"Peaceful Coexistence?
Reconciling Non-discrimination Principles with Civil Liberties"
United States Commission on Civil Rights
Briefing on March 22, 2013
Expanded Statement of Kimberlee Wood Colby, Senior Counsel
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I am Kim Colby, Senior Counsel at Christian Legal Society's Center for Law and Religious Freedom, where I have worked for over 30 years to protect religious students' rights to meet for religious speech on college campuses. Christian Legal Society ("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. For that reason, CLS was instrumental in passage of the Equal Access Act of 1984[1] that protects the right of students to meet for "religious, political, philosophical or other" speech on public secondary school campuses.[2] The Act has protected both religious and homosexual student groups seeking to meet for disfavored speech.[3]

CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. 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. Beginning in 1993, CLS student chapters, like other religious student groups, began to encounter some university administrators' *misuse* of nondiscrimination policies to exclude religious student groups from campus, simply because they require their leaders to agree with their religious beliefs.[4]

This expanded written statement examines the supposed conflict between university nondiscrimination policies and religious liberty that occurs when some college administrators' misinterpret nondiscrimination policies to treat religious groups' use of religious leadership criteria as "religious discrimination." But it is common sense and basic religious liberty – not discrimination -- for religious groups to expect their leaders

[1] 20 U.S.C. 4071-4074 (2013).

[2] *See* 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement).

[3] *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (requiring access for religious student group); *Straights and Gays for Equality v. Osseo Area School No. 279*, 540 F.3d 911 (8th Cir. 2008) (requiring access for homosexual student group).

[4] *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).

to share their religious beliefs. Nondiscrimination policies serve valuable purposes. But nondiscrimination policies are intended to *protect* religious students on campus, not *punish* them for being religious. When universities misuse nondiscrimination policies to exclude religious student groups, they actually undermine nondiscrimination policies' purposes and the good they serve. If used with appropriate sensitivity, nondiscrimination policies and religious liberty are eminently compatible, as shown by many universities' model policies that create a sustainable environment in which nondiscrimination principles and religious liberty can harmoniously thrive.[5]

Part II explores the need for a reflective understanding of "discrimination" that is sensitive to both religious liberty and nondiscrimination principles. Examining the intersection of religious freedom and nondiscrimination norms, a leading constitutional scholar explains:

> When we say that 'discrimination' is wrong, what we actually mean is that wrongful discrimination is wrong, and when we affirm that governments should oppose it we mean that governments should oppose it when it makes sense, all things considered, and when it is within their constitutionally and morally limited powers, to do so.[6]

Caution needs to be taken before affixing the stigmatizing label of "wrongful discrimination" to religious groups' exercise of a fundamental religious liberty. Reflecting an appropriate sensitivity to religious liberty, most nondiscrimination laws, including Title VII, simultaneously prohibit discrimination while protecting religious groups' ability to maintain their religious identities.

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[5] *See* Attachment C. The University of Florida's nondiscrimination policy is an excellent model for striking the appropriate balance between nondiscrimination policies and religious liberty: "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." University of Florida "Student Organization Registration Policy Update," at 12, *available at* https://www.studentinvolvement.ufl.edu/Portals/1/Documents/Organizations/Handbooks/Student%20Org%20Handbook%202011-2012.pdf (last visited March 8, 2013). *See also*, University of Texas, "New Student Organization Application," *available at* http://deanofstudents.utexas.edu/sa/downloads/New_Org_App.pdf (last visited March 8, 2013); University of Houston, "Organizations Policies," § 2.4 (a) (3), *available at* http://www.uh.edu/dos/pdf/2011-2012StudentHandbook.pdf (last visited March 8, 2013); University of Minnesota "Constitution and By-Laws Instructions" in Student Groups Official Handbook, *available at* http://sua.umn.edu/groups/handbook/constitution.php (last visited March 8, 2013).

[6] Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194, 198 (Cambridge University Press, 2012). A summary of Professor Garnett's article is found at Richard W. Garnett, *Confusion about Discrimination, The Public Discourse*, Apr. 5, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5151/ (last visited March 8, 2013).

Parts III and V analyze the Supreme Court's decision in *Christian Legal Society Chapter of University of California, Hastings College of the Law v. Martinez,*[7] a narrow decision that is easily misunderstood. In Martinez, the Court explicitly did not decide whether nondiscrimination policies could be used to penalize the religious students that they are supposed to protect. Instead, the Court narrowly, and conspicuously, confined its decision to an unusual "all-comers policy," unique to one law school, that required all student groups to allow any student to be a member and leader of the group, regardless of whether the student agreed with—or actively opposed—the values, beliefs, or speech of the group.[8] Moreover, the Court held it was not enough for a university to adopt an "all- comers policy": the policy must actually be uniformly applied to all student groups.[9]

As Part IV explains, "all-comers policies" are rare because, as the *Martinez* decision requires, they must be applied without exception to all student groups. As a practical matter, an "all-comers policy" is completely unworkable because of its inherent incompatibility with the sororities and fraternities, a cappella groups, and club sports teams found on most campuses. Besides ending selection of members and leaders on the basis of sex, an all-comers policy would seem to require fraternities and sororities to adopt a "first-come, first-pledge" selection process to ensure their openness to all students.

A healthy balance between nondiscrimination policies and religious liberty is absolutely necessary and easily attainable. The conflict is entirely avoidable if university administrators exercise tolerance, common sense, and sensitivity to religious student groups and their basic religious liberty to be led by persons who share their religious beliefs.

I. Misuse of Nondiscrimination Policies to Exclude Religious Student Groups from Campus Violates The Students' Basic Religious Liberty and Is Instead Religious Discrimination by the Universities.

Nondiscrimination policies serve valuable purposes. But nondiscrimination policies are intended to protect religious students on campus, not punish them for being religious. When universities *misuse* nondiscrimination policies to exclude religious student groups, they actually undermine nondiscrimination policies' purposes and the good they serve.[10] In the process, they diminish diversity on campus. In the name of

[7] 130 S. Ct. 2971 (2010).

[8] *Id.* at 2982, 2984; *id.* at 2999 (Kennedy, J., concurring).

[9] *Id.* at 2993-2995.

[10] As Dean Joan Howarth of the Michigan State University College of Law has explained, "the application of the nondiscrimination policy against faith-based groups undermines the very purpose of the nondiscrimination policy: protecting religious freedom." Joan Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 915 (2009).

"tolerance," college administrators institutionalize religious intolerance. In the name of "inclusion," college administrators exclude religious student groups from campus.[11]

This misuse of nondiscrimination policies is unnecessary. 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."[12] 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."[13] 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."[14] 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."[15] By demonstrating that nondiscrimination policies and religious liberty are eminently compatible, such model policies create university environments in which nondiscrimination principles and religious liberty harmoniously thrive.

The treatment of religious students is important not only for the students threatened with exclusion, and not only to preserve a diversity of ideas on college campuses, but also because the lessons taught on college campuses about the First

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[11] This happened quite literally at Tufts University when a group calling itself the "Coalition Against Religious Exclusion" failed to see the irony in its efforts to exclude a religious student group from campus because of the group's traditional religious beliefs. After the religious student group was derecognized for several months, its recognition was restored under a new policy that allows religious groups to have religious leadership criteria. Tufts University, Undergraduate Education, Student Affairs, & Student Services, "Decision of the Tufts University Committee on Student Life on Recognition of Student Religious Groups," Dec. 5, 2012, *available at* http://uss.tufts.edu/studentaffairs/handbook /SRGrecognition.asp (last visited March 8, 2013).

[12] University of Florida "Student Organization Registration Policy Update,"p. 12 *available at* https://www.studentinvolvement.ufl.edu/Portals/1/Documents/Organizations/Handbooks/Student%20Org% 20Handbook%202011-2012.pdf (last visited March 8, 2013).

[13] University of Texas "New Student Organization Application," *available at* http://deanofstudents.utexas.edu/sa/downloads/New_Org_App.pdf (last visited March 8, 2013).

[14] University of Houston "Organizations Policies," § 2.4 (a) (3), *available at* http://www.uh.edu/dos/pdf/2011-2012StudentHandbook.pdf (last visited March 8, 2013).

[15] University of Minnesota "Constitution and By-Laws Instructions" *in Student Groups Official Handbook, available at* http://sua.umn.edu/groups/handbook/constitution.php (last visited March 8, 2013).

Amendment spill over into our broader civil society.[16] Those who insist that we must choose between religious liberty and nondiscrimination policies in reality are demanding a zero-sum game in which religious liberty, nondiscrimination principles, and pluralism ultimately all lose.

Religious student organizations enhance campus diversity in myriad ways by contributing to the religious, philosophical, cultural, social, and ethnic "marketplace of ideas" on campus. But this diversity is threatened when university administrators ban religious student organizations from campus because they exercise the basic religious liberty to require their leaders to agree with their religious beliefs.

For the past forty years, some college administrators have tried to exclude religious student groups from campus.[17] From the mid-1970s to the mid-1990s, the Establishment Clause was the justification given for excluding religious student groups. Administrators claimed that the Establishment Clause would be violated if they allowed religious groups to meet in empty classrooms on campus. But in 1981,[18] and again in 1995,[19] the Supreme Court ruled that the Establishment Clause was not violated by religious groups meeting on campus. Instead, the Court held that the freedoms of speech and association protected religious groups' right to meet on campus.

Universities' nondiscrimination policies then became a new justification for excluding religious student groups from campus. Asserting it was "religious discrimination," some administrators told religious groups they could not require their leaders to agree with their religious beliefs.[20]

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[16] For example, a federal appellate judge opined that New York City might consider denying a church access to public school auditoriums on weekends, to which other community groups had access, because its meetings might not be "open to the general public" if the church reserved communion to baptized persons. *Bronx Household v. Bd. of Education*, 492 F.3d 89, 120 (2d Cir. 2007) (Leval, J., concurring).

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[17] 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. Large universities have several hundred student groups. The Ohio State University, for example, has over 1000 recognized student organizations. *See* http://ohiounion.osu.edu/get_involved/student_organizations (last visited March 8, 2013).

[18] *Widmar v. Vincent*, 454 U.S. 263 (1981) (religious student groups have free speech and free association rights to meet on public university campus, and such meetings do not violate the Establishment Clause).

[19] *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (religious student group's freedom of speech was violated when the university denied it access to student activity fee funding for the printing costs of its evangelical magazine, and the Establishment Clause would not be violated by the University paying $5,862 toward those printing costs).

[20] *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.

But it is common sense -- not discrimination -- for religious groups to choose leaders who agree with their religious beliefs. It is religious liberty – not discrimination – that protects religious groups' ability to choose leaders who agree with their religious beliefs. The leadership of any organization affects its ability to carry out its mission. Particularly true for religious groups, leaders conduct the Bible studies, guide the prayers, and facilitate the worship at religious groups' meetings. To expect the person conducting the Bible study to believe that the Bible reflects truth seems obvious. To expect the person leading prayer to believe in the God to whom she is praying seems reasonable. Both are a far cry from wrongful discrimination.

Yet some university administrators woodenly characterize these common sense expectations as "religious discrimination." For example, last year, Vanderbilt University denied recognition to a Christian Legal Society student chapter because the students expected their leaders to lead Bible study, prayer, and worship, and to affirm that they agreed with the group's core religious beliefs.[21] Vanderbilt University demanded that another Christian group delete five words from its leadership requirements if it wanted to remain on campus: "personal commitment to Jesus Christ."[22] In the end, Vanderbilt University forced fourteen Catholic and evangelical Christian student groups from campus.[23] While Vanderbilt refused to allow religious groups to have religious leadership

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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).

[21] *See* Attachment A (also *available at* https://www.clsnet.org/document.doc?id=457 (last visited March 15, 2013)).

[22] *See* Attachment B (also *available at* http://www.clsnet.org/document.doc?id=455 (last visited March 8, 2013)).

[23] 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.

In two videos, Vanderbilt students discuss their exclusion by Vanderbilt University. *See* Foundation for Individual Rights in Education (FIRE), "Exiled from Vanderbilt: How Colleges Are Driving Religious Groups Off Campus," *available at* http://www.youtube.com/watch?v=dGPZQKpzYac (last visited March 8, 2013); and Vanderbilt Alumni, "Leadership Matters for Religious Organizations," *available at* http://vimeo.com/40185203 (last visited March 8, 2013). Vanderbilt held a remarkable "townhall meeting" on January 31, 2012, during which Vanderbilt administrators tried to explain the University's policy in response to students' challenging questions. It can be viewed in its entirety at http://www.youtube.com/watch?v=pUdGSHoXLuo (last visited March 8, 2013). A six-minute video summary of the town hall meeting can be found at http://www.youtube.com/watch?v=msT_lI7mNcA&list=UUlRloSC2llSI2Mwf5eQJhsQ&index=1&feature=plcp (last visited March 8, 2013).

requirements, it specifically announced that fraternities and sororities could continue to engage in sex discrimination in their selection of both leaders and members.[24]

Religious groups' ability to choose their leaders is the most basic of religious liberties. Last year, the Supreme Court unanimously protected the right of religious institutions 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*,[25] the Court rejected the 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."[26] Religious leaders "personify" a religious group's beliefs and "shape its own faith and mission."[27] 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."[28]

These same considerations are true for student religious groups when they choose the leaders who will speak on their behalf to the campus community and lead the Bible study, prayer, and worship at their meetings. In perhaps the most cogent legal analysis of the reason nondiscrimination policies, when misused, impose a particular burden on religious student groups, Seventh Circuit Judge Kenneth Ripple has explained:

> Under this [nondiscrimination] policy, most clubs can limit their membership to those who share a common purpose or view: Vegan students, who believe that the institution is not accommodating adequately their dietary preferences, may form a student group restricted to vegans and, under the policy, gain official recognition. Clubs whose memberships are defined by issues involving "protected" categories,

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[24] Colleges frequently invoke Title IX's exemption for fraternities and sororities to justify their unequal treatment of religious groups compared to Greek groups. 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. If a university exempts fraternities and sororities from its nondiscrimination policies, it must also exempt religious groups. *See Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2993, 2995 (2010); *cf., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545-46 (1993).

[25] 132 S. Ct. 694 (2012).

[26] *Id.* at 710.

[27] *Id.* at 706.

[28] *Id.* at 713 (Alito, J., concurring).

> however, are required to welcome into their ranks and leadership those who do not share the group's perspective: Homosexual students, who have suffered discrimination or ostracism, may not both limit their membership to homosexuals and enjoy the benefits of official recognition. The policy dilutes the ability of students who fall into "protected" categories to band together for mutual support and discourse.
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> 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. . . .
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> 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.*
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> *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.

Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 805-806 (9th Cir. 2011) (Ripple, J., concurring) (emphasis added), *cert. denied*, 132 S. Ct. 1743 (2012).

By insisting that religious groups abandon their religious belief requirements for their leaders, university administrators effectively demand that religious groups recant their basic religious beliefs. No starker illustration can be found than Vanderbilt

University telling a Christian group that it could remain a recognized student group *only* if it deleted "personal commitment to Jesus Christ" from its constitution.[29] This is something that many faithful Christian groups will not do. It is not that they are unable to recant – deleting a few words is not that difficult. It is that Christians view recanting religious beliefs as the equivalent of overtly denying God. Over the past two millennia, millions of Christians have suffered great hardship rather than recant their faith. In comparison, forfeiting access to campus may seem a small thing. But it is still fundamentally wrong for university authorities to demand that religious students choose between recanting their religious beliefs and remaining on campus.

Of course, when university administrators are also government officials, as are public university administrators, then the government itself is making the demand. If the First Amendment does not protect in this situation, what is left of religious liberty? Public school students faced an analogous situation when they were expelled during World War II for refusing to salute the flag because they believed they would thereby violate the Second Commandment.[30] In ruling for the students, the Supreme Court's words seem particularly apt to a discussion of the protection of both religious liberty and nondiscrimination values:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order.* If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[31]

Religious liberty must be reinforced on university campuses. The "right to religious freedom" must not be redefined to mean the "right to recant." Religious freedom must remain the right to hold traditional religious beliefs without fear of expulsion from the public square.

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[29] *See* Attachment B, (also available at http://www.clsnet.org/document.doc?id=455 (last visited March 8, 2013).

[30] *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1942).

[31] *Id.* at 642.

II. When Religious Groups Require Their Leaders to Share Their Religious Beliefs, They Are Exercising Their Religious Liberty, Not Discriminating.

A. The label of "discrimination," or the "Scarlet D," must be affixed carefully.

To our society's credit, affixing the label of "discrimination" to an action immediately casts that action as bad and intolerable. For that reason, the push to recast as "discrimination" religious groups' right to have religious leadership requirements must be carefully weighed (and ultimately rejected) if religious liberty and pluralism are to survive in our society. "It is tempting and common, but potentially misleading and distracting, to attach the rhetorically and morally powerful label of 'discrimination' to decisions, conduct, and views whose wrongfulness has not (yet) been established."[32]

When school administrators impose a "Scarlet D" on religious groups for being openly religious, great damage is done to religious liberty and pluralism. But damage is also done to the equality and nondiscrimination principles that those applying the label claim to advance. A constitutional scholar recently explained that "overenthusiastic or insufficiently deliberate campaigns against 'discrimination,' in the name of 'equality,' can conflict with or even undermine the fundamental and core idea of liberal, constitutional, and, therefore, limited government."[33] To force an unnecessary and false dichotomy between nondiscrimination policies and religious liberty is likely to diminish religious citizens' support for nondiscrimination policies generally. Because it is possible to have strong nondiscrimination policies *and* religious liberty, the better approach is to facilitate both, rather than demand that religious liberty lose.

Instructively, the Supreme Court itself "decline[s] to construe" federal laws "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."[34] College administrators would do well to follow the Supreme Court's example of restraint and interpret university policies, which are hardly on par with federal laws, to avoid "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." This is particularly true when the common sense interpretation of nondiscrimination policies avoids the dilemma altogether.

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[32] Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194, 197 (Cambridge University Press, 2012). A summary of Professor Garnett's article is found at Richard W. Garnett, *Confusion about Discrimination*, *The Public Discourse*, Apr. 5, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5151/.

[33] Garnett, *supra* n.32, at 198.

[34] *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

B. It is common sense, not "religious discrimination," for religious groups to have religious leadership criteria.

To begin, "[i]t is not 'discrimination' that is wrong; instead, it is *wrongful* discrimination that is wrong."[35] "'Discrimination,' after all, is another word for discernment, and for choosing and acting in accord with or with reference to particular criteria."[36] To label something "discrimination" is not the end of the matter, but merely the beginning of the inquiry because:

> When we say that 'discrimination' is wrong, what we actually mean is that wrongful discrimination is wrong, and when we affirm that governments should oppose it we mean that governments should oppose it when it makes sense, all things considered, and when it is within their constitutionally and morally limited powers, to do so.[37]

The essential common sense of the matter renders it self-evident that the government should not infringe religious liberty by wrongly invoking the label of "discrimination" when religious groups confine their leadership to those who share their faith.[38] Religious groups need leaders who agree with the group's basic beliefs regarding the Bible, prayer, worship, mission, and message. Leaders exemplify the group's mission and articulate the group's message to the broader campus community. A religious group's leaders necessarily guide the group's distinctive religious practices, including worship, prayer, study of scripture, and service to others. Leaders are the group's primary voice, both internally to its members and externally to the University community. A committed leader can determine whether a group thrives or withers.

For centuries, religious groups' right to control the selection of their leaders has been crucial to securing religious liberty for all. "The ultimate authority of religious organizations to select and supervise their leaders has been vital to the development of

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[35] Garnett, *supra* n.32, at 197.

[36] *Id.*

[37] Garnett, *supra* n. 32, at 198.

[38] Professor Garnett identifies several factors that should be considered in assessing whether action constitutes "wrongful" discrimination, including:

> Who is the decision maker? Who are the affected parties? What is the criterion for decision? How will the decision, and others like it, affect our ability to respect and vindicate other goods? How costly would it be to regulate or try to prohibit such decisions? Is the social meaning of the particular decision in question such that it belies the principle that people are of equal ultimate worth, or is it something else? And, is the decision one that a limited state in a free society has the authority to supervise?

Garnett, *supra* n. 32, at 199 (quotation marks omitted).

institutional religious freedom."[39] From "the investiture controversy of the eleventh and twelfth centuries, in which popes and monarchs fought over who would have the authority to appoint Catholic bishops"[40] to President Thomas Jefferson's letter to the Ursuline Sisters of New Orleans, assuring the religious order that "the Louisiana Purchase would not undermine their legal rights," including the order's right "'to govern itself according to its own voluntary rules without interference from the civil authority,'" religious groups' ability to be free to choose their leaders has been a basic component of religious liberty.[41]

The Supreme Court's jurisprudence has long protected the ability of religious institutions to select their leaders according to their own religious criteria.[42] A year ago, the Supreme Court unanimously protected the right of religious institutions 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,*[43] the Court rejected the government's argument that nondiscrimination laws may be used to second-guess religious institutions' leadership decisions. Rejecting the government's "untenable" position that the Religion Clauses do not protect such decisions, the Court stressed that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations" and rejected the government's "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[44] The Court agreed that religious leaders "personify" a religious group's beliefs and "shape its own faith and mission."[45] 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

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[39] Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck, Richard W. Garnett, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 179 (2011). *See id.* at 179-184 (detailing the dominant role played by church-state struggles over control of religious institutions' leadership in the development of religious liberty in Europe and America). *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 702-704 (2012) (tracing similar history).

[40] *Id.* at 179.

[41] *Id.* at 182-183 (*quoting* Thomas Jefferson's letter, *as quoted in* 1 Anson Phelps Stokes, Church and State in the United States 478, 678 (1950)).

[42] *See, e.g., Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

[43] 132 S. Ct. 694 (2012).

[44] *Id.* at 706.

[45] *Id.*

faith."[46] Because religious groups' "very existence is dedicated to the collective expression and propagation of shared religious ideals," [w]hen it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters."[47] Obviously, "[a] religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses."[48]

Most relevant to the subject of the briefing, 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."[49] Concluding that "the First Amendment has struck the balance," the Supreme Court ruled that "[t]he church must be free to choose those who will guide it on its way."[50] Likewise, in their concurrence, Justice Alito and Justice Kagan affirmed the importance of nondiscrimination laws, yet came down on the side of religious groups' ability to choose their leaders without interference:

> [W]here the goal of the civil law in question, the elimination of discrimination against persons with disabilities, is so worthy – it is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws. To safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.[51]

C. 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 staff on the basis of their religious beliefs.

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[46] *Id.* at 706 & 713 (Alito, J., concurring).

[47] *Id.* at 712-13 (Alito, J., concurring).

[48] *Id.* at 713 (Alito, J., concurring).

[49] *Id.* at 710.

[50] *Id.* at 710.

[51] *Id.* at 712 (Alito, J., concurring).

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. Pursuant to 42 U.S.C. § 2000e-1(a), Title VII 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. Pursuant to 42 U.S.C. § 2000e-2(e)(2), an 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." Pursuant to 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." It is hard to imagine a better example of "a bona fide occupational qualification" than the requirement that the individual who leads a religious group's Bible study, worship, and prayer agree with the group's religious beliefs.[52]

In 1987, the Supreme Court upheld the constitutionality of Title VII's exemption against an Establishment Clause challenge.[53] Justice Brennan wrote a concurring opinion in which he explained why religious groups need such an exemption:

> We are willing to countenance the [religious group's] imposition of [a religious] condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.[54]

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[52] Legislative proposals to expand Title VII to include sexual orientation are invariably accompanied by exemptions for religious groups with conflicting religious views. *E.g.*, Employment Non-Discrimination Act of 2009, H.R. 3017 § 6. Every state law extending nondiscrimination protections to sexual orientation has some exemption for religious groups *See* Colo. Rev. Stat. §§ 24-34-401(3), 24-34-402(7), 24-34-601(1); Conn. Gen. Stat. § 46a-81p; 19 Del. Code § 710(6); D.C. Code § 2-1402.41(3); Haw. Rev. Stat. § 515-4b;
775 Ill. Comp. Stat. §§ 5/5-102.1(b), 25/3; Iowa Code §§ 216.6(6)(d), 216.7(2)(a), 216.9(2), 216.12(1)(a); Mass. Gen. Laws 151B §§ (1)(5), (4); 5 Me. Rev. Stat. §§ 4553(10)(G), 4602; Md. Code, State Gov't § 20-604(2); Minn. Stat. § 363A.26(2); Nev. Rev. Stat. § 613.320; N.H. Rev. Stat. § 354-A:2(XIV-C); N.J. Stat. §§ 10:5-5(n), 10:5-12(a); N.M. Stat. § 28-1-9(C); N.Y. Exec. Law § 296(11); Or. Rev. Stat. § 659A.006(3), (5); R.I. Gen. Laws §§ 28-5-6(15), 34-37-3(16); 9 Vt. Stat. § 4502(l), 21 Vt. Stat. § 495(e); Wash Rev. Code §§ 49.60.040(2), (11); Wis. Stat. § 111.337(2)(am).

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

[54] *Id.* at 342-43 (Brennan, J., concurring).

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."[55]

III. In *Martinez*, the Supreme Court Avoided Deciding the Issue of Nondiscrimination Policies.

A. The *Martinez* decision is narrowly limited to a unique factual context of an "all-comers policy," not a nondiscrimination policy.

The holding and scope of the Supreme Court's narrow decision in *Martinez* is easily misunderstood. In *Martinez,* the Court explicitly did *not* decide whether an enumerated nondiscrimination policy could be used to penalize the religious students it is supposed to protect. [56]

The Court narrowly, and conspicuously, confined its decision to an unusual policy, unique to Hastings College of the Law, that required *all* student groups to allow any student to be a member and leader of the group, regardless of whether the student agreed with—or actively opposed—the values, beliefs, or speech of the group.[57] Moreover, the Court held it was not enough for a university to adopt an all-comers policy: the policy must actually be uniformly applied to all student groups.[58]

The decision explicitly does *not* apply to conventional nondiscrimination policies that prohibit discrimination on the basis of enumerated, protected classes, which are commonly found at most universities. Writing for the majority, Justice Ginsburg

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[55] *Id*. at 341-42 (quotation marks and punctuation omitted).

[56] Commenting on *Martinez,* a senior vice president and general counsel for claims management at United Educators Insurance, who is "a prominent adviser to colleges on issues related to legal risk," cautioned university counsel that they should "not be lulled into thinking their policies on student groups are immune to legal challenges based on the U.S. Supreme Court's decision." According to *The Chronicle for Higher Education*:

> The ruling … focused on a type of policy … found at only a minority of colleges: an "accept all comers" policy requiring any student group seeking official recognition to be open to anyone who wishes to join. More common at colleges … is a policy of allowing student groups to have requirements for membership and leadership as long as those requirements are not discriminatory.

Peter Schmidt, *Ruling Is Unlikely to End Litigation over Policies on Student Groups*, Chron. Higher Educ. (June 30, 2010) available at http://chronicle.com/article/Many-Colleges-Student-Group/66101/ (last visited March 8, 2013).

[57] *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* 130 S. Ct. 2971, 2982, 2984 (2010)*; id.* at 2999 (Kennedy, J., concurring).

[58] *Id*. at 2995. The Court remanded the case on that issue.

emphasized that "[t]his opinion, therefore, considers *only* whether conditioning access to a student organization forum on compliance with *an all-comers policy*" is permissible and does not address a written nondiscrimination policy that protects specific, enumerated classes.[59] Justice Ginsburg emphasized that the policy under review was "one requiring *all* student groups to accept *all* comers."[60]

Instead, in *Martinez*, four Supreme Court justices explicitly determined that a nondiscrimination policy cannot be constitutionally applied to religious groups' choice of leaders and members.[61] These justices explained that such an application of a nondiscrimination policy would be unconstitutional viewpoint discrimination. Justice Stevens, who retired the day *Martinez* was announced, was the only justice who expressed the view that a written nondiscrimination policy could be constitutionally applied to religious student groups' selection of leaders, in a concurrence that began by observing that the Court "confines its discussion to the narrow issue" of the all-comers policy.[62] In his concurrence, Justice Kennedy emphasized that the decision was only concerned with an all-comers policy.[63]

As explained in more detail below, *Martinez* also makes clear that an all-comers policy is unconstitutional if it is not applied uniformly to every student group on campus.[64] An all-comers policy must be applied to all student groups' membership and leadership criteria.

The *Martinez* decision requires no change in any college's policy. The decision merely permitted a law school the discretion to adopt a novel policy, the wisdom of which has been widely questioned. The majority noted that "the *advisability* of Hastings' policy does not control its *permissibility*."[65] For instance, the fact that Hastings was a law school, as opposed to a university, meant that Hastings need not consider the effect

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[59] *Id.* at 2984 (emphasis added).

[60] *Id*. at 2993 (original emphasis). *See Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 795 (9th Cir. 2011), *citing Martinez*, 130 S. Ct. at 2982, 2984 (the Supreme Court in *Martinez* "expressly declined to address whether [its] holdings would extend to a narrower nondiscrimination policy that, instead of prohibiting all membership restrictions, prohibited membership restrictions only on certain specified bases, for example, race, gender, religion, and sexual orientation"); *see also*, *id*. at 805 (Ripple, J., concurring) ("this case is not controlled by the majority opinion in *Christian Legal Society*"; the Supreme Court "explicitly reserved" the issue in *Martinez*).

[61] 130 S. Ct. at 3009-13 (2010) (Alito, J., dissenting, joined by Roberts, C.J., Scalia, J., and Thomas, J.).

[62] *Id.* at 2995 (Stevens, J., concurring).

[63] *Id.* at 2999 (Kennedy, J., concurring).

[64] *Id.* at 2995 (remanding to determine whether "Hastings selectively enforces its all-comers policy").

[65] *Id.* at 2992.

of its "all-comers policy" on the wide array of groups that most universities have on campus, particularly fraternities and sororities.[66]

B. Misuse of a nondiscrimination policy to prohibit religious groups' religious leadership criteria creates viewpoint discrimination.

In *Martinez*, four Supreme Court justices would have found that a nondiscrimination policy cannot be constitutionally applied to religious groups' choice of leaders and members.[67] These justices explained that such an application of a nondiscrimination policy would be unconstitutional viewpoint discrimination.

To prohibit religious groups from adopting criteria for leaders related to the goals of the organization and purposes of the activities, while allowing other student groups to do so, is unconstitutional viewpoint discrimination and violates the students' free speech rights. Essentially, the University violates its own nondiscrimination policy if it prohibits religious student organizations from having leadership requirements that reflect their religious viewpoints, while it allows nonreligious student groups to have leadership requirements that reflect their nonreligious viewpoints. Just as the Democratic Students Association wants its leaders to agree with the Democratic Party's platform, and the Animal Rights Club wants its leaders to commit to veganism, many religious groups believe that it is essential for expression of their religious identities that their officers agree with their religious beliefs. In other words, the right of religious groups to be religious depends on their ability to have leaders who are committed to their religious beliefs.

The Seventh Circuit held that a university's application of a nondiscrimination policy to a religious student group was unconstitutional, stating it had "no difficulty concluding that [a university's] application of its nondiscrimination policies in this way burdens CLS's ability to express its ideas."[68] The Second Circuit held that the Equal Access Act requires a public secondary school to recognize a religious student group despite its religious leadership criteria.[69] In so holding, the Second Circuit relied heavily on First Amendment precedent to reach its conclusion. The Ninth Circuit reached a different result and allowed application of a nondiscrimination policy to religious groups; however, the panel believed it was bound by a prior Ninth Circuit decision.[70] It remanded the case for a determination whether the policy had been uniformly applied to all groups.

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[66] An all-comers policy's inherent incompatibility with fraternities and sororities is discussed *infra* at Part IV.B.

[67] *Id.* at 3009-13 (2010) (Alito, J., dissenting, joined by Roberts, C.J., Scalia, J., and Thomas, J.).

[68] *Christian Legal Society v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006).

[69] *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996).

[70] *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012) .

In perhaps the most cogent legal analysis of the reason nondiscrimination policies, when misused, impose a particular burden on religious student groups, Seventh Circuit Judge Kenneth Ripple explained that nonreligious groups can redefine themselves to form around shared values, but religious groups cannot do this because their shared values are *religious* values, which some administrators will mislabel as "religious discrimination."[71]

IV. An All-comers Policy Is Unworkable and Undermines Nondiscrimination Values.

A. An "all-comers" policy may be applied to religious groups *only* if the University applies the policy to *all* groups *without exception*.

There are numerous reasons why an all-comers policy is bad policy and unworkable. As *Martinez* itself explains, "the *advisability* of Hastings' policy does not control its *permissibility*."[72]

The Court held that it was 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.[73] *Martinez* is unequivocal that if a university allows *any* exemption to its all-comers policy, it cannot deny an exemption to a religious group.[74] Indeed, the Court remanded the *Martinez* case for further consideration of whether the all-comers policy had been uniformly or "selectively enforce[d]."[75] Justice Ginsburg emphasized that the policy under review was "one requiring *all* student groups to accept *all* comers."[76]

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 the university allowed any exemption to its policy.[77] As the Court has long ruled, the government cannot deny religious groups an exemption for certain conduct while granting nonreligious groups an exemption for similar conduct. "[I]n circumstances in which individualized exemptions from a general requirement are available, the

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[71] *Id*. at 804-805 (Ripple, J., concurring). Judge Ripple's reasoning is quoted at length *supra* at pp. 7-8.

[72] 130 S. Ct. at 2992.

[73] *Id.* at 2995.

[74] *Id.* at 2995; *id.* at 2999 (Kennedy, J., concurring).

[75] *Id.* at 2995.

[76] *Id.* at 2993 (original emphasis).

[77] *Id.* at 2993.

government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'"[78] Such a discrepancy triggers strict scrutiny of the government's denial of the exemption to the religious group.[79]

Of course, this is precisely why "all-comers" policies are rare: they must be applied without exception to *all* student groups. In *Martinez* itself, the Court hardly endorsed an "all-comers" policy when it observed that "the *advisability* of Hastings' policy does not control its *permissibility*."[80]

B. Single-sex sororities and fraternities, a cappella groups, and intramural sports teams are incompatible with an all-comers policy.

The *Martinez* facts were unusual, not only because of the unique all-comers policy, but also because the school at issue was a stand-alone law school and not a major university. The law school did not need to weigh the impact of an all-comers policy on single-sex sororities and fraternities, a cappella groups, and club sports teams. 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. Besides ending selection of members and leaders on the basis of sex, an all-comers policy would require fraternities and sororities to adopt a "first-come, first-pledge" selection process because all groups must be open to all students. 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.

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.[81] 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.

C. An all-comers policy undermines the very protection for minority groups that nondiscrimination policies are intended to provide.

In a remarkably candid PBS interview, the acting dean of the law school in *Martinez* admitted that its all-comers policy required an African-American student group

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[78] *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993), *quoting Employment Div. v. Smith*, 494 U.S. 872, 884 (1990).

[79] "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418, 433 (2006), *quoting Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation marks and ellipses omitted).

[80] 130 S. Ct. at 2992 (original emphasis).

[81] 20 U.S.C. 1681-1688 (2013).

to admit white supremacists as members.[82] At oral argument, its counsel conceded that an all-comers policy would allow exclusion of Orthodox Jewish groups or Muslim groups, if their traditional practices were deemed to be "discriminatory."[83] 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.

D. An all-comers policy eviscerates all university 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 would wish to preserve. The ability of groups to form around a specific goal and mission has fueled most great reform movements and is necessary in order to maintain genuine pluralism and diversity on campus.[84]

E. 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. A student who denies global warming could force the Sierra Club to defend itself in administrative proceedings to determine whether his or her beliefs were improperly considered by the group in denying the student's bid for its presidency.

In regard to religious groups, the administrative difficulties are particularly troubling. University administrators will need to examine religious groups' religious practices to respond to any claim that a religious group's traditional practices are "discriminatory." Examining religious groups' doctrine, however, is not within the province of government officials.[85] Determining that some religious groups' doctrines are "discriminatory," but other religious groups' doctrines are not, strikes at the

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[82] *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/ (last visited March 8, 2013).

[83] Tr. of Oral Arg. 44, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1371.pdf (last visited March 8, 2013).

[84] *See, e.g.*, Adam Goldstein, *Supreme Court's CLS Decision Sucker-Punches First Amendment*, The Huffington Post (June 29, 2010) at http://www.huffingtonpost.com/adam-goldstein/supreme-courts-cls-decisi_b_628329.html?view=print (last visited March 8, 2013).

[85] *Thomas v. Review Board*, 450 U.S. 707 (1981).

Establishment Clause's core requirement that the State not favor some religious beliefs over other religious beliefs.[86] To save its policy, Hastings' counsel claimed that groups might impose tests on membership and, therefore, a religious group could require applicants to pass a Bible test—but only "[i]f it were truly an objective knowledge test."[87] A policy that envisions university officials determining whether a religious group's knowledge test is "objective" or "subjective" is a constitutional quagmire.

F. An all-comers policy exposes the University to lawsuits because consistent enforcement is nearly impossible.

Any student can insist that the University review his or her exclusion from any group for any reason, with a lawsuit dangling over each administrative review. Indeed, *Martinez* places the burden on university administrators to ensure that the policy is not used by students to change the message or mission of any group.[88] The Court provided no practical guidance for administrators as to how to carry out a task that seems inherently to contradict the basic concept of an all-comers policy.

V. Even as a limited decision, *Martinez* is incompatible with the Supreme Court's traditional First Amendment jurisprudence.

Martinez's departure is so sharp, and its analysis so superficial, that its viability seems doubtful, even on the very narrow issue that it decided. Whether or not *Martinez* was correctly decided has no bearing on whether nondiscrimination policies and religious liberty are compatible. Yet, it is worth noting that the *Martinez* majority opinion has been criticized on a number of grounds.[89] In fundamental ways, the opinion departed

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[86] *Larson v. Valente*, 456 U.S. 228 (1982).

[87] Tr. of Oral Arg. 52, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1371.pdf (last visited March 8, 2013).

[88] 130 S. Ct. at 3000 (Kennedy, J., concurring) (observing that a group "would have a substantial case on the merits if it were shown that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views").

[89] *See, e.g.*, John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 Hastings L.J. 1213, 1231-1242 (2012); John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 5-6, 145-149 (Yale University Press 2012); Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Sarat, *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits* 194, 208-211, 219-225 (Cambridge University Press 2012); Douglas Laycock, *Sex, Atheism, and the Free* Exercise of Religion, 88 U. Det. Mercy L. Rev. 407, 428-29 (2011); Michael W. McConnell, *Freedom by Association*, First Things, Aug-Sep2012, at 39-44 *available at* http://www.firstthings.com/article/2012/07/freedom-by-association (last visited March 8, 2013); Mary Ann Glendon, *The Harold J. Berman Lecture Religious Freedom – A Second-Class Right?*, 61 Emory L.J. 971, 978 (2012); Richard Epstein, *Church and State at the Crossroads:* Christian Legal Society v. Martinez, 2010 Cato Sup. Ct. Rev. 105 (2010); William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of* Christian Legal Society v. Martinez, 261 Ed. Law Rep. 473 (2010); Carl H. Esbeck, *Defining Religion Down: Hosanna-Tabor, Martinez, and the U.S. Supreme Court*, 11 First Amendment Law Review 1 (2012); Note, *Freedom of Expressive Association*, 124 Harv. L. Rev. 249 (2010).

from forty years of Supreme Court precedent protecting student groups' free speech, expressive association and free exercise rights on campus.[90]

A. The Supreme Court has repeatedly held that universities do not endorse student groups and their beliefs when they recognize them: recognition is not endorsement.

As the Supreme Court remarked in *Healy v. James*, "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[91] For nearly forty years before the *Martinez* decision – since *Healy* – it has been universally recognized that group rights of freedom of speech and association extend to student groups operating on state university campuses.

The *Martinez* decision deeply conflicts with the Court's landmark decisions in *Healy* and in *Widmar v. Vincent*.[92] Both those cases held that campus student groups possess an affirmative freedom of speech and expressive association to meet on state university campuses, without restriction based on officials' disapproval of the nature of their associations or identities. *Healy* involved a *political* group's associational freedom, while *Widmar* involved a *religious* group's religious speech and identity. In each situation, campus officials had argued that they possessed the authority to exclude such groups from recognition because of the nature and content of the groups' expressive identity. And in each case, the Court rejected the college administrators' arguments.[93]

Healy specifically rejected a state university's claimed authority to deny a student political group, Students for a Democratic Society ("SDS"), recognition because of its associational identity: "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs."[94] Accordingly, "denial of official recognition, without justification, to college organizations burdens or abridges that associational right."[95] The Court *held* that a state university "*may not restrict speech*

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[90] Adam Goldstein, *Supreme Court's CLS Decision Sucker-Punches First Amendment* (June 29, 2010), *available at* http://www.huffingtonpost.com/adam-goldstein/supreme-courts-cls-decisi_b_628329.html (last visited March 6, 2013). An attorney with the Student Press Law Center, Mr. Goldstein stated that "the rationale of this opinion could end up doing more violence to student expression rights than any decision in the last 22 years." *Id.*

[91] 408 U.S. 169, 180 (1972).

[92] 454 U.S. 263 (1981).

[93] *Healy* and *Widmar* of course stand in the midst of a long line of Supreme Court cases recognizing a broad right of expressive association. *See* Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 Minn. L. Rev. 1917, 1923-39 (2001) (collecting and discussing cases).

[94] 408 U.S. at 181.

[95] *Id.*

or association" of campus student groups simply because it considered a particular group's views, identity, or affiliations to be undesirable as a policy matter – indeed, even if it thought a group's positions "abhorrent."[96]

In *Widmar,* the Court extended *Healy*'s recognition of campus groups' freedom of speech and association to religious groups: "*With respect to persons entitled to be there,* our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."[97] Because "students enjoy First Amendment rights of speech and association on the campus," denial of recognition and use of facilities to student groups, on the basis of their religious mission and identity, "must be subjected to the level of scrutiny appropriate to any form of prior restraint."[98]

The *Martinez* majority attempted to distinguish *Healy* and *Widmar* by treating them as cases where the student groups "had been unconstitutionally *singled out*" for different treatment.[99] Ostensibly, there was no *general* right of campus student groups to freedom of expressive association. But such a distinction is utterly alien to the opinions in *Healy* and *Widmar* themselves which spoke clearly of students possessing group rights of "*speech and association,*" "*on campus,*" simply because they were "*entitled to be there.*"[100]

But there is an even more dramatic conflict between *Martinez,* on one hand, and *Healy* and *Widmar,* on the other. Fundamentally, the central premise of *Martinez* is entirely irreconcilable with the central premise of *Healy* and *Widmar,* as well as the underlying premise of *Good News Club*, *Rosenberger*, *Lamb's Chapel* and *Mergens.*[101] Inexplicably, the *Martinez* majority began with the mistaken premise that permitting a student group access to a limited forum was "subvention" or "state subsidy" of the group's expression.[102] But *Martinez*'s starting point simply cannot be squared with four decades of caselaw protecting student groups' free speech and expressive association. If access to a speech forum is a "state subsidy" of the group's purposes or identity, then

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[96] *Id.* at 187-88 (emphasis added).

[97] 454 U.S. at 268-69 (emphasis added).

[98] *Id.* at 267 n.5 (*citing Healy*).

[99] 130 S. Ct. at 2987-88.

[100] *Widmar*, 454 U.S. at 268-69 (emphasis added). *Accord Healy*, 408 U.S. at 181-182, 184.

[101] *Good News Club v. Milford Central School,* 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990). *See also, Capitol Square Rev. & Advisory Bd. v. Pinette,* 515 U.S. 753 (1995); *Fowler v. Rhode Island,* 345 U.S. 67 (1953); *Niemotko v. Maryland,* 340 U.S. 268 (1951).

[102] 130 S. Ct. at 2978, 2986.

Healy, *Widmar*, *Lamb's Chapel*, *Rosenberger*, *Mergens*, and *Good News Club* were all wrongly decided. If a student group's access to meeting space is a state subsidy, then Central Connecticut State College had every right to refuse to subsidize the SDS's advocacy of violence in *Healy*. And the school officials in *Widmar*, *Lamb's Chapel*, *Rosenberger*, *Mergens*, and *Good News Club* were absolutely correct that access for religious groups was the equivalent of government subsidy of religious speech in violation of the Establishment Clause. But the Court held the exact opposite each time.

Martinez's basic construct -- that student groups' access to classroom space and campus communication channels is a government subsidy – is a radical departure from *Healy*, *Rosenberger*, *Widmar*, *Lamb's Chapel*, *Mergens*, and *Good News Club*. In *Rosenberger*, the Court stressed that it "did not suggest in *Widmar*, that viewpoint-based restrictions are proper when *the University does not itself speak or subsidize transmittal of a message it favors* but instead expends funds to encourage a diversity of views from private speakers."[103] As the Court held, access to meeting space, channels of communication, and student activity fee funds was not a government subsidy of the religious student group's private speech. For that reason, the Establishment Clause was not violated by a religious group's access to meeting space, channels of communication, or student activity fee funding.[104] The Court made this point itself in *Rosenberger*: "If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled."[105]

A troubling aberration, *Martinez*'s treatment of students' associational rights conflicts with long-established precedent establishing the First Amendment principle that students at state universities possess group rights of expression and association, simply by virtue of being "entitled to be there" as students.

B. The government cannot justify its denial of one group's expressive association rights by wiping out all groups' expressive association rights.

The decision in *Martinez* also rested on the mistaken premise that a state university might uniformly provide that *all* campus groups be denied rights of "expressive association" traditionally enjoyed by private expressive groups, as an aspect of the university's restrictions on its limited public forum. The religious student group's right to choose its leaders and members could be denied because, *and only because*, all other student groups' right to choose their leaders and members was denied.

But the First Amendment usually cannot be evaded so easily. For example, a religious speaker challenged Los Angeles International Airport's policy that banned all

[103] 515 U.S. at 834.

[104] *Id.* at 842-43.

[105] *Id.* at 843.

First Amendment activity in the airport. The Supreme Court unanimously ruled for the religious speaker "because no conceivable governmental interest would justify such an absolute prohibition of speech."[106] For the same reason, an all-comers policy that bans all student groups from exercising their rights of speech and expressive association should have been a *per se* violation of the First Amendment.

Healy and *Widmar* again demonstrate the incorrectness of the *Martinez* decision. If *Martinez* is correct, all the campus officials in *Healy* needed to do to keep the SDS off campus was to adopt a uniform policy restricting all campus student groups' freedom of expressive association. Under *Martinez* – quite contrary to *Healy* – a state university apparently *may* restrict speech and association and *does* have power to burden the associational right of student groups "to associate to further their personal beliefs," even though *Healy* holds the diametrical opposite.[107] All the university need do is impose "neutral" across-the-board restrictions on all groups' expressive association. Likewise, all that the campus officials in *Widmar* needed to do in order to suppress students' religious meetings was to adopt a uniform policy forbidding all student groups from having any ideologically distinctive identity. Under *Martinez* – quite contrary to *Widmar* – students "enjoy First Amendment rights of speech and association on the campus" only to the extent state university officials choose to define their limited forum in such a way as to allow such rights, which contradicts both *Healy* and *Widmar*.[108]

C. The Court's more recent decision in *Hosanna-Tabor* rejected the basic free exercise analysis upon which *Martinez* relied.

The Court's decision in *Hosanna-Tabor* casts serious doubt on the correctness of *Martinez*'s treatment of the free exercise claim. The majority believed that *Employment Division v. Smith*[109] "forecloses" a religious student group's free exercise claim that a state university may not penalize a religious group for requiring its leaders to agree with its religious beliefs.[110] In *Hosanna-Tabor*, however, the Court unanimously distinguished "a church's selection of its ministers" from *Smith*, which it characterized as "involv[ing] government regulation of only outward physical acts."[111] A state university's use of its nondiscrimination policy to penalize a religious student group for insisting its leaders agree with its religious beliefs seems much closer to the "government interference with an internal church decision that affects the faith and mission of the

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[106] *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987).

[107] 408 U.S. at 181.

[108] 454 U.S. at 267-68 & n.5.

[109] 494 U.S. 872 (1990),

[110] 130 S. Ct. at 2995 n.27, 2993 n.24.

[111] 132 S. Ct. at 707.

church itself," found unconstitutional in *Hosanna-Tabor*, than to "government regulation" of "an individual's ingestion of peyote," permitted in *Smith.* This is particularly true given that the Free Exercise Clause provides "special solicitude to the rights of religious organizations."[112]

Indeed, even without *Hosanna-Tabor's* analysis, *Martinez* was incorrect to claim that *Smith* governed. Even under the *Smith* analysis, the government may not regulate, or discriminate against, the exercise of First Amendment rights of expression and association, on the basis of the *religious* nature of such expression or association. The minimum content of the Free Exercise Clause is that government must not *discriminate against religion specifically* and regulate conduct *specifically because* of its religious nature or the religious identity of the person or persons engaged in it.[113] To exclude religious groups from campus because their leadership criteria are *religious* is discrimination on the basis of religion in violation of *Smith* and *Lukumi.*

Conclusion

Religious liberty scholar, Professor Douglas Laycock, 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 free exercise of religion may be a bad idea, or at least, a right to be minimized."[114] He posits "that the deep disagreements over sexual morality . . . have generated a much more pervasive hostility to certain kinds of religion, and this hostility has consequences."[115] He counsels against taking a "path [that] causes the very kinds of human suffering that religious liberty is designed to avoid," a path leading to a society in which religious persons "who cannot change their mind [about a moral issue] are sued, fined, forced to violate their conscience, and excluded from occupations if they refuse."[116]

Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too often neglected. Misuse of university nondiscrimination policies poses a serious threat to religious liberty and pluralism – a threat easily avoided if nondiscrimination policies are once again given a

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[112] *Id.*.

[113] *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Smith*, 494 U.S. at 877; *McDaniel v. Paty*, 435 U.S. 618 (1978).

[114] Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 407 (2011). Other religious liberty scholars are sounding a similar alarm. *See, e.g.*, Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 Cardozo L. Rev. 1755, 1780 (2011) ("I fear that religious liberty, understood as a distinctive and precious human right, our 'first freedom,' might become a relic of the past – perhaps a cherished relic, but one that no longer commands a contemporary commitment."); Mary Ann Glendon, *The Harold J. Berman Lecture Religious Freedom – A Second-Class Right?*, 61 Emory L.J. 971 (2012).

[115] Laycock, *supra* n. 114, at 414.

[116] *Id*. at 419.

common sense interpretation that protects religious student groups, rather than penalizing them for choosing leaders who agree with their religious beliefs.

ATTACHMENT A

---------- Forwarded message ----------
From: [redacted]
Date: Tue, Aug 9, 2011 at 10:40 PM
Subject: RE: Christian Legal Society status
To: [redacted]
Cc: [redacted]

Dear [redacted],

Thank you for submitting your new Constitution for the Christian Legal Society. In reviewing it, there are some parts of it that are in violation of Vanderbilt University's policies regarding student organizations; they will need to be addressed before the Office of Religious Life can endorse CLS's approval.

Article III states that, "All officers of this Chapter must subscribe to the Christian Legal Society Statement of Faith." Vanderbilt's policies do not allow any student organization to preclude someone from a leadership position based on religious belief. Only performance-based criteria may be used. This section will need to be rewritten reflecting this policy.

The last paragraph of Section 5.2 states that "Each officer is expected to lead Bible studies, prayer and worship at Chapter meetings as tasked by the President." This would seem to indicate that officers are expected to hold certain beliefs. Again, Vanderbilt policies do not allow this expectation/qualification for officers.

Section 9.1 regarding Amendments to the Constitution should include language stating that any amendment must also be in keeping with Vanderbilt University's policies on student organizations and must be approved by the University before taking effect.

Please make these few changes and submit a copy of the amended Constitution to me so we can proceed with the approval process.

Also, we do not have in hand a copy of the revised Officer and Advisor Affirmation Form, as requested in the initial deferral. Specifically, we need a clean document without the handwritten text that seems to be an exclusionary clause advocating for partial exemption from the University's non-discrimination policy. Please forward us a copy of this as well.

Thank you. Please let me know of any questions you may have.

Best,

[redacted]

[redacted]

ATTACHMENT B

---------- Forwarded message ----------
From: vanderbiltcollegiatelink
<noreply@collegiatelink.net<mailto:noreply@collegiatelink.net><mailto:noreply@collegiatelink.net<mailto:noreply@collegiatelink.net>>>
Date: Tue, Apr 17, 2012 at 11:53 AM
Subject: Registration Status Update: [redacted name of Christian student group]
To: [redacted name of student]

The registration application that you submitted on behalf of [redacted name of Christian student group] <https://vanderbilt.collegiatelink.net/organization/[redacted]> has not been approved and may require further action on your part. Please see the reviewer's comments below or access your submission now<https://vanderbilt.collegiatelink.net/organization/[redacted]/register/Review/650475>.

Thank you for submitting your registration application. Vanderbilt appreciates the value of its student organizations. Your submission was incomplete or requires changes, thus we are not able to approve your application at this time. Please re-submit your application including the following items or changes: - Please change the following statement in your constitution:
"Article IV. OFFICERS
Officers will be Vanderbilt students selected from among active participants in [redacted name of Christian student group]. Criteria for officer selection will include level and quality of past involvement, personal commitment to Jesus Christ, commitment to the organization, and demonstrated leadership ability."

CHANGE TO:
Officers will be Vanderbilt students selected from among active participants in [redacted name of Christian student group]. Criteria for officer selection will include level and quality of past involvement, commitment to the organization, and demonstrated leadership ability.

We are committed to a timely review of every complete application received and to letting you know the status of your application as soon as possible.

ATTACHMENT C

Student Activities • Office of the Dean of Students • *Division of Student Affairs* • The University of Texas at Austin • Student Services Building, 4.400 • 512-471-3065 • **deanofstudents.utexas.edu/sa/**

Student Activities
WHAT STARTS HERE CHANGES THE WORLD

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: *(Check one only)*

- q Political
- q Student Governanace
- q Recreational
- q International/Cultural
- q Educational/Departmental
- q Professional
- q Religious
- q Special Interest
- q Honorary
- q Social
- q Service

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? q Yes q No

For Office Use Only

Receipt Number _____

Staff Signature _____ Date _____

August 2011

ORGANIZATIONS POLICY

1. General Statement of Purpose

The University recognizes:

1. the importance of organized student activities as an integral part of the total educational program of the University;
2. that college learning experiences are enriched by student organizational activity; and
3. that organizations provide a framework for students within which they may develop their own special talents and interests.

Inherent in the relationship between the University and organized student groups is the understanding that the purposes and activities of such groups should be consistent with the main objectives of the University.

All student organizations must register annually with the Department of Campus Activities and must then comply with the procedures and policies regarding registration as set forth.

The Dean of Students Office recognizes the role of Greek Coordinating Councils in establishing and upholding policies for member groups. However, membership in said councils does not exempt fraternities and sororities from judicial referrals to the Dean of Students Office for violations of Student Life Policies, including Organizations Policies.

The University Hearing Board, with the approval of the Dean of Students, delegates to Greek coordinating councils general supervision over those chapters of social sororities and fraternities which choose to be members of these councils.

The term "general supervision" shall include all the duties, powers and responsibilities exercised by the Greek coordinating council prior to the adoption of this policy, with the provision that membership in the Greek coordinating councils is optional with the local chapter.

It is understood that the Greek coordinating councils and their member groups will operate under the provisions of the Student Life Policies, including the Organizations Policy.

2. Procedure for Registration of New Organizations

2.1 Permanent Organizations

a. The group will file its name, statement of purpose, constitution or statement regarding its method of operation, faculty/staff advisor (if applicable), and the names of its officers or contact persons with the Department of Campus Activities.

b. In cases where a potential faculty/staff advisor is unknown to the group, the Campus Activities staff will assist in identifying a university faculty or staff member who may wish to serve as an advisor. Organizations are encouraged to have a faculty/staff advisor.

c. Should the group not have elected its officers or completed other work connected with its formation at the time they initially see the Campus Activities staff, the Campus Activities staff shall make arrangements for them to use university facilities for organizational purposes on a meeting-to-meeting basis until the organizational process is completed and the required information can be filed.

d. At the time of filing, three officers or contact persons for the organization will sign a statement indicating that they are familiar with and will abide by the aforementioned responsibilities of student organizations. They will also sign the standard hazing and discrimination disclaimer required of all student organizations.

e. Having ascertained that the group's purpose is law- ful and within university regulations and that the group has filed the required forms and disclaimers, the Director of Campus Activities, or designate, will sign the application. Appropriate university personnel are notified by Campus Activities that the group is then eligible for all of the rights of student organizations.

f. Should the staff feel that the organization does not meet the requirements for registration, a written copy of the decision and reasons will be furnished to the applying organization. The group may appeal the decision to the Dean of Students.

g. The Campus Activities staff shall make arrangements for the group to use university facilities on a meeting- to-meeting basis until the appeals process is completed.

h. Decisions of the University Hearing Board may be appealed to the Dean of Students.

2.2 Registration for a Limited Purpose: Temporary Status In some cases, groups will organize with some short-term (one which can be accomplished in less than one academic year) goal in mind such as the passage of some particular piece of legislation or the holding of some particular event. The organization's structure will expire on the date indi- cated on the registration form. Requests for extension of Temporary Status may be made to the Director of Campus Activities.

2.3 Membership Regulations

a. Registered student organizations have freedom of choice in the selection of members, provided that there is no discrimination on the basis of race, color, religion, national origin, sex, age, disability, veteran status, or sexual orientation.

b. Membership in registered student organizations is restricted to currently enrolled University of Houston students, faculty, staff and alumni.

c. Hazing-type activities of any kind are prohibited.

2.4 Officers Regulations

a. Student organizations are free to set qualifications and procedures for election and holding office, with the following provisions:

1. All officers must be regular members of the organization.
2. There is no discrimination on the basis of race, color, religion, national origin, sex, age, disability, veteran status, or sexual orientation except where such discrimination is allowed by law.
3. 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.

b. Persons not currently enrolled at the University of Houston may not hold office or direct organizational activities.

2.5 Records

All registered student organizations must maintain the following records in the Campus Activities Office:

a. An organizational information form listing the current officers and faculty/staff advisor (if applicable) is due at the beginning of each school year. Any changes during the year, other than membership, are to be recorded within 10 days with the Department of Campus Activities.

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 CSAl'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.