the Colorado legislature are considering a bill protecting religious freedom for student groups, specifically protecting religious groups' ability to appoint leaders who will comply with the groups' sincerely held religious beliefs or standards of conduct. Why does this matter?

Are religious students in any need of protection?

In a number of cases recently, university officials have decided not to allow Christian student groups to have religious requirements for their leaders. Last year, California State University kicked a Christian organization off campus for requiring its leaders to affirm their Christian faith.¹ This issue is cropping up regularly around the country.

According to the 2014 Pew Research Center Report,² 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 2007.³ To their surprise, Tobin and Weinberg, the authors, 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

¹ Carla Rivera, *Christian group fights for identity against Cal State policy*, Los Angeles Times, October 24, 2014, at <http://www.latimes.com/local/education/la-me-calstate-clubs-20141024-story.html#page=1>.

² Religious Hostilities Reach Six-Year High, *Pew Research Center*, Jan. 14, 2014.

³ Gary Tobin and Aryeh Weinberg, Vol. II: Religious Beliefs and Behavior of College Faculty, Institute for Jewish & Community Research, 2007.

campus.”⁴ They comment, “The prejudice against them stands out prominently in institutions dedicated to liberalism, tolerance, and academic freedom.”⁵

Perhaps because of this prejudice, a number of universities have excluded religious campus groups unless the groups are willing to subscribe to a complete nondiscrimination policy or an all-comers policy. These policies are particularly difficult for religious groups, because “their shared beliefs coincide with their shared status. They cannot otherwise define themselves and not run afoul of the nondiscrimination policy.”⁶ This means religious groups are specifically marginalized. Unsurprisingly, this has led to a number of lawsuits.

If studies indicate that the campus environment is an unfriendly place in some ways for students with strong religious faith, what are the alternatives? Should students be forced to change their beliefs and perspectives to whatever is currently acceptable? Some might believe so, but that is not the pluralism that made America great. Should they leave campus? 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.

This is really an issue about whether student religious groups get to choose their religious leaders based on their religious beliefs without the state of Colorado, through government university officials, telling religious groups what their religious beliefs have to be and who their religious leaders have to be. We should all agree that government should not be involved in telling religious groups who their leaders can be.

Does it really matter if a student group is not recognized?

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

⁴ *Id.*, p. 86.

⁵ *Id.*, p. 87.

⁶ *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 806 (9th Cir. 2011) (Ripple, J., concurring).

Won't allowing religious groups to discriminate on the basis of religion undermine true diversity on campus?

In other words, don't you need complete nondiscrimination to protect diversity? On the contrary, complete nondiscrimination does not protect diversity; it promotes homogeneity. The natural tendency of a human association is to rally around a particular idea, interest, or skill, and select its leaders and even members accordingly: the President of the Chess Club plays chess well, the Asian-American Association has ethnic or experiential roots in Asia; the Young Democrats voted for Governor Hickenlooper; and so on. If we enforce a particular way of thinking, if we say that all positions in all organizations are open to everyone, we get a bland ideological mush—or worse yet, the thought police. And minorities, whether homosexual, religious, or ethnic, will not fare well. True liberalism and diversity will suffer—with a reduced exchange of ideas on campus and a restricted marketplace of ideas.

Will this bill affect the civil rights of the LGBT groups?

Last year, the opposition to this bill seemed to focus on LGBT rights, and we understand that our LGBT brothers and sisters speak up strongly for civil rights. Christian Legal Society has always affirmed the civil rights of other minorities. For instance, the federal Equal Access Act, which CLS helped to pass, protects the right of both Christian groups and LGBT groups to meet in public high schools. Certainly, our LGBT brothers and sisters should be treated respectfully.

We had a LGBTQ conference last week in Denver that discussed LGBTQ religious beliefs, and the fact that they are heavily involved in some religious circles. Other religious groups and churches affirm traditional marriage and do not affirm the gay lifestyle, so they are less involved there. This is a point of disagreement in our culture.

The genius of American pluralism is that we can live with points of disagreement. In fact, right now in America, about 35% of people favor same-sex marriage, and about 31% oppose. But a majority also favors religious exemptions for those who do not wish to participate in same-sex marriages.⁷ LGBT student groups should be permitted to meet and choose leaders sympathetic to their beliefs. Religious student groups should be permitted to do the same, whether or not they have identical beliefs with other groups or strong disagreement. Our public square is broad enough for civil rights for everyone—that is what the First Amendment and true diversity is all about.

⁷ See *AP-GfK Poll: Support of gay marriage comes with caveats*, Feb. 5, 2015, at <http://ap-gfkipoll.com/featured/findings-from-our-latest-poll-13>.

Is it constitutional to allow religious groups to set their own standards for leaders?

The Supreme Court acknowledged the importance of recognition for student groups in its landmark 1972 decision, *Healy v. James*.⁸ 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. The Court pointed out that students do not shed their constitutional rights at the schoolhouse gate, and that in fact, a college should be a "marketplace of ideas."⁹

In 1981, in *Widmar v. Vincent*,¹⁰ 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.

In 2012, a unanimous Supreme Court decided *Hosanna-Tabor v. EEOC*,¹¹ 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." The Court spoke at some length about the right to freedom of expressive association, shared by both religious and secular groups, as a way of promoting their viewpoint.¹² This holding would apply equally to student groups, such as the Catholic Newman Center, so it seems likely that student religious groups have an absolute constitutional right to choose their leaders.

Another recent Supreme Court case is also relevant: *Agency for International Development v. Alliance for Open Society, Int'l, Inc.*¹³ 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.

How do nondiscrimination policies work well?

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

⁸ 408 U.S. 169 (1972).

⁹ 408 U.S. at 180.

¹⁰ 454 U.S. 263 (1981).

¹¹ 132 S.Ct. 694 (2012).

¹² 132 S.Ct. at 712 (Alito, J. , concurring).

¹³ 133 S. Ct. 2321 (2013).

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 nondiscrimination policies that simultaneously respect the religious groups’ religious liberty.¹⁴

The Supreme Court heard a case about one particular kind of policy in *Christian Legal Society v. Martinez*,¹⁵ 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.¹⁶

Should we change anything about HB 15-1037?

I do have one change in the language to recommend. 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. I request that the word “solely” be removed.

Why does HB 15-1037 make sense?

HB 15-1037 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.

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

¹⁴ These model policies are attached to this testimony.

¹⁵ 130 S.Ct. 1971 (2010).

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

Religious students already are 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, and 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 or not their speech is popular. CLS was instrumental in the passage of the Equal Access Act of 1984,¹⁷ 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 was also instrumental in passing the Religious Freedom Restoration Act of 1993 and the Religious Land Use and Institutionalized Persons Act of 2000.

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 practices constitutional and religious liberties law.

¹⁷ 20 U.S.C. 4071-4074 (2013).