



CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

March 30, 2015

The Hon. Steve Brunk, Chair
Members of the House Standing Committee
on Federal and State Affairs
300 Southwest Tenth Street
Topeka, Kansas 66612

Re: Hearing on SB No 175 to protect religious student associations at
postsecondary educational institutions

Dear Chairman Brunk and Members of the Committee:

The Christian Legal Society supports SB 175, which will provide necessary protection for college students' freedoms of speech and association. But most importantly, the legislation will protect students' religious liberty in the vitally important context of state colleges and universities.

Attached to this statement are actual letters from public university officials or student government representatives to religious groups threatening to exclude the religious groups from campus because they require their leaders to agree with the groups' religious beliefs. (Attachments B, C, E, F, I, K, and M). These letters exemplify the problem that the legislation will prevent in Kansas. By passing the legislation, the legislature will ensure that Kansas taxpayers' money is not spent on the unnecessary litigation that would result if Kansas's public universities interpreted their existing policies, or adopted new policies in the future, to exclude religious groups from campus because they require their leaders to share their religious beliefs.

I respectfully request that this letter and its attachments be included in the record for the hearing on SB 175 before the House Standing Committee on Federal and State Affairs, currently scheduled for March 30, 2015.

I. Brief Background on the Christian Legal Society's Expertise in Defending Religious Student Organizations' Access to Public College Campuses.

The Christian Legal Society ("CLS") is a national association of Christian attorneys, law students, and law professors, including attorney chapters in St. Louis and Kansas City. CLS has student chapters at approximately 110 law schools nationwide, including at the University of Kansas and Washburn University. CLS law student chapters typically are small groups of students who meet for weekly prayer, Bible study, and worship at a time and place convenient to the students. All students are welcome at CLS meetings. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of faith, signifying agreement with the traditional Christian beliefs that define CLS.

CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected regardless of the current popularity of their speech or religious beliefs. For that reason, CLS was instrumental in the passage of three landmark federal laws that protect religious liberty: 1) the Equal Access Act of 1984 that protects the right of all students, including religious groups and LGBT groups, to meet for "religious, political, philosophical or other" speech on public secondary school campuses;¹ 2) the Religious Freedom Restoration Act of 1993 that protects the religious liberty of all Americans;² and 3) the Religious Land Use and Institutionalized Persons Act of 2000 that protects religious liberty for congregations of all faiths and for prisoners.³

¹ See, e.g., 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement).

² See Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 1 n.a (1994) (thanking the Center for Law and Religious Freedom, "one of the prime proponents of the Religious Freedom Restoration Act," for research assistance).

³ See, e.g., *Religious Liberty*: Hearing Before the Senate Committee on the Judiciary on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure 4-18 (1999) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society).

As the current Director of the Christian Legal Society's religious liberty advocacy arm, the Center for Law and Religious Freedom, I have worked for over thirty years on securing equal access for religious student groups in the public education context, including higher education. On June 10, 2014, I testified before the Subcommittee on the Constitution and Civil Justice of the Judiciary Committee of the United States House of Representatives, on "The State of Religious Liberty in the United States," including the issue of campus access for religious student organizations. On March 22, 2013, I was a panelist for a briefing convened by the United States Commission on Civil Rights entitled, "Peaceful Coexistence? Reconciling Non-discrimination Principles with Civil Liberties," specifically to address the religious liberty issue of religious student groups' access to college campuses. I have served as co-counsel for religious student groups in two cases heard by the United States Supreme Court: *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), involving access for high school religious student groups, and *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), involving access for college religious student groups.

II. There is Substantial Need for the Protection that SB 175 will Provide To Religious Student Associations.

SB 175 protects religious student associations' meetings on college campuses by prohibiting public colleges from denying access to a religious student association if it requires its leaders or members to:

- adhere to the association's sincerely held religious beliefs;
- comply with the association's sincere religious observance requirements;
- comply with the association's sincere religious standards of conduct;
- or
- be committed to furthering the association's religious mission.

It is common sense -- and basic religious liberty -- for a religious association to expect its leaders and members to agree with the association's religious beliefs, religious observance requirements, religious standards of conduct, and religious mission. Commitment to religious beliefs, observances, standards of conduct, and mission are all defining characteristics of religious organizations.

It should be common ground that *government officials*, including state college administrators, should not interfere with religious associations' religious beliefs, observances, standards of conduct, or mission. Why then would a public college exclude a religious student association from campus because it required its leaders or members to agree with its basic religious beliefs?

Unfortunately, this is a recurrent problem on many college campuses across the country, from California to Idaho to Oklahoma to Ohio. In 2004, the Washburn Student Bar Association penalized the CLS student chapter at the Washburn School of Law after a student complained that CLS would not let him lead its Bible studies even though he admitted that he did not agree with CLS's religious beliefs as set out in CLS's Statement of Faith. The Washburn situation is described in Part A and Attachment P.

SB 175 would prevent such a problem from recurring in Kansas by protecting Kansas students' basic religious liberty. In so doing, Kansas would join a growing list of states (Ohio, Idaho, Tennessee, Oklahoma, Arizona, Virginia, and North Carolina) that have adopted similar protections for religious student associations.

A. In 2004, the Christian Legal Society student chapter at Washburn School of Law was penalized when it would not allow a student, who admitted he did not agree with CLS's religious beliefs, to lead the CLS Bible studies.

Washburn University recognizes over 150 student organizations.⁴ In the

⁴See <http://www.washburn.edu/campus-life/index.html> (last visited March 4, 2015).

2004-2005 academic year, the School of Law recognized 26 student organizations and collected a \$35.00 per semester student activity fee from each of its students to fund extracurricular programs and activities. All organizations were guaranteed a baseline appropriation, but the Washburn Student Bar Association ("WSBA") determined the additional amount above the baseline that various recognized student organizations received.

In Spring 2004, a law student began attending CLS Washburn meetings. After attending several meetings, he volunteered to lead CLS's weekly Bible study. In leading the study, the student incorporated doctrine that was consistent with his own faith but contradicted CLS's Statement of Faith. The CLS student chapter president met with him and explained that the CLS student leaders had determined that he should no longer lead CLS's Bible studies, since his interpretations of the Bible were inconsistent with the beliefs contained in CLS's Statement of Faith. He was assured that he was welcome to attend CLS meetings.

Instead, the student filed a formal complaint of religious discrimination against the CLS student chapter with the WSBA Budget and Finance Committee. The complaint alleged that "CLS is an organization that discriminates on the basis of religion, and therefore should not receive any funds from the WSBA."⁵ Although he admitted that he "can't in good conscience sign the CLS Statement of Faith," he complained that "people who don't agree with the Statement of Faith enough to sign it cannot be full participating members of the CLS."

The Chair of the WSBA Budget and Finance Committee sent a letter notifying the CLS chapter president that after meeting with the Dean of the School of Law and the Associate Dean of Student Affairs, WSBA "decided that the appropriate course of action is to place a hold on Washburn Student Bar Association funding to the Christian Legal Society," pending a resolution of the complaint.⁶

⁵ See Attachment P.

⁶ See Attachment P.

The WSBA held a hearing to consider the complaint of religious discrimination against CLS. On September 3, 2004, the CLS chapter president received an email from the President of WSBA stating, "The WSBA board met yesterday evening and voted to no longer fund the CLS."⁷ After receiving no response to its inquiries asking how to appeal the WSBA's decision, CLS eventually filed a lawsuit, which was voluntarily dismissed after the university agreed to allow CLS to receive the funding to which it was entitled without forfeiting its religious liberty to require that its leaders and members agreed with its religious beliefs.

B. For Forty Years, Religious Student Groups Have Repeatedly and Discriminatorily Been Denied Access to College Campuses.

- 1. In its landmark decision in *Widmar v. Vincent*, the Supreme Court held that the University of Missouri – Kansas City could not condition campus access for religious groups on their promise not to engage in religious teaching or worship.**

CLS established the Center for Law & Religious Freedom in 1975 specifically to address the emerging discrimination against religious student associations, which were being denied equal access at some college campuses. Some university administrators claimed that the Establishment Clause would be violated if religious student groups were allowed to meet in empty classrooms to discuss their religious beliefs on the same basis as other student groups were allowed to meet to discuss their political, social, or philosophical beliefs. The administrators claimed that merely providing heat and light in these unused classrooms gave impermissible financial support to the students' religious beliefs, even though free heat and light were provided to all student groups. The administrators also claimed that college students were "impressionable" and would believe that the university endorsed religious student groups' beliefs, even though

⁷ See Attachment P.

hundreds of student groups with diverse and contradictory ideological beliefs were allowed to meet.⁸

In 1981, the University of Missouri -- Kansas City made similar arguments before the United States Supreme Court in the landmark case of *Widmar v. Vincent*, 454 U.S. 263 (1981). In 1977, UMKC adopted a new policy that prohibited the use of buildings or grounds “for purposes of religious worship or religious teaching” by student groups.⁹ In order to become a recognized student group,¹⁰ each group had to state that its meetings did not include “religious worship or religious teaching.” Of approximately one hundred student groups meeting on the UMKC campus, only one group refused to agree to the new policy. A group of evangelical Christian students, calling themselves “Cornerstone,” had met for a number of years on campus.¹¹ But the Cornerstone students refused to eliminate religious worship and religious teaching from their meetings, even though their decision meant their group would lose recognition and the ability to meet on campus.

UMKC banned Cornerstone’s meetings. UMKC administrators claimed that allowing a student group to engage in worship and religious instruction on campus violated the “establishment clauses” of both the federal and state constitutions.

Eventually the students sued, and the case went to the Supreme Court. In an 8-1 ruling, the Supreme Court rejected UMKC’s arguments. Instead, the Supreme

⁸ For example, the University of Kansas lists over 570 recognized student organizations. See <https://rockchalkcentral.ku.edu/Organizations> (last visited March 5, 2015).

⁹ 454 U.S. at 265& n.3.

¹⁰ The technical term for excluding student groups from campus is to “deny them recognition.” To be an official student group on campus, the group must “register” or “be recognized” by the administration as an official student group. “Recognition” as a student group allows a student group to reserve meeting space for meetings and activities, publicize meetings through campus channels of communication, attract new members through the organizational fair in the fall, and apply for funding to bring speakers to campus. Practically speaking, without recognition, a student organization cannot exist on campus.

¹¹ 454 U.S. at 265.

Court held that UMKC violated the religious student association's speech and association rights. The Court found that "UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment."¹² In other words, religious student groups have a First Amendment right to meet on public university campuses for religious speech and association.

Next the Court held that the federal Establishment Clause was not violated by allowing religious student associations access to public college campuses.¹³ The Court ruled that college students understand that simply *allowing* a student group to meet on campus does not mean that the University *endorses* or *promotes* the students' religious speech, teaching, worship, or beliefs. As the Court observed in a subsequent equal access case that protected high school students' religious meetings, "the proposition that schools do not endorse everything they fail to censor is not complicated."¹⁴ The *Widmar* Court also held that Missouri's state constitution did not justify suppressing the religious student association's free speech and association rights.¹⁵

2. The Supreme Court and Congress extended the *Widmar* principles to protect religious student groups in public secondary and elementary schools, as well as religious community organizations.

In 1995, the Supreme Court reaffirmed *Widmar*'s reasoning. The Court ruled that the University of Virginia violated a religious student association's rights

¹² *Id.* at 269.

¹³ *Id.* at 270-75.

¹⁴ *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (holding that the federal Equal Access Act protects high school students' right to meet for religious speech in public secondary schools).

¹⁵ 454 U.S. at 275-76.

of free speech and association when it denied a religious student publication the same funding available to sixteen other nonreligious student publications.¹⁶

In 1984, Congress applied *Widmar*'s reasoning to public secondary schools when it enacted the Equal Access Act, 20 U.S.C. §§ 4071-74. Under the Act, any public secondary school that receives federal financial assistance, if it allows one or more noncurriculum-related student groups to meet, must allow a religious student group to meet for religious speech. Relying on *Widmar*, the Supreme Court upheld the constitutionality of the Equal Access Act in *Board of Education v. Mergens*.¹⁷ Finding that "the logic of *Widmar* applies with equal force to the Equal Access Act," the Supreme Court held that religious student associations' meetings in public secondary schools did not violate the Establishment Clause.¹⁸

In 1993, in *Lamb's Chapel v. Center Moriches Union Free School Dist.*,¹⁹ the Supreme Court again extended the *Widmar* reasoning to find that a New York school district violated a church's free speech rights when it refused the church access to a school auditorium in the evening to show a film series about family values. The school district allowed other community groups to discuss family values in school facilities on weekends and evenings. In 2001, in *Good News Club v. Milford Central School*,²⁰ the Court again extended *Widmar*'s reasoning to require that a New York school district allow a religious community group to meet after school with elementary students to learn Bible stories, verses, religious songs, and prayers. In all of these cases, the Court ruled that an educational institution did not endorse a religious association's beliefs simply because it provided the religious association with meeting space. Access does not equal endorsement.

¹⁶ *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

¹⁷ 496 U.S. 226 (1990).

¹⁸ *Id.* at 248.

¹⁹ 508 U.S. 384 (1993).

²⁰ 533 U.S. 98 (2001).

C. Discrimination against religious student groups continues to the present.

From the mid-1970s to the mid-1990s, some university administrators used the Establishment Clause to justify excluding religious student groups from campus. But after the Supreme Court made clear that the Establishment Clause could not justify exclusion of religious student groups, some university administrators began to claim that university nondiscrimination policies were violated if the religious student groups required their leaders to agree with their religious beliefs. These administrators began to threaten religious student groups with exclusion from campus if they required their leaders to agree with the groups' religious beliefs.

The University of Illinois and the University of Minnesota were among the earliest universities to misinterpret and misuse nondiscrimination policies in this way. Administrators threatened to deny religious student associations access to campus because they chose their leaders and members according to their religious beliefs. Both abandoned these threats when law professors defended the religious student groups.²¹

But it is common sense and basic religious liberty – not discrimination – for religious groups to expect their leaders to share the groups' religious beliefs. Nondiscrimination policies serve valuable and important purposes. One of the most important purposes of a college's nondiscrimination policies is to protect religious students on campus. It is simply wrong to use nondiscrimination policies to punish religious student groups for being religious. When universities misuse nondiscrimination policies to exclude religious student groups, they actually undermine nondiscrimination policies' purposes and the good they serve.

Such misuse of nondiscrimination policies is unnecessary. Nondiscrimination policies and students' religious liberty are eminently

²¹ See Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 668-72 (1996) (detailing University of Minnesota's threat to derecognize CLS chapter); Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994) (detailing University of Illinois' threat to derecognize CLS chapter).

compatible, as shown by many universities' model policies that create a sustainable environment in which nondiscrimination principles and religious liberty harmoniously thrive.²²

But, unfortunately, many universities have chosen to *misuse* their nondiscrimination policies to exclude religious student associations from campus. Alternatively, some universities have excluded religious student associations by claiming to have what they call "all-comers" policies. These "all-comers" policies purport to prohibit any and all student associations from requiring their leaders to agree with the associations' political, philosophical, religious, or other beliefs. As will be explained below, "all-comers" policies rarely, if ever, actually exist. But SB 175 would prohibit Kansas public colleges from using either nondiscrimination policies or purported "all-comers" policies to exclude religious student groups from campus. In doing so, SB 175 would protect Kansas public institutions of higher education, and the taxpayers that support them, from potential litigation and its costs. More importantly, SB 175 would protect Kansas students' religious liberty, as well as their freedoms of speech and association.

²² Many leading universities have policies that protect religious groups' religious leadership criteria. The University of Florida's nondiscrimination policy is an excellent model for striking the appropriate balance between nondiscrimination policies and religious liberty. Protection for religious student groups is embedded in the nondiscrimination policy: "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." Similarly, the University of Texas provides: "[A]n 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." The University of Houston likewise provides: "Religious student organizations may limit officers to those members who subscribe to the religious tenets of the organization where the organization's activities center on a set of core beliefs." The University of Minnesota provides: "Religious student groups may require their voting members and officers to adhere to the organization's statement of faith and its rules of conduct." These policies are Attachment A.

D. SB 175 would avoid the problems other states have experienced and subsequently addressed through similar legislation.

- 1. California State University is now excluding religious student associations with religious leadership requirements from its 23 campuses, including religious organizations that have met for forty years.**

The California State University comprises 23 campuses with 437,000 students. Since August 2014, the University has denied recognition to several religious student associations, including InterVarsity, Cru (formerly Campus Crusade for Christ), Chi Alpha, Rejoyce in Jesus Campus Fellowship, and Ratio Christi.

In January 2015, California State sent the student president of a religious student association that had met at its Northridge campus for forty years a letter which read:

This correspondence is to inform you that effective immediately, your student organization, Rejoyce in Jesus Campus Fellowship, will no longer be recognized by California State University, Northridge.

. . . . The Rejoyce in Jesus Campus Fellowship organization will no longer be recognized given failure to submit an organizational constitution that is in compliance with nondiscrimination and open membership requirements as outlined in California State University Executive Order 1068. In withdrawing University recognition, your organization is no longer afforded the privileges of University recognition Clubs and Organizations.²³

The letter then listed seven basic benefits that the religious student association had lost because it required its student leaders to agree with its

²³ The letter is Attachment B.

religious beliefs, including the ability to recruit new student members through club fairs, access to a university-issued email account or website, and free access for its meetings. As the letter details, “Groups of students not recognized by the university who reserve rooms through [University Student Union (“USU”)] Reservations and Events Services will be charged the off-campus rate and will not be eligible to receive two free meetings per week in USU rooms.” As a result of being “de-recognized,” some religious student groups have paid thousands of dollars to pay for room reservations and insurance coverage that had been free during the prior forty years and remain free to other student groups.

In 2012, California State University’s Chancellor adopted “Executive Order 1068,” in which the Chancellor re-interpreted its nondiscrimination policy to prohibit religious student groups from having religious leadership requirements. The Chancellor also purported to adopt an “all-comers” policy that would prohibit religious groups’ religious leadership requirements.²⁴ Contradicting this so-called “all-comers” policy, the Chancellor explicitly allowed fraternities and sororities to continue to engage in sex discrimination in selecting leaders and members. In other words, California State denies religious organizations the right to select their leaders according to their religious beliefs, but it permits fraternities to continue to select leaders and members on the basis of sex.

In 2013, to implement the new executive order, California State employed “Constitutional Review Student Assistants” to comb through student associations’ constitutions and censor those constitutions that did not conform to the executive order. After this review, California State notified several religious student organizations that they would no longer be recognized as a student organization unless they stopped requiring their leaders to agree with the groups’ religious beliefs.

In reality, the executive order affects only religious student associations. California State granted religious student associations a one-year moratorium on implementation of the policy from August 2013 to August 2014. Only religious groups needed a moratorium because all other groups could easily structure their leadership and membership requirements to comply with the new policies.

²⁴ The California State University executive order is Attachment C.

Since September 2014, California State has withdrawn recognition from many religious student associations. Several of the excluded groups had met for over forty years on California State campuses with an explicit requirement that their leaders affirm the groups' statements of doctrinal faith. In December 2014, members of Congress sent a letter to California State University expressing their disapproval of the religious student groups' exclusion.²⁵

2. **The Tennessee General Assembly passed legislation similar to SB 175 after Vanderbilt University excluded fourteen Catholic and evangelical Christian organizations from campus, including a Christian group because it required its leaders to have a "personal commitment to Jesus Christ."**

In August 2011, Vanderbilt University administrators informed the Christian Legal Society student chapter at Vanderbilt Law School that the *mere expectation* that its leaders would lead its Bible studies, prayer, and worship was "religious discrimination." Its requirement that its leaders agree with its core religious beliefs was also "religious discrimination."²⁶

In April 2012, Vanderbilt told another Christian student group that it could remain a recognized student organization only if it deleted five words from its constitution. What were those five words? They were: "personal commitment to Jesus Christ." The students left campus rather than recant their belief in Jesus Christ.²⁷

Catholic and evangelical Christian students patiently explained to the Vanderbilt administration that nondiscrimination policies should protect, not exclude, religious organizations from campus. Members of Congress sent two letters asking the Vanderbilt administration to respect the students' religious liberty.²⁸

²⁵ The letter is Attachment D.

²⁶ Vanderbilt's email to CLS is Attachment E.

²⁷ Vanderbilt's email is Attachment F.

²⁸ The letters are Attachment G.

In April 2012, Vanderbilt denied recognition to fourteen Christian organizations.²⁹ While religious organizations could not keep their religious leadership requirements, Vanderbilt permitted fraternities and sororities to engage in sex discrimination in selecting leaders and members.

Vanderbilt excluded the religious groups based on its misinterpretation of a university nondiscrimination policy that had never previously been interpreted to prohibit religious groups from having religious leadership requirements. In addition, Vanderbilt purported to adopt an “all-comers” policy, even though the policy explicitly exempted fraternities and sororities and, therefore, could not qualify as an “all-comers” policy.

After Vanderbilt adopted its “all-comers” policy, the University of Tennessee reportedly claimed to have an “all-comers” policy as well, even though it had never previously claimed to have such a policy. The Tennessee General Assembly enacted T.C.A. § 49-7-156, a law that protects the right of a religious student association on public college campuses to “require[] that only persons professing the faith of the group and comporting themselves in conformity with it qualify to serve as members or leaders.”³⁰

3. The Oklahoma Legislature passed legislation very similar to SB 175 in order to protect religious student associations at Oklahoma public universities.

In August 2011, the University of Oklahoma Student Association sent a memorandum to all registered student organizations that would prohibit religious

²⁹ The excluded groups are: Asian-American Christian Fellowship; Baptist Campus Ministry; Beta Upsilon Chi; Bridges International; Campus Crusade for Christ (Cru); Christian Legal Society; Fellowship of Christian Athletes; Graduate Christian Fellowship; Lutheran Student Fellowship; Medical Christian Fellowship; Midnight Worship; The Navigators; St. Thomas More Society; and Vanderbilt Catholic.

³⁰ T.C.A. § 49-7-156 is Attachment H.

student associations' religious leadership and membership criteria.³¹ After unwelcome publicity, the University disowned the attempt.

After hearings last year, the Oklahoma Legislature enacted language very similar to SB 175. The "Exercise of Religion by Higher Education Students Act," 70 Okl. St. Ann. § 2119, protects religious student organizations from being excluded from state college campuses because of their religious expression or because they require their leaders to agree with the organizations' core religious beliefs.³²

4. The Idaho Legislature passed legislation very similar to SB 175 after Boise State University threatened to exclude religious student associations that required their leaders to share the associations' religious beliefs.

In 2008, the Boise State University student government threatened to exclude several religious organizations from campus, claiming that religious leadership requirements were discriminatory. The BSU student government informed one religious group that its requirement that its leaders "be in good moral standing, exhibiting a lifestyle that is worthy of a Christian as outlined in the Bible" violated the student government's policy. The student government also found that the group's citation of Matthew 18:15-17, which quotes Jesus, also violated the policy. The student government informed a Campus Crusade chapter that "not allowing members to serve as officers due to their religious beliefs" conflicted with BSU's policy.³³

In 2009, BSU reversed course and agreed to allow religious organizations to maintain religious criteria for leaders. In June 2012, however, BSU informed the religious organizations that it intended to adopt a new policy, which would exclude religious organizations with religious leadership requirements from campus. The religious organizations spent several months corresponding with BSU in an effort to dissuade it from changing its policy.

³¹ The memorandum is Attachment I.

³² 70 Okl. St. § 2119 is Attachment J.

³³ The letters are Attachment K.

In March 2013, the Idaho Legislature enacted legislation prohibiting public colleges from “tak[ing] any action or enforc[ing] any policy that would deny a religious student group any benefit available to any other student group based on the religious student group’s requirement that its leaders adhere to its sincerely held religious beliefs or standards of conduct.” Idaho Code § 33-107D.³⁴ The Idaho law is similar to SB 175.

5. The Ohio Legislature passed legislation like SB 175 after The Ohio State University threatened to exclude religious student associations if they required their leaders to share the associations’ religious beliefs.

From October 2003 through November 2004, the Christian Legal Society student chapter at the OSU College of Law was threatened with exclusion because of its religious beliefs. After months of trying to reason with OSU administrators, a lawsuit was filed, which was dismissed after OSU revised its policy “to allow student organizations formed to foster or affirm sincerely held religious beliefs to adopt a nondiscrimination statement consistent with those beliefs in lieu of adopting the University’s nondiscrimination policy.” The CLS student chapter then met without problem from 2005-2010.

In September 2010, however, the University asked the student government whether the University should change its policy to no longer allow religious groups to have religious leadership and membership requirements. On November 10, 2010, the OSU Council of Graduate Students unanimously adopted a resolution urging the University to drop its protection of religious student groups. The OSU Undergraduate Student Government passed a similar resolution. On January 18, 2011, the OSU Council on Student Affairs voted 12-1 to remove the protection for religious student groups. The Council “endorse[d] the position that every student, regardless of religious belief, should have the opportunity . . . to apply or run for a leadership position within those organizations.”³⁵

In June 2011, the Ohio Legislature prohibited public universities from “tak[ing] any action or enforc[ing] any policy that would deny a religious student

³⁴ Idaho Code § 33-107D is Attachment L.

³⁵ The student government resolutions are Attachment M.

group any benefit available to any other student group based on the religious student group's requirement that its leaders or members adhere to its sincerely held religious beliefs or standards of conduct." Ohio Rev. Code § 3345.023.³⁶ The Ohio law is similar to SB 175.

6. The Arizona Legislature passed legislation to protect religious student associations and students' religious expression.

In 2011, Arizona enacted a law that protects both individual students' religious expression, A.R.S. §§ 15-1862 & 15-1864, and religious student associations' choice of their leaders and members, A.R.S. § 15-1863.³⁷ In 2004, Arizona State University College of Law had threatened to deny recognition to a CLS student chapter because it limited leadership and voting membership to students who shared its religious beliefs. The University claimed that this violated its nondiscrimination policy. A lawsuit was dismissed when the University agreed to allow religious student groups to have religious leadership and membership requirements.³⁸

7. The North Carolina General Assembly and the Virginia General Assembly passed legislation to protect religious student associations' religious liberty.

After years of constant harassment of religious student groups on various University of North Carolina campuses, the North Carolina General Assembly enacted N.C.G.S.A. §§ 115D-20.1 & 116-40.12. The law prohibits colleges from denying recognition to a student organization because, among other things, it "determine[s] that only persons professing the faith or mission of the group, and comporting themselves in conformity with, are qualified to serve as leaders of the organization." N.C.G.S.A. § 116-40.12. Virginia passed a similar law, Va. Code Ann. § 23-9.2:12, in 2013.

³⁶ Ohio Rev. Code § 3345.023 is Attachment N.

³⁷ A.R.S. §§ 15-1862-64 is Attachment O.

³⁸ *Christian Legal Society Chapter at Arizona State University v. Crow*, No. 04-2572 (D. Ariz. Nov. 17, 2004).

In 2005, a district court had granted a preliminary injunction against the University of North Carolina when it denied recognition to a Christian student organization because the group required its officers and members to agree with its religious viewpoints.³⁹ Despite this court victory, religious student groups experienced recurrent problems on UNC campuses over the past decade.

E. Legislation like SB 175 is particularly important in helping colleges avoid the mistake of trying to adopt an all-comers policy.

When state legislatures adopt laws like SB 175, they help college administrators avoid the mistake of trying to adopt an “all-comers” policy, an effort that disrespects the First Amendment and is likely to lead only to litigation.⁴⁰

The Supreme Court has held that it is not enough for a university to adopt an “all-comers” policy: a university must actually apply the policy uniformly, without exception, to all student groups.⁴¹ The Court was unequivocal that if a university allows any exception to its “all-comers” policy, it must grant an exemption to a religious group.⁴² Justice Ginsburg emphasized that the policy under review was “one requiring all student groups to accept all comers.”⁴³ Therefore, even if a university were to adopt an “all-comers” policy, it could not deny a religious group an exemption for religious leadership requirements if

³⁹ *Alpha Iota Omega Christian Fraternity v. Moeser*, 2005 WL 1720903 (M.D.N.C. 2005). The case was dismissed in 2006 after the university adopted a policy allowing all groups to require their members to agree with the groups’ beliefs. *Alpha Iota Omega Christian Fraternity*, 2006 WL 1286186 (M.D.N.C. 2006).

⁴⁰ Prof. John D. Inazu, “*The Perverse Effects of the ‘All Comers’ Requirement*,” Sept. 15, 2014, Library of Law and Liberty Blog, available at <http://www.libertylawsite.org/2014/09/15/the-perverse-effects-of-the-all-comers-requirement/>.

⁴¹ *Christian Legal Society v. Martinez*, 130 S. Ct. 2071, 2095 (2010).

⁴² *Id.* at 2995; *id.* at 2999 (Kennedy, J., concurring).

⁴³ *Id.* at 2993 (original emphasis).

the university allowed any exemption to its policy, *e.g.*, an exemption for fraternities.⁴⁴

Of course, this is precisely why “all-comers” policies are rare: they must be applied without exception to all student groups. For that reason, single-sex sororities and fraternities, a cappella groups, and intramural sports teams are incompatible with an “all-comers” policy. If an “all-comers” policy were implemented, a university would have to abandon any current exemption for fraternities and sororities to select members and leaders according to sex. The Greek system is the antithesis of an “all-comers” policy, based as it is on selection of members through the highly subjective “rush” system.⁴⁵

Equally importantly, an “all-comers” policy undermines the very protection for minority groups that nondiscrimination policies are intended to provide. The acting dean of a California law school admitted that its purported “all-comers” policy required an African American student group to admit white supremacists as members.⁴⁶ Thus, the groups most likely to be harmed by an “all-comers” policy are the very groups -- minority racial, ethnic, or religious groups -- that a conventional nondiscrimination policy is intended to protect.

An “all-comers” policy also harms all students’ First Amendment rights. An “all-comers” policy erases all student groups’ freedom of expression to require their leaders to agree with their specific goals, values, and speech, a right that most students want to preserve. The ability of groups to form around a specific

⁴⁴ *Id.* at 2993, 2995.

⁴⁵ Colleges frequently invoke Title IX’s exemption for fraternities and sororities, but that response is a red herring. Title IX gives fraternities and sororities an exemption only from Title IX itself, which prohibits sex discrimination in higher education. It does not give fraternities and sororities a blanket exemption from all nondiscrimination laws or policies, including a university’s own nondiscrimination policy or an “all-comers” policy.

⁴⁶ *Christian Legal Society v. Martinez*, Religion & Ethics Newsweekly (PBS television broadcast) (Apr. 16, 2010), <http://www.pbs.org/wnet/religionandethics/episodes/april-16-2010/christian-legal-society-v- martinez/6109/>.

goal and mission has fueled most great reform movements and is necessary to maintain genuine pluralism and diversity on campus.

Finally, an “all-comers” policy compounds university administrators’ administrative difficulties. Under an “all-comers” policy, a university must police the rationale for all decisions made by every student group regarding membership and leadership, rather than limiting its concern only to decisions that might violate the limited protected categories in a nondiscrimination policy. Dissatisfied students could challenge every election outcome on the basis that their beliefs were improperly considered by the other students who voted.

SB 175 will help public colleges avoid the legal and administrative morass that “all-comers” policies create. In doing so, SB 175 will help Kansas’s colleges avoid costly litigation for which the taxpayers and students eventually foot the bill.

F. Federal and state nondiscrimination laws typically protect religious organizations’ ability to choose their leadership on the basis of religious belief.

Of course, no federal or state law, regulation, or court ruling requires a college to adopt a policy that prohibits religious groups from having religious criteria for their leaders and members. Instead, federal and state nondiscrimination laws typically protect religious organizations’ ability to choose their leaders on the basis of their religious beliefs.

Title VII explicitly provides that religious associations’ use of religious criteria in their employment decisions does not violate Title VII’s prohibition on religious discrimination in employment. In three separate provisions, Title VII exempts religious associations from its general prohibition on religious discrimination in employment. 42 U.S.C. § 2000e-1(a) (does not apply to religious associations “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on” of the associations’ activities); 42 U.S.C. § 2000e-2(e)(2) (educational institution may “employ employees of a particular religion” if it is controlled by a religious association or if its curriculum “is directed toward the propagation of a particular religion”); 42 U.S.C. § 2000e-2(e)(1) (any employer may hire on the basis of religion “in those certain instances where religion ... is a bona fide occupational qualification

reasonably necessary to the normal operation of that particular business or enterprise.”).

In 1987, the Supreme Court upheld the constitutionality of Title VII’s exemption against an Establishment Clause challenge.⁴⁷ Concurring in the opinion, Justice Brennan insisted that “religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to ... select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.”⁴⁸

In 2012, the Supreme Court unanimously protected the right of religious congregations to choose their leaders despite the federal government’s claim that their decisions violated federal nondiscrimination laws. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,⁴⁹ the Court rejected the federal government’s argument that nondiscrimination laws could be used to second-guess religious associations’ leadership decisions. The Supreme 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.”⁵⁰ Religious leaders “personify” a religious group’s beliefs and “shape its own faith and mission.”⁵¹ In their concurrence, Justice Alito and Justice Kagan stressed that “[r]eligious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.”⁵²

⁴⁷ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

⁴⁸ *Id.* at 342-43 (Brennan, J., concurring).

⁴⁹ 132 S. Ct. 694 (2012).

⁵⁰ *Id.* at 710.

⁵¹ *Id.* at 706.

⁵² *Id.* at 713 (Alito, J., concurring).

G. Legislatures have taken action in order to protect religious liberty and help public colleges and state taxpayers avoid costly litigation.

Legislation such as SB 175 protects students' religious liberty. But such legislation also protects colleges from adopting policies that are highly problematic. Such policies expose colleges – and eventually state taxpayers – to costly lawsuits. As seen in Section D, sometimes the impetus for such policies comes from student government rather than university administrators. By passing the proposed legislation, the legislature provides administrators with a substantive reason for resisting student government's potentially ill-advised treatment of religious student associations.

As discussed in Section C, colleges certainly should have robust nondiscrimination policies that simultaneously prohibit invidious discrimination while protecting religious student associations' religious liberty. The problem is not that colleges have nondiscrimination policies, but that some college administrators or student governments misinterpret the policies at the cost of students' religious liberty.

When state legislatures adopt laws like SB 175, their proactive efforts help steer college administrators in the right direction. They also help insulate college administrators from pressure that special interest groups may sometimes exert to penalize student groups that do not share their views. In passing this legislation, state legislatures ensure that the First Amendment rights of all students will be respected on campus.

Judge Kenneth Ripple of the Federal Court of Appeals for the Seventh Circuit explained why misinterpretation of nondiscrimination policies places a particular burden on religious groups, when he wrote:

For many groups, the intrusive burden established by this requirement can be assuaged partially by defining the group or membership to include those who, although they do not share the dominant, immutable characteristic, otherwise sympathize with the group's views. Most groups dedicated to forwarding the rights of a "protected" group are able to couch their membership requirements in terms of shared beliefs, as opposed to shared status

Religious students, however, do not have this luxury—their shared beliefs coincide with their shared status. They cannot otherwise define themselves and not run afoul of the nondiscrimination policy. . . .The Catholic Newman Center cannot restrict its leadership—those who organize and lead weekly worship services—to members in good standing of the Catholic Church without violating the policy. Groups whose main purpose is to engage in the exercise of religious freedoms do not possess the same means of accommodating the heavy hand of the State.

The net result of this selective policy is therefore to marginalize in the life of the institution those activities, practices and discourses that are religiously based. While those who espouse other causes may control their membership and come together for mutual support, others, including those exercising one of our most fundamental liberties — the right to free exercise of one's religion — cannot, at least on equal terms.⁵³

Conclusion

Religious liberty is America's most distinctive contribution to humankind. The genius of American religious liberty is that we protect every American's religious beliefs and practices, no matter how unpopular or unfashionable those beliefs and practices may be at any given time. But religious liberty is fragile, too easily taken for granted and too often neglected. A leading religious liberty scholar, Professor Douglas Laycock of the University of Virginia, recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that

⁵³ *Alpha Delta Chi v. Reed*, 648 F.3d 790, 805-806 (9th Cir. 2011) (Ripple, J., concurring) (emphasis added).

Letter to Chairman Brunk
March 30, 2015
Page 25 of 25

free exercise of religion may be a bad idea, or at least, a right to be minimized.”⁵⁴
Passage of SB 175 represents an important step in defending religious liberty on
Kansas’s public college campuses.

Yours truly,

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⁵⁴ Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 407 (2011). For other respected scholars’ similar assessments that the future of religious liberty in America is endangered, see Michael W. McConnell, *Why Protect Religious Freedom?*, 123 Yale L.J. 770 (2013); Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 Mich. L. Rev. 1043 (2014); John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. Rev. 787 (2014); Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Contemp. Legal Issues 279 (2013).