CHRISTIAN LEGAL SOCIETY

February 18, 2020

Ms. Lynn Mahaffie
Deputy Assistant Secretary
for Policy, Planning, and Innovation
Office of Postsecondary Education
Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

By: regulations.gov portal

Re: Docket ID **ED-2019-OPE-0080**

Dear Ms. Mahaffie:

Christian Legal Society ("CLS") writes this comment letter on behalf of its student and attorney members in response to the Department of Education's Notice of Proposed Rulemaking, 85 Fed. Reg. 3190 (Jan. 17, 2020). CLS writes to express its wholehearted support for Proposed Regulations § 75.500(d) and § 76.500(d) because they will protect religious students who meet for scripture study, prayer, worship, and other religious expression and exercise on public college campuses.

CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 law schools. CLS 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 by which CLS defines itself.

For several decades, CLS student chapters and other religious student groups on various campuses nationwide have been threatened with exclusion from campus because of their religious beliefs, speech, practices, policies, membership standards, and leadership standards. The proposed regulations would ensure that religious student groups of all faiths, including CLS student chapters, would be allowed to continue to serve their campuses in countless positive ways. By protecting religious student groups, the proposed regulations will increase the range of religious and ideological diversity on public college campuses.

I. Proposed Regulations § 75.500(d) and § 76.500(d) Are a Common Sense Solution to the Discrimination that Religious Student Groups Too Often Face on Public College Campuses.

For nearly four decades, religious student groups have been threatened with exclusion from college campuses across the country. Often religious student groups are threatened with

exclusion because they require their leaders to agree with the core religious beliefs that define the group.

But it is only common sense that a religious group should be able to require its leaders to agree with its religious message and mission. Because they lead religious groups' prayer, worship, and study of their sacred texts, religious groups' leaders should agree with the group's religious beliefs in order to communicate those beliefs effectively by word and conduct. The stories of many of the students who have been in religious groups threatened with loss of recognition because of their speech, beliefs, or leadership standards are the focus of our comments. See *infra* at 9-16.

Proposed Regulations § 75.500(d) and § 76.500(d) would solve many of the problems that religious groups have faced for too long on public college campuses. The proposed regulations do not require any college to adopt any policy whatsoever. The regulations simply direct that *whatever* policy a university has chosen to adopt, it may not be applied so as to exclude religious student groups from campus because of their religious "beliefs, practices, policies, speech, membership standards, and leadership standards."

Proposed Regulations § 75.500(d) and § 76.500(d) simply ensure fair treatment for religious groups on public university campuses. No organization—whether religious, political, or ideological—can exist without leaders who share and promote its mission and message (whether the group is the Sierra Club, the Democrats or Republicans, or a Christian, Jewish, or Muslim group).

Proposed Regulations § 75.500(d) and § 76.500(d) follow the well-marked path of federal protections for religious students' right to be religious in their public educational institutions.[1] Basically, the federal government does not want taxpayer funding channeled to public educational institutions that discriminate against students on the basis of their religious beliefs. The regulations also mirror other federal protections for religious organizations' decisions about who will express their messages and carry out their missions.[2]

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[1] See, *e.g.*, Equal Access Act, 20 U.S.C. §§ 4071-4074; U.S. Dept. of Education, Office of the General Counsel, *Updated Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, 85 Fed. Reg. 3257 (Jan. 21, 2020); U.S. Dept. of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003); Richard W. Riley, U.S. Secretary of Education, *Religious Expression in Public Schools: A Statement of Principles* (June 1998); William J. Clinton, *Presidential Memorandum on Religious Expression in Public Schools*, 2 Pub. Papers 1083 (July 12, 1995).

[2] See, *e.g.*, 42 U.S.C. § 2000e-1(a) (protecting right of religious associations' to employ only "individuals of a particular religion"); 42 U.S.C. § 2000e-2(e)(2) (protecting religious educational institutions' right to employ only "employees of a particular religion"); 42 U.S.C. § 2000e-2(e)(1) (allowing any employer to hire on the basis of religion "where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"); 20 U.S.C. § 6801(a)(3) (protecting religious institutions of higher education from application of major federal civil rights law when its requirements conflict with an institution's religious tenets); 34 C.F.R. § 106.12 (same); 42 U.S.C. 5172(a)(C)(3) ("No house of worship, educational facility, or any other private nonprofit facility may be excluded from receiving contributions [i.e., federal disaster aid] under paragraph (1)(B) because leadership or membership in the organization operating the house of worship is limited to persons who share a religious faith or practice."); 42 U.S.C. 5122(11)(B) ("No house of worship may be excluded from this

Religious groups on campuses are an essential, positive, and vibrant component of a campus that aspires to be authentically diverse. One study found that not only is participation in religious groups positively associated with social integration, emotional well-being, and academic success, but also with greater awareness of people from different races and cultures.[3] Religious student groups typically are among the most diverse groups on campus in terms of the racial, ethnic, and socio-economic backgrounds of their students. They welcome all students to explore spiritual values and ideas, to participate in their activities, and to experience genuine community. For many first-generation students, religious groups are crucial to finding a welcoming, nurturing space in an unfamiliar environment. Religious student groups also inspire service to others, whether it is distributing water at campus events or digging wells in rural villages during spring break trips abroad. Encouraging spiritual growth and service to others are defining attributes of most student groups regardless of their specific faith. The proposed regulations protect religious student groups' ability to carry out their missions and benefit their campuses.

II. Proposed Regulations § 75.500(d) and § 76.500(d) Redress the Problem Facing Religious Student Groups For Forty Years of Discriminatory Exclusion from Campuses at Many Public Colleges.

On a typical university campus, hundreds of student groups meet to discuss political, social, cultural, and philosophical ideas.[4] These groups form when a few students apply to the university administration for "recognition" or "registration" as a student group. "Recognition" or "registration" allows a student group to reserve meeting space on campus, communicate with other students, and apply for student activity fee funding otherwise available to other student groups. Without recognition, a group finds it very difficult, if not impossible, to exist on campus.

A. From the 1970s to the mid-1990s, the Establishment Clause was used by some university administrators to justify discriminatory treatment of religious student groups.

1. Proposed Regulations § 75.500(d) and § 76.500(d) would codify the Supreme Court's landmark decision in *Widmar v. Vincent* (1981).

In the early 1970s, in *Healy v. James*, the Supreme Court acknowledged the importance to any student group of a public college's official recognition. The Court held that denial of recognition violates a student group's freedom of speech and expressive association.[5]

Specifically, in *Healy*, the Court ruled that a public college must give official recognition to the Students for a Democratic Society ("SDS"), which was represented by the American Civil

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definition because leadership or membership in the organization operating the house of worship is limited to persons who share a religious faith or practice.").

[3] Bryant, Alyssa N., *The Effects of Involvement in Campus Religious Communities on College Student Adjustment and Development*, Journal of College and Character, 8:3, p.4 (2007).

[4] The Ohio State University, for example, has over 1,400 recognized student organizations. *See* https://activities.osu.edu/involvement/student_organizations/find_a_student_org/ ("There are over 1,400 student organizations at Ohio State").

[5] 408 U.S. 169 (1972).

Liberties Union. The Court rejected the Central Connecticut College's argument that if it recognized the student group, it would be endorsing the national SDS's extremist political agenda, which in the early 1970s was characterized by violence, including bombings.

Instead, in an analysis particularly pertinent to religious groups that wanted to be officially recognized on public college campuses, the Court emphasized that a college's recognition of a student group does not mean that the college endorses the student group's beliefs or speech. *Recognition does not equal endorsement.*

Religious student organizations have been meeting on public college campuses since at least the early 1950s. But in the 1970s, discrimination against religious student organizations began to emerge as some college administrators began to claim that the Establishment Clause would be violated if religious student groups were allowed to meet in empty classrooms to discuss their religious beliefs on the same basis as other student groups were allowed to meet to discuss their political, philosophical, or ideological beliefs. The administrators claimed that merely providing heat and light in unused classrooms gave impermissible financial support to the students' religious speech, even though heat and light were provided to all student groups' meetings. These administrators also claimed that college students were "impressionable" and would believe that the university endorsed religious student groups' religious beliefs, even though hundreds of student groups with diverse, and contradictory, beliefs were simultaneously meeting on campus.

In 1981, the University of Missouri -- Kansas City (UMKC) made these arguments before the Supreme Court in the landmark case, *Widmar v. Vincent*,[6] and lost. UMKC had changed its policy to prohibit use of buildings or grounds "for purposes of religious worship or religious teaching."[7] In order to be recognized, a student group had to affirm that its meetings did not include "religious worship or religious teaching."

Cornerstone, a group of evangelical Christian students, had met for a number of years on campus.[8] But the Cornerstone students refused to sign paperwork saying that they did not engage in religious worship and religious teaching at their meetings when they did, even though their refusal meant that their group would lose recognition and the ability to meet on campus. UMKC refused to renew Cornerstone's recognition, claiming that allowing a student group to engage in worship and religious instruction on campus violated the Establishment Clause of the United States Constitution, as well as the Missouri Constitution.

But in an 8-1 ruling, the Supreme Court held that the university had violated Cornerstone's speech and association rights. The Court ruled that the university had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment."[9]

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[6] 454 U.S. 263 (1981).
[7] *Id.* at 265 & n.3. The University of Missouri currently has over 600 recognized student organizations. See https://getinvolved.missouri.edu/find-an-org/ ("With more than 600 recognized student organizations at Mizzou, it is easy to find one that is right for you.").
[8] *Id.* at 265.
[9] *Id.* at 269.

The Court then held that the federal Establishment Clause was not violated by allowing religious student associations access to public college campuses.[10] The Court ruled that college students understand that a college's *recognition* of a student group does not mean that the college *endorses* the students' religious speech or beliefs. Relying on *Healy*, the Court again ruled that *recognition is not endorsement*. As the Court observed in a subsequent equal access case protecting high school students' religious meetings, "the proposition that schools do not endorse everything they fail to censor is not complicated."[11] The Court also held that the university's invocation of the state constitution's "establishment clause" could not justify denial of the student group's freedom of speech and expressive association.

Instead the Court flipped the Establishment Clause concern when it observed that "the University would risk greater 'entanglement' [between religion and government] by attempting to enforce its exclusion of 'religious worship' and 'religious speech'" because "the University would need to determine which words and activities fall within 'religious worship and religious teaching.'"[12] The Court saw this as "'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'"

The proposed regulations codify the Supreme Court's decision in *Widmar* by protecting religious student groups' speech and right to official recognition on public college campuses.

2. Proposed Regulations § 75.500(d) and § 76.500(d) would codify the Supreme Court's landmark decision in *Rosenberger v. University of Virginia* (1995).

In 1995, in *Rosenberger v. Rector & Visitors of the University of Virginia*,[13] the Supreme Court reaffirmed *Widmar*'s reasoning when it ruled that a university violated a religious student organization's freedom of speech and expressive association when it denied a religious student publication the same funding made available to sixteen other nonreligious student publications. As in *Widmar*, the Court further held that the Establishment Clause was not violated by a religious student publication receiving significant funding from the student activity fees system. Even *funding* for a religious student group does *not* mean that the university *endorses* the group's religious beliefs and speech.[14] As in *Widmar*, the Court warned that the university officials were taking a "course of action [that] would risk fostering a pervasive bias or hostility to

[10] *Id.* at 270-75. The Court also held that the state constitution did not justify suppressing the religious student group's free speech and association rights. *Id.* at 275-76.
[11] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (holding that the Equal Access Act protects students' right to meet for religious speech in public secondary schools).
[12] 454 U.S. at 272 n.11. *See also, id.* at 270 n. 6 (allowing religious "speech," but not religious "worship," would require line-drawing that is beyond "the judicial competence to administer" because it "would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths. Such faiths would tend inevitably to entangle the State with religion in a manner forbidden by our cases.")
[13] 515 U.S. 819 (1995).
[14] The Court has repeatedly applied this principle over the past four decades in granting religious groups access to the public square. *See, e.g., Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (religious community group's access to elementary school); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (religious community group's access to high school auditorium in evenings); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (religious student group's access to high school recognition); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (religious community group's access to park); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (religious persons' access to park).

religion, which could undermine the very neutrality the Establishment Clause requires"[15] because "the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophical assumptions respecting religious theory and belief."

The proposed regulations codify the Supreme Court's decision in *Rosenberger* by protecting religious student groups' speech and access to "any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution."

B. In the mid-1990s, university administrators at some major universities began to justify exclusion of religious student groups by citing their own university policies.

After the Supreme Court removed the Establishment Clause as a credible justification for excluding religious groups, some college administrators began to use college policies, including nondiscrimination policies, as their justification for excluding religious groups.[16] Beginning in the mid-1990s, religious student groups, including CLS student chapters, began to encounter this *misuse* of college policies to exclude religious student groups from campus simply because they required their leaders to agree with their religious beliefs.[17] Religious student groups are told they must remove from their governing documents any requirement that their leaders agree with the groups' basic religious beliefs if they want to remain on campus as a recognized student group.

Religious student groups that have been recognized on a campus for decades with governing documents that require their leaders to agree with the groups' religious beliefs are abruptly told that they may no longer have such requirements. Basic religious freedom, however, requires that religious groups be free to choose leaders who agree with their religious beliefs and teachings. Indeed, it should be common ground-- particularly for those who advocate a strict separation of church and state -- that government officials, including public university administrators, should not interfere with religious groups' choice of their student leaders.

By definition, leaders matter to any association of people formed for a common purpose -- from campus organizations to congressional committees. The leadership of any organization determines whether it is able to carry out its mission. This is particularly true for religious groups whose leaders conduct their Bible studies, lead their prayers, and facilitate their worship observances. For a student group to expect the student who teaches its Bible studies to believe that the Bible reflects truth is eminently reasonable. To expect the student leading prayer to believe in the God to whom she is praying is completely logical. Yet too many university administrators

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[15] 515 U.S. at 845–46.

[16] *See* Michael Paulson, "Colleges and Evangelicals Collide on Bias Policy," *The New York Times*, June 9, 2014, p. A1, *available at* http://www.nytimes.com/2014/06/10/us/colleges-and-evangelicals-collide-on-bias-policy.html?_r=0 (last visited May 29, 2015) ("For 40 years, evangelicals at Bowdoin College have gathered periodically to study the Bible together, to pray and to worship. . . . After this summer, the Bowdoin Christian Fellowship will no longer be recognized by the college. . . . In a collision between religious freedom and antidiscrimination policies, the student group, and its advisers, have refused to agree to the college's demand that any student, regardless of his or her religious beliefs, should be able to run for election as a leader of any group, including the Christian association."). This article is Attachment A.

[17] *See, e.g.*, 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).

woodenly characterize these common sense expectations and basic religious freedom principles as "religious discrimination."

When university administrators conflate religious organizations' self-governance with religious discrimination, they misuse university policies to punish the very religious students that their policies are supposed to protect. The problem is not with the policies but with their misuse. In the name of "tolerance," college administrators institutionalize religious intolerance. In the name of "inclusion," college administrators exclude religious student groups from campus.

III. While Many Leading Universities Respect Religious Students' Right to Organize and Choose Their Leaders Without Government Interference, Other Universities have Threatened to Exclude Religious Groups Despite the Fact that They have Met on Campus with Religious Leadership Requirements for Many Decades.

Many leading universities have demonstrated that nondiscrimination policies and students' religious freedom are completely compatible. These universities have embedded robust protection for religious freedom within their nondiscrimination policies, promoting a campus environment in which both religious freedom and nondiscrimination policies harmoniously thrive.[18]

But other universities have abruptly changed their policies and threatened religious student groups with exclusion after decades of being officially recognized student groups on campus. The religious student groups' leadership requirements have not changed, but the universities' policies have changed. For example, Cru had been a recognized student group with a religious leadership requirement on most Cal State campuses since the 1950s. Then in 2014, Cal State changed its policy with the aim of derecognizing all religious student groups that required their leaders to agree with their religious beliefs. InterVarsity Christian Fellowship had been a recognized student group with religious leadership requirements at Wayne State University since the 1940s. Then in 2017, Wayne State officials said it must lose its recognition because of its religious leadership requirements. CLS had been a recognized student group with leadership standards at the University of Iowa since the 1980s. Then in 2018, along with 31 other religious groups, it was told that it faced derecognition because it required its leaders to agree with its religious beliefs.

A. Religious student groups of many faiths have been threatened with exclusion.

[18] Many universities have policies that protect religious groups' religious leadership criteria. The University of Florida has a model nondiscrimination policy that strikes the appropriate balance between nondiscrimination policies and religious liberty, which reads: "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." The University of Texas provides: "[A]n organization created primarily for religious purposes may restrict the right to vote or hold office to persons who subscribe to the organization's statement of faith." The University of Houston likewise provides: "Religious student organizations may limit officers to those members who subscribe to the religious tenets of the organization where the organization's activities center on a set of core beliefs." The University of Minnesota provides: "Religious student groups may require their voting members and officers to adhere to the organization's statement of faith and its rules of conduct." The model policies are in Attachment B.

Religious groups of many faiths are currently threatened with derecognition at the University of Iowa. In 2019, the university filed a court document in federal district court in a lawsuit brought by a religious student group that the university had derecognized. The document listed hundreds of student groups that were officially recognized by the University of Iowa. In blue highlighting, the university indicated all the student groups that would be derecognized should the court rule in its favor. The list is remarkable: 32 religious groups would be excluded; no nonreligious groups would be excluded; and the 32 religious groups included Jewish, Muslim, Catholic, Evangelical Christian, Orthodox Christian, Sikh, and other faith groups.[19] Their transgression was that they required their leaders to share the religious beliefs of the group they led. While only religious groups were excluded, some religious groups that claimed not to have religious leadership requirements were to be allowed to remain. This, of course, violates the basic command of the Religion Clauses that the government not discriminate among religious groups.[20]

Muslim, Jewish, Catholic, and Protestant student groups signed a protest letter to Indiana University administrators when they announced the proposed adoption of a new policy that would, among other things, prohibit religious leadership standards for religious student groups. The letter asked the university to "clarify [its] proposed non-discrimination policy so that it expressly protects the right of religious student groups to select their leaders using religious criteria, including belief."[21]

Confirmation that religious groups are being targeted for exclusion comes from the fact that a deeply troubling double standard pervades the universities' efforts to exclude religious student groups. The universities are adamant that religious groups not engage in "religious discrimination" in selecting their leaders, but then permit fraternities and sororities to engage in sex discrimination in their selection of both leaders and members. The University of Iowa and Indiana University both expressly exempted fraternities and sororities from their nondiscrimination policies, permitting them to engage in sex discrimination in selecting their members and leaders.[22]

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[19] The document is Attachment C. The 32 religious groups that the University intended to exclude were: Agape Chinese Student Fellowship; Athletes in Action; Bridges International; Business Leaders in Christ; Campus Bible Fellowship; Campus Christian Fellowship; Chabad Jewish Student Association; Chi Alpha Christian Fellowship; Chinese Student Christian Fellowship; Christian Legal Society; Christian Medical Association; Christian Pharmacy Fellowship; Cru; Geneva Campus Ministry; Hillel; Imam Mahdi Organization; International Neighbors at Iowa; InterVarsity Graduate Christian Fellowship; J. Reuben Clark Law Society; Latter-day Saint Student Association; Lutheran Campus Ministry; Multiethnic Undergrad Hawkeye InterVarsity; Muslim Students Association; Newman Catholic Student Center; Orthodox Christian Fellowship; Ratio Christi; The Salt Company; Sikh Awareness Club; St. Paul's University Center; Tau Omega Catholic Service Fraternity; Twenty Four Seven; Young Life.
[20] *Larson v. Valente*, 456 U.S. 228 (1982).
[21] The letter is Attachment D. The letter was signed by: Adventist Christian Fellowship; Baptists Collegiate Ministry; Bridges International; Campus Outreach; Chabad House; Chi Alpha; Christian Legal Society; Christian Life Fellowship; Christian Student Fellowship; Clearnote; Connexion; Cru; Hoosier Catholic Students; InterVarsity Christian Fellowship; Lutheran Church- Missouri Synod; Muslim Student Association; The Navigators; Redeemer at IU; Reformed University Fellowship.
[22] "Frequently Asked Questions about SGSOs and Indiana University's Non-Discrimination Policy, http://policies.iu.edu/docs/academic-policy-docs/student-orgs-faqs.pdf. The FAQ is Attachment E.

To justify this unequal treatment of religious groups compared to fraternities and sororities, universities frequently invoke Title IX's exemption for fraternities and sororities. But that response is a red herring because Title IX gives fraternities and sororities an exemption *only* from Title IX's own prohibition on 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 or "all-comers" policies, it must also exempt religious groups.[23] Proposed Regulations § 75.500(d) and § 76.500(d) would end this unequal treatment of religious students.

B. Students' written statements in a congressional subcommittee's hearing record document several public colleges' threats to exclude religious student groups because of their religious beliefs and leadership standards.

In 2015, many former college students submitted written statements to the United States House of Representatives Committee on the Judiciary's Subcommittee on the Constitution and Civil Justice. In these first-hand accounts, the former students document the stigma they felt and the harm to their organizations that occurred when their religious organizations were excluded, or threatened with exclusion, from campus.[24] Unfortunately, their experiences exemplify the experiences of too many other religious students on college campuses.

1. California State University: Should the Nation's Largest University System Teach Students to Censor Other Students?

With over 430,000 students on 23 campuses, Cal State is the largest 4-year university system in the country. In 2015, Cal State administrators implemented a new policy under which it withdrew recognition for religious student groups that had religious leadership requirements. Religious groups that had had religious leadership requirements for over 60 years were abruptly derecognized.

a. Religious groups must pay prohibitive rental fees for previously free space: Religious student groups no longer had the same access to free meeting space and channels of communication that other student groups enjoyed. Without recognition, it became difficult, if not nearly impossible, for a student group to maintain its existence on campus. For example, the University told a small group whose members were predominantly African-

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[23] *See Christian Legal Society v. Martinez,* 561 U.S. 661 (2010) (all-comers policy may not be applied to religious groups if it is not applied to all secular groups without exception); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545-46 (1993) (government policy violates free exercise clause if it applies to religious conduct but exempts analogous secular conduct).

[24] These letters were submitted in conjunction with CLS's testimony before the Subcommittee. *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary House of Representatives*, 114th Cong. 39-58 (June 2, 2015) (testimony of Kimberlee Wood Colby, Director, Center for Law & Religious Freedom, Christian Legal Society). The letters are found in the supplemental hearing record at http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-20150602-SD003.pdf (hereinafter "Supp. Hrg. Rec.").

American that it would no longer be allowed to reserve free meeting space.[25] Instead the University would charge it the hourly rental rate that non-University groups were charged to rent University facilities. Basically, the group would have to pay $200 per week to use a previously free classroom for its weekly meetings. This was prohibitively expensive for the modest-sized group of students. For a much larger group, which held weekly meetings in an auditorium, the rental rate jumped from free to over $1000 each week.

In her letter, Ms. Cinnamon McCellen, who was student president of Rejoyce in Jesus Campus Fellowship ("RJCF") at the California State University Northridge campus from 2013-2015, explained that when the university derecognized her group, it "reluctantly" left the campus because it "could not pay the weekly rental fee of $200 that CSU said we would have to pay to keep meeting in the room that we had held our weekly meetings in for free." On behalf of the religious group, she concluded, "We feel that CSU is engaging in religious discrimination by excluding religious student groups from campus solely because they exercise their basic religious liberty to choose their leaders according to their religious beliefs." She objected, "To call this discrimination is ridiculous."[26]

b. A double standard exempts fraternities and sororities while excluding religious student groups: Yet another example of the double standard described earlier, Cal State permitted fraternities and sororities to discriminate on the basis of sex in their selection of both their members and leaders but refused to permit religious groups to select their leaders on the basis of religion. Ms. Bianca Travis, student president of the Chi Alpha group at the California State University Stanislaus campus from 2014-2015, noted, "[F]or the first time in almost 40 years, our student group was kicked off campus by the university's administrators, all because of our religious identity." She told the congressional subcommittee, "That continued discrimination makes the opportunity you are providing [i.e., receiving their letters] all the more important to us: it helps ensure we won't be forgotten."[27]

c. Encouraging students to censor other students' religious beliefs teaches American and international students the wrong lesson: Most troubling, the university actually trained students to censor other students. To process the constitutions of the thousands of student organizations on the 23 Cal State campuses, the university enlisted students to read the constitutions of student organizations and "edit" them to conform to the university's new policy. The "edited" constitutions were then returned to the student organizations with a warning that they would not be recognized unless they made the changes.

What does this mean for a free society when our public universities are training students in censorship? What lesson do the students learn other than that censorship of other students' speech is their prerogative--or at least the prerogative of the State? All Americans will reap a society that is intolerant of minority religious beliefs and practices if this lesson continues to be taught on public college campuses.

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[25] Ltr. from Patrick H. Bailey, Dir. Off. Student Involvement and Development, to Cinnamon McCellan (Jan. 20, 2015) is Attachment F.

[26] Ltr. from Ms. Cinnamon McCellen to Chairman Trent Franks (June 10, 2015) (Supp. Hrg. Rec. at 48-49) is Attachment G.

[27] Ltr. from Ms. Bianca Travis to Chairman Trent Franks (June 9, 2015) (Supp. Hrg. Rec. at 50) is Attachment H.

And what of international students who come to observe American self-government and take home instead lessons in censorship? American colleges should exemplify the values of free speech and religious freedom with the hope that international students will return home inspired to improve protections for these most basic human rights. American universities should not teach international students that free speech and religious freedom are mere ideals to which only lip service is due.

Eventually Cal State retreated from its position by claiming, in an ambiguously worded letter, that religious groups would be allowed, in certain circumstances, to question leadership candidates regarding their religious beliefs. But the official policy continues to prohibit religious leadership requirements, and the religious groups remain on campus solely at the discretion of university administrators. Furthermore, in the past two years, some religious groups have again had problems obtaining recognition on individual campuses within the Cal State system.

2. Texas A&M University: How much should religious students be required to pay to choose their leaders?

Dr. Ra'sheedah Richardson credits participation in the religious student group, ReJoyce in Jesus Campus Fellowship ("RJCF") with "encourag[ing] me to pursue academic excellence and to develop character traits like integrity, wisdom, composure and faithfulness that have been essential for a successful professional career." She participated in RJCF during her undergraduate and graduate years at Texas A&M ("TAMU"). In 2011, university administrators pressured RJCF to remove its religious requirements for its leaders and voting members if it wished to remain a recognized student organization. Dr. Richardson explained:

> Without student group recognition, we would not have been able to continue to meet freely on campus to encourage each other in our growth both spiritually and academically. According to TAMU policy, non-recognized student groups are required to pay $100 per instance for each room reservation. It would have cost our group up to $7,000 per academic year to continue to operate on campus. This is far too great a hardship for a small student group like RJCF to maintain.[28]

Only after legal counsel intervened on RJCF's behalf did the university allow it to retain recognition while maintaining its religious requirements.

3. The Ohio State University: Should religious students' free exercise of religion and free speech be put to a vote by other students?

2003-2004: In 2003-2004, a law student demanded that the OSU Moritz College of Law derecognize the CLS student chapter because it had religious requirements for its leaders and voting members. Mr. Michael Berry, who was student president of the CLS chapter, described the harm to CLS that derecognition would have caused:

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[28] Ltr. from Dr. Ra'sheedah Richardson to Chairman Trent Franks (June 10, 2015) (Supp. Hrg. Rec. at 58-59) is Attachment I.

> The consequences of such action would have been devastating. Without the ability to meet on campus, to receive financial assistance, or to even exist as a recognized organization, I am certain CLS would have ceased to continue its ministry at The Ohio State University. Those of us for whom CLS provided a meaningful and important vehicle through which we could use our legal education for the greater good would be relegated to second-class citizens simply because of our sincerely held beliefs.[29]

Mr. Berry then recounted the personal consequences that he experienced as a result of belonging to a religious organization that required its leaders to be religious. He found himself the subject of a hostile education environment in which he was "often the subject of name-calling, gossip, and rumor-mongering," was "verbally admonished" by classmates for his religious beliefs, and was "warned by upperclassmen not to take courses by certain professors who were not likely to give [him] fair evaluations."

Only after CLS sought protection in court did the University revise its policy to state explicitly that religious student organizations could have religious leadership and membership requirements. As a result, CLS met without incident from 2004 to 2010.

2010-2012: But in 2010, the university asked the student government whether the university should discard its policy and no longer allow religious student groups to have religious leadership and membership requirements. Sadly, the student government urged the university to drop its protection for religious student groups, declaring "that every student, regardless of religious belief, should have the opportunity . . . to apply or run for a leadership position within those organizations."[30]

In 2011, the Ohio Legislature stepped in to protect the religious student groups. It enacted legislation prohibiting public institutions of higher education from denying recognition to religious student organizations because of their religious leadership and membership requirements.[31]

4. Vanderbilt University: Should a university, albeit private, punish a religious student group for expecting the students who lead its Bible studies, prayer, and worship to "hold certain beliefs"?

Proposed Regulations § 75.500(d) and § 76.500(d) apply to public institutions of higher education, not private, and therefore would not apply to Vanderbilt University. However, Vanderbilt's exclusion of fourteen religious groups because of their religious leadership requirements is an apt illustration of the mindset that religious students face on many public university campuses.

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[29] Ltr. from Mr. Michael Berry to Chairman Trent Franks (June 5, 2015) (Supp. Hrg. Rec. at 62-64) is Attachment J.
[30] The student government resolutions are Attachment K.
[31] Ohio Rev. Code § 3345.023.

In August 2011, Vanderbilt told the CLS student chapter that it was "religious discrimination" to state in its constitution that it expected its leaders to lead its Bible study, prayer, and worship. According to Vanderbilt, this was forbidden because it indicated that CLS expected its leaders to "hold certain beliefs." Nor could CLS require that its leaders agree with its basic religious beliefs.[32]

Even more jaw-dropping, Vanderbilt told a small student group, which met for worship one night a week, that it must delete five words from its constitution's leadership requirements in order to remain on campus. The five words were: "personal commitment to Jesus Christ."[33] The group had worked in good faith with Vanderbilt administrators to revise its constitution so that it could remain on campus, taking whatever changes the administrators required. But this last-minute demand to delete "personal commitment to Jesus Christ" was too much. The religious students left campus rather than recant their faith, which is what they felt Vanderbilt was demanding.

a. Vanderbilt applied a double standard favoring fraternities and sororities and disfavoring religious student groups: Justin Gunter, student president of the CLS chapter at Vanderbilt in the 2011-2012 academic year, described the university's treatment of the fourteen religious groups:

> In spring 2012, our chapter, along with thirteen other religious groups, were removed from Vanderbilt. Through this process, Vanderbilt once again redefined its policy as an "all-comers" policy – a policy purporting to require that any student group must allow anyone to be a leader regardless of whether they support (or are even hostile to) the group's basic beliefs. Despite this sweeping policy, Vanderbilt only removed Christian student groups. In fact, Vanderbilt specifically exempted groups that discriminate on the basis of sex from its policy.

As Mr. Gunter observed, Vanderbilt's policy "contradict[s] the American ideal of a pluralistic society – where individuals and associations may express their opinions and beliefs freely without being censored by a university administrator or government executive."[34]

b. "The Wrong Kind of Christian": Tish Harrison Warren, a staff member with InterVarsity Christian Fellowship at Vanderbilt in 2011-2012 and a self-described "progressive evangelical," wrote a powerful essay to convey her disconcerting realization that "the student organization I worked for at Vanderbilt University got kicked off campus for being the wrong kind of Christians." She explained:

> In effect, the [university's] new policy privileged certain belief groups and forbade all others. Religious organizations were welcome as long as they were malleable: as long as their leaders didn't need to profess anything in particular; as long as they could be governed by sheer democracy and

[32] The Vanderbilt emails are Attachment L.
[33] The email is Attachment L.
[34] Ltr. from Mr. Justin Gunter to Chairman Trent Franks (Supp. Hrg. Rec. at 60-61) is Attachment M.

> adjust to popular mores or trends; as long as they didn't prioritize theological stability. Creedal statements were allowed, but as an accessory, a historic document, or a suggested guideline. They could not have binding authority to shape or govern the teaching and practices of a campus religious community.[35]

In an attempt to find a compromise, Ms. Warren met several times with university administrators but to no avail, as she records:

> The word *discrimination* began to be used—a lot—specifically in regard to creedal requirements. It was lobbed like a grenade to end all argument. Administrators compared Christian students to 1960s segregationists. I once mustered courage to ask them if they truly thought it was fair to equate racial prejudice with asking Bible study leaders to affirm the Resurrection. The vice chancellor replied, "Creedal discrimination is still discrimination."
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> ****
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> It didn't matter to them if we were politically or racially diverse, if we cared about the environment or built Habitat homes. It didn't matter if our students were top in their fields and some of the kindest, most thoughtful, most compassionate leaders on campus. There was a line in the sand, and we fell on the wrong side of it.[36]

5. Temple University School of Medicine: Should a public university punish medical students for requiring their religious group's leaders to agree "to live according to biblical morality"?

Ryan Finigan, a Second Lieutenant in the United States Air Force, was a third-year medical student and a leader in the Christian Medical and Dental Association ("CMDA") chapter. The CMDA student chapter required its leaders to agree to live according to biblical morality. University administrators informed the group that it "would very likely have its official status revoked because" CMDA was "discriminating in [its] selection of leader by having [its] leader contract to lead a life according to biblical morality." Mr. Finigan explained that religious student groups should be protected "not only because we should be allowed to practice our faith on our school campus, but also because the CMDA has played a critical role in the training of American physicians."[37]

6. Boise State University: Should a student government be permitted to punish a Christian student group because it requires its leaders to "exhibit a lifestyle that is worthy of a Christian"?

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[35] Tish Harrison Warren, The Wrong Kind of Christian, Christianity Today 54, Vol. 58, No. 7 (Sept. 2014), http://www.christianitytoday.com/ct/2014/september/wrong-kind-of-christian-vanderbilt-university.html?start=2 and in Attachment N.

[36] *Id.*

[37] Ltr. from Mr. Ryan Finigan to Chairman Trent Franks (Supp. Hrg. Rec. 65) is Attachment O.

2008-2009: In 2008, the Boise State University ("BSU") student government derecognized several religious groups because they had religious leadership requirements. For example, the student government informed one religious group that its requirement that its leaders "be in good moral standing, exhibiting a lifestyle that is worthy of a Christian as outlined in the Bible" violated student government policy. The group's constitution cited Matthew 18:15-17 (where Jesus instructs His disciples on internal dispute resolution), which the student government said also violated its policy.[38]

The student president of Cornerstone Ministry at BSU at the time, Mr. Justin Ranger, explained:

> Cornerstone Ministry could not withhold the statement of belief from our constitution since it is what determines our identity and the purpose of the club. Although, we were assured that it was unlikely that anyone who did not agree with our beliefs or the purposes of the club would attempt to run for an office in our club, it was a matter of honesty, integrity, and transparency to be upfront with the criteria by which officers would be considered. Since BSU would not accept our criteria for officers before the settlement agreement, we were forced to be de-recognized.[39]

Mr. Jesse Barnum attempted to secure recognition for another religious student group, the Veritas Forum, which would invite speakers to "explore life's hardest questions . . . like what is morality, and why is there suffering and pain in our lives and in the world" from a Christian perspective at events open to the entire campus. Despite the fact that the Veritas Forum's first event drew 240 students and faculty, the university denied it recognition because it required its leaders to agree with its religious beliefs. He wrote:

> Religious student organizations have a vital role in university life. Not only do they support those students who are part of a particular religion, they increase the cross-section of ideas present on campus. Without the presence and articulate expression of these ideas on campus, the quality and success of a university education diminishes.[40]

2012-2013: In order to settle a court challenge brought in 2009 by several religious student groups, the university agreed to allow religious organizations to maintain religious criteria for leaders. But in 2012, the university informed the religious organizations that it intended to adopt a new policy, which would have the effect of excluding religious organizations with religious leadership requirements from campus. In response, the Idaho Legislature enacted legislation to protect religious student groups at public universities.[41]

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[38] The emails are Attachment P.
[39] Ltr. from Mr. Justin Ranger to Chairman Trent Franks (June 11, 2015) (Supp. Hrg. Rec. 70-71) is Attachment Q.
[40] Ltr. from Mr. Jesse Barnum to Chairman Trent Franks (June 11, 2015) (Supp. Hrg. Rec. 72-73) is Attachment R.
[41] Idaho Code § 33-107D.

7. University of South Carolina School of Law: Should public universities deny religious student groups access to student activity fee funding otherwise available to nonreligious groups?

In 2008, the CLS student chapter was denied access to student activity fee funding that was available to other student groups solely because it was religious. As the CLS student president at the time, Mr. Robert S. "Trey" Ingram III, explained to the Subcommittee, after the group challenged the policy in court, the university adopted a new policy that allowed all student groups to be funded on the same terms.[42] Of course, this is the result required by the Supreme Court's decision in *Rosenberger*.[43] The fact that 13 years after the *Rosenberger* decision, a public university was still denying benefits to a student group because it was religious supports the wisdom of codifying *Rosenberger* as Proposed Regulations § 75.500(d) and § 76.500(d) would do.

C. Additional problems continue to surface on campuses nationwide.

The problem has occurred at additional universities. The list below provides examples but is not comprehensive. Additionally, accompanying these comments is a longer list of approximately 70 situations, including many not described here.[44]

1. Indiana University: In August 2015, Indiana University announced that it intended to change its policy to one that would not allow student groups to require their leaders to agree with the groups' beliefs. As at other campuses, this proposed change would deny recognition to religious groups, many of which had for several decades met at IU with religious leadership requirements.

a. While fraternities and sororities are exempted, religious groups are not: In an FAQ explaining its new policy, the university forthrightly admitted that "a chapter of a religious student alliance would not be permitted to forbid someone of a different religion, or someone non-religious, from running for a leadership position within the SGSO." ("SGSO," the acronym for "self-governed student organization," is the university's term for recognized student organizations.) The FAQ asked, "May SGSOs require students seeking to serve in leadership positions to be members of a particular religion?" The FAQ answered, "No." But, predictably, the FAQ stated that fraternities and sororities would be allowed to continue to discriminate on the basis of sex in their selection of members and leaders.[45]

b. Christian, Jewish, and Muslim groups protest the policy change: Nineteen religious student groups, including Catholic, Muslim, Jewish, and Christian student groups, sent a letter to the administration expressing their concerns about the proposed new policy and its impact on religious groups' ability to choose their leaders according to their religious beliefs.[46]

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[42] Ltr. from Mr. Robert S. "Trey" Ingram III to Chairman Trent Franks (June 11, 2015) (Supp. Hrg. Rec. 74-75) is Attachment S.
[43] 515 U.S. 819 (1995).
[44] See "Overview of the Problem Facing Religious Student Groups," in Attachment T.
[45] "Frequently Asked Questions about SGSOs and Indiana University's Non-Discrimination Policy, http://policies.iu.edu/docs/academic-policy-docs/student-orgs-faqs.pdf is Attachment E.
[46] The letter from the 19 religious groups is Attachment D.

The student president of the CLS chapter at IU-Bloomington wrote about the unfairness of the burden that fell on religious, but not other, student groups: "The IU policy was what is sometimes referred to as a 'laundry list policy,' which prohibits discrimination only based on certain factors. In other words, the vegan group could turn away those who enjoyed hunting animals and the Republican students could turn away those who supported Democratic candidates, but the Christian group could not restrict its leadership to only those who shared their faith."[47]

She also described the toll that standing up to the university took on students: "Around the middle of the school year, I started to feel the toll of the amount of time I was devoting to this project in addition to my regular class load, law journal, moot court, and on-campus interviews for summer clerkships. It seemed that no matter how hard we worked, the university remained firm in its determination to enact the policy."

After almost the entire academic year had passed with persistent communication from students, alumni, donors, and political leaders, the university announced that it would not revise its policy. As a result, religious student groups have continued to be recognized despite having religious leadership requirements; however, nothing prevents the university from again announcing a policy change at any time.

2. University of Iowa: CLS has had a chapter at the University of Iowa College of Law since approximately the 1980s. The CLS constitution has consistently required that its leaders agree with its religious beliefs. On at least four occasions since 1999, often under pressure from the student government, the University has threatened to deny recognition if CLS did not remove its leadership requirement from its constitution. In 2004, however, the University sent CLS a letter confirming that its religious leadership standards did not violate University policies.[48]

But in 2018, the university derecognized two religious groups because they required their leaders to agree with their religious beliefs. The groups turned to federal court. During the litigation, the University produced a court document in which it highlighted over 30 religious student groups, including the CLS chapter, that it intended to derecognize because of their religious leadership standards.[49] The University listed groups from the Jewish, Muslim, Sikh, Christian, and other faiths.

In 2019, the federal district court ruled that the university had unconstitutionally excluded one of the religious groups based on its religious viewpoint in violation of the Free Speech Clause.[50] The Department of Justice filed a statement of interest in support of the religious

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[47] Julia C. Payne, "Answering God's Call for Christian Leadership," *The Christian Lawyer*, Fall 2018, at 25-26, https://christianlegalsociety.org/sites/default/files/2018-10/TCL%20Fall%202018_Updated_Web2.pdf, is Attachment U.

[48] CLS's *amicus* brief describing the problems it has had at the University of Iowa over the past 20 years is Addendum A.

[49] The University of Iowa document is Attachment C.

[50] *Business Leaders in Christ v. University of Iowa*, 360 F. Supp.3d 885 (S.D. Iowa 2019), appeal docketed, No. 19-1696 (8th Cir. Apr. 3, 2019).

student group, quoting *Trinity Lutheran Church v. Comer*, when it explained that "[t]he government also may not require a religious group 'to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified.'"[51]

Six months later, the court ruled in favor of the second religious student group on basically the same grounds.[52] But this time, the district court ruled that three of the college administrators had lost their claims to qualified immunity and could be held personally liable for derecognizing the religious student group. The district court explained that "'[t]he doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."'"[53] Both cases are on appeal.

This recent development of college administrators being found personally liable for derecognizing a religious student group demonstrates that Proposed Regulations § 75.500(d) and § 76.500(d) have the beneficial effect of protecting college administrators as well as religious student groups. College administrators need clarity on this issue in order to avoid costly litigation resulting in personal liability.

In 2019, the Iowa Legislature enacted Iowa Code § 261H.3(3), to protect religious student groups on public university campuses and to protect taxpayer funds from being wasted on the litigation that occurs when college administrators move to exclude religious student groups from campus.

Wayne State University: InterVarsity Christian Fellowship serves over 1000 student-led chapters on approximately 700 campuses. Fifty-four percent of all InterVarsity students are non-white or international students. InterVarsity welcomes all students to participate in its activities and to join its groups as members. InterVarsity has served students at Wayne State University in Detroit, Michigan, since the early 1940s. Wayne State recognizes more than 400 student groups.

In October 2017, Wayne State derecognized the InterVarsity chapter and cancelled its room reservations because it deemed InterVarsity's leadership requirements to be "discriminatory" because InterVarsity requires its leaders to affirm a statement of core religious beliefs.[54] After a lengthy attempt to get the university to reconsider its decision, InterVarsity sought court protection. On September 20, 2019, the federal district court denied the university's motion to dismiss.[55] The case is ongoing.

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[51] United States' Statement of Interest in Support of Plaintiff's Motion for Summary Judgment *filed in Business Leaders in Christ v. The University of Iowa*, Civ. 3:17-0080 (S.D. Iowa, Dec. 21, 2018) at 21, quoting *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017) is Addendum B.

[52] *InterVarsity Christian Fellowship v. University of Iowa*, 408 F. Supp.3d 960 (S.D. Iowa 2019), appeal docketed, No. 19-3389 (8th Cir. Nov. 5, 2019).

[53] *Id.* at 990, quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)

[54] Ingrid Jacques, *WSU Errs in Ousting Christian Group*, The Detroit News (Mar. 12, 2018), https://www.detroitnews.com/story/opinion/columnists/ingrid-jacques/2018/03/12/editorsnote-wsu-errs-ousting-christian-group/32875005/, is Attachment

[55] *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State University*, --- F. Supp.3d ---, 2019 WL 4573800 (E.D. Mich., Sept. 20, 2019)

Southeast Missouri State University: In the 2015-2016 academic year, the university denied a religious student group recognition because it required its leaders to agree with its religious beliefs. The group worked hard to persuade the administration and the student government to adopt a policy that would respect religious groups' ability to choose their leaders. But in April 2016, the student government voted *against* adopting such a policy. Several more religious groups then sent a letter to the university stating that they would not be able to remain on campus if they could not require their leaders to agree with their religious beliefs. In October 2016, the university and student government agreed that religious student groups could keep their religious requirements for leaders.

University of West Georgia: Sigma Alpha Omega (SAO) is a Christian women's student group with active chapters at 36 universities across the country. SAO chapters allow women students to come together in shared faith for the purpose of supporting and encouraging one another. In 2014, SAO sought recognition as an official student group at the University of West Georgia. However, it required legal assistance for it to gain recognition because university administrators insisted that SAO submit "original documentation for [Title IX] exemption directly from the U.S. Department of Education." The university continued to insist on such a document even after regional Department of Education representatives told the university that it never provides such documents.

In August 2019, university officials revoked SAO's recognition. After initially being approved for the 2019-2020 academic year, the students were told that their group would not be recognized because it consisted of Christian women. In discussions, an administrator indicated that she was "unsure why [SAO] would limit itself to just Christians" even though religious belief is the core around which SAO chapters form. Once again, legal assistance was required to regain recognition. These constant legal battles distract the chapter and its members from doing the spiritual and charitable work that is their purpose in gathering.

University of North Texas Dallas College of Law: The Christian Legal Society student chapter at the University of North Texas Dallas College of Law sought recognition in the fall of 2016. The Student Bar Association claimed that the CLS chapter's requirement that its leaders agree with its religious beliefs violated the SBA's policy. The CLS officers spent much of the 2016-2017 academic year in discussions with the Student Bar Association and the law school administration as to whether it would be recognized, eventually gaining recognition in the second semester.

IV. Fourteen States have Enacted Laws that Protect Religious Student Groups on Public College Campuses.

In the past eight years, fourteen states have acted to protect religious students on public college campuses. Those states are: Arizona (2011), Ohio (2011), Idaho (2013), Tennessee (2013), Oklahoma (2014), North Carolina (2014), Virginia (2016), Kansas (2016), Kentucky (2017), Louisiana (2018), Arkansas (2019), Iowa (2019), South Dakota (2019), and Alabama

(2020).[56] Five states have protected only religious students; six have protected religious and political, or belief-based, student groups; and three have protected all student groups.

These state laws demonstrate that there is a need nationwide for protection for religious student groups on public college campuses. They also validate the approach taken by Proposed Regulations § 75.500(d) and § 76.500(d): No subsequent problems have arisen in states that have adopted these protections.[57] By providing clarity to college administrators, these laws have decreased the likelihood of litigation while defending religious freedom and promoting religious diversity on their campuses. These laws preserve the positive benefits that religious student groups bring to their campuses and increase student well-being and satisfaction.

Often these laws have been enacted in response to a specific problem at a university in the state, while other states have acted proactively. To date, there have been no challenges to these laws.

Unfortunately, some states where problems have arisen are less hospitable to religious freedom and free speech, which is one reason a national solution is needed. Students should be able to cross state lines in pursuit of their education without losing the right to belong to religious groups whose beliefs, speech, policies, practices, and leadership and membership standards are protected from some campus administrators' antipathy. Proposed Regulations § 75.500(d) and § 76.500(d) would provide needed protection for all students' religious freedom and free speech nationwide.

V. Proposed Regulations §§ 75.500(d) and 76.500(d) Will Benefit College Administrators by Avoiding Costly Litigation and Exposure to the Risk of Personal Liability for Damages.

A. A federal district court recently ruled that three college administrators were personally liable for denying recognition to a religious student group because of its religious leadership standards.

The proposed regulations will help college administrators avoid litigation and personal liability. By clarifying that college administrators may not exclude religious student groups from campus, the proposed regulations should prevent costly litigation, with its wasteful expenditure of taxpayers' money. Unnecessary confusion has arisen on many college campuses as a result of some college administrators denying recognition to religious student groups if, as often happens, the administrators mistakenly believe the college has a policy that it does not have, or they fail to apply their policy evenhandedly.

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[56] Ala. Code 1975 § 1-68-3(a)(8) (all student groups); Ariz. Rev. Stat. § 15-1863 (religious and political student groups); Ark. Code Ann. § 6-60-1006 (all student groups); Idaho Code § 33-107D (religious student groups); Iowa Code § 261H.3(3) (all student groups); Kan. Stat. Ann. §§ 60-5311-5313 (religious student groups); Ky. Rev. Stat. Ann. § 164.348(2)(h) (religious and political student groups); La. Stat. Ann.-Rev. Stat. § 17.:3399.33 (belief-based student groups); N.C. Gen. Stat. Ann. § 116-40.12 (religious and political student groups); Ohio Rev. Code § 3345.023 (religious student groups); Okla. St. Ann. § 70-2119.1 (religious student groups); S.D. Ch. § 13-53-52 (ideological, political, and religious student groups); Tenn. Code Ann. § 49-7-156 (religious student groups); Va. Code Ann. § 23.1-400 (religious and political student groups).

[57] The Iowa litigation, however, is ongoing.

As a result of this confusion, college administrators can themselves become personally liable for the damages incurred by the religious student groups who are denied recognition. This happened in the most recent case against the University of Iowa. In early 2019, the federal district court found three university administrators had lost their qualified immunity, leaving them personally liable for the religious student group's damages.[58]

B. The proposed regulations clarify confusion.

This unnecessary confusion would be ended by Proposed Regulations § 75.500(d) and § 76.500(d). This confusion has existed since the mid-90s, but it was exacerbated in 2010 by the ruling in *Christian Legal Society v. Martinez.*[59] The fact that fourteen states have passed laws to clarify the protections religious student groups enjoy on public college campuses confirms that this confusion exists and explains why states began passing the laws in 2011 with Arizona and Ohio.

Completely consistent with the *Martinez* opinion, Proposed Regulations § 75.500(d) and § 76.500(d) clarify the confusion that many college administrators seem to have experienced in *Martinez*'s wake. Often misunderstood and mischaracterized, *Martinez* was an extremely limited and narrow ruling that addressed only a type of policy which essentially is nonexistent in the real world.

Professor Michael Paulsen, co-author of a leading law school textbook on Constitutional Law, has filed comments affirming that Proposed Regulations § 75.500(d) and § 76.500(d) are consistent with past Supreme Court rulings and merely clarify any confusion created in a way perfectly consistent with the Court's precedents. Specifically, Professor Paulsen writes:

> In my opinion, the proposed rule accomplishes a valuable clarification of religious and student group freedom of speech and freedom of expressive associational liberty under the First Amendment to the U.S. Constitution and, further, seeks faithfully to implement these constitutional principles in the context of certain federal grant programs. The proposed rule builds upon earlier landmark Supreme Court decisions protecting First Amendment liberties, including (among others) *Widmar v. Vincent,* 454 U.S. 263 (1981), *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819 (1995), and *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012 (2017). The proposed rule also specifically protects the rights of private religious groups to maintain their religious identities and associational freedom, including in the selection of their members and leaders. The Supreme Court has recently (and unanimously) held that such rights are protected by the First Amendment. *See Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,* 565 U.S. 171 (2012).

[58] *InterVarsity Christian Fellowship v. University of Iowa*, 408 F. Supp.3d 960 (S.D. Iowa 2019), appeal docketed, No. 19-3389 (8th Cir. Nov. 5, 2019).
[59] *Christian Legal Society v. Martinez,* 561 U.S. 661 (2010).

> The provisions of the proposed rule go a step further in protecting the substance of these liberties than the Court's decision in *Christian Legal Society v. Martinez,* 561 U.S. 661 (2010) held to be constitutionally *required*. But the rule in no way *contradicts* that decision; it simply provides protection, by a proper federal rule, for rights that *Christian Legal Society v. Martinez* did not deem required as a constitutional matter. The *Christian Legal Society* case was decided before the Supreme Court's important decision in *Hosanna-Tabor*. Because *Christian Legal Society* nonetheless continues to create confusion for college administrators, the proposed rule is helpful to accomplish the goal of fully protecting campus student religious groups from exclusion or discrimination attributable to such a group's doctrinal views, affiliations, self-understanding, or standards of conduct for its members or leaders. The language chosen is aptly suited for that purpose.[60]

As we have seen, many college administrators mistakenly believed that *Martinez* held that a public law school could use a *nondiscrimination* policy to deny recognition to a religious student group because it required its leaders to agree with its religious beliefs. Not so. Indeed, all nine justices in the 5-4 decision agreed that the majority opinion had not ruled on nondiscrimination policies.[61]

Instead the Court decided only that a law school had the *discretion*, but was not *required*, to apply an *all-comers policy* to *all* student groups on its campus. The Court further ruled that only if a public college applied the all-comers policy to all student groups could it apply the policy to the religious groups.[62] The Court was clear that an all-comers policy both 1) had to exist and 2) had to be applied evenly to *all* student groups. It could not be applied only to religious groups, which is what happens when a college claims to be applying an all-comers policy.

Proposed regulations § 75.500(d) and § 76.500(d) are completely consistent with the *Martinez* decision: Nothing in the decision prohibits the federal government from conditioning federal funds on a public college agreeing not to enforce any policy that results in the denial to religious groups of benefits that are otherwise available to nonreligious student groups. That is just basic fairness.[63]

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[60] The tracking number for Professor Paulsen's full comment letter is 1k4-9f38-hkv (uploaded Feb. 18, 2020).
[61] 561 U.S. at 678; *id.* at 698 (Stevens, J., concurring); *id.* at 704 (Kennedy, J., concurring); *id.* at 707 (Alito, J., dissenting).
[62] *Id.* at 694, 697-698; *id.* at 703-704 (Kennedy, J., concurring).
[63] Indeed, this result may also be required by the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* The Department of Justice has directed that "[a]gencies also must not discriminate against religious organizations in their contracting or grant-making activities." U.S. Dept. of Justice, *Federal Law Protections for Religious Liberty*, 82 Fed. Reg. 49668, 49671 (Oct. 26, 2017). It has also reminded the agencies that "RFRA apples to all actions by federal administrative agencies, including rulemaking, adjudication or other enforcement actions, and grant or contract distribution and administration." *Id.* at 49669. A strong argument can be made that agreement to comply with RFRA's terms, which apply the highest strict scrutiny whenever government places a substantial burden on persons' religious exercise, can be made a material condition of federal grants to state and local government actors.

Since *Martinez*, colleges' claims that they have an all-comers policy have been used to target religious student groups for exclusion from campus. As a realistic matter, we are unaware of any college that has a true all-comers policy that it applies evenhandedly to all student groups. This is because an all-comers policy means that a college would have to prohibit all fraternities and sororities, both social and professional, from requiring their leaders and/or members to be female. As we have seen repeatedly, colleges are unwilling to apply such policies, or any policies, evenhandedly to fraternities' and sororities' selection of leaders and members.

An all-comers policy would also mean that there could not be single-sex choral groups or club sports teams. An environmental group could not require its leaders to agree that climate change is real. An animal rights group could not require its leaders to denounce hunting or wearing fur. The Democrats could not require their leaders to agree with the Democratic Party's platform.

As a matter of fact, when a college claims to implement either an all-comers policy, or a nondiscrimination policy, or both, only religious groups have been threatened with exclusion. We have seen this most clearly in the remarkable document that the University of Iowa filed in federal district court last year.[64] The list showed that 32 groups would be derecognized – all religious groups, including Muslim, Jewish, Sikh, Catholic, and Protestant groups.

C. The proposed regulations respect and reinforce separation of church and state.

As discussed *supra* at 3-6, Proposed Regulations § 75.500(d) and § 76.500(d) codify two Supreme Court decisions, *Widmar* and *Rosenberger*. By protecting religious student organizations' right to be a recognized student group, to meet on public college campuses, and to be eligible for activity fee funding that is otherwise available to other student groups, the proposed regulations codify the free speech and expressive association holdings of those decisions.

But the proposed regulations also reinforce the holdings in *Widmar* and *Rosenberger* that the Establishment Clause is not violated when religious student groups are officially recognized, meet on campus, and receive student activity fee funding. The proposed regulations respect the Court's warnings in *Widmar* and *Rosenberger* that there is a greater risk of violating the Establishment Clause when college administrators interfere with religious groups than when they leave the groups alone to function according to their core religious beliefs.[65]

It should be common ground with even the most ardent proponents of strict separation of church and state that government officials, including college administrators, should not penalize a religious group because of its beliefs, practices, speech, or mission. Nor should government officials be interfering in religious groups' internal governance, particularly their choice of their leaders. "According the state the power to determine which individuals will minister to the

[64] The document is Attachment C.
[65] *Widmar*, 454 U.S. at 270 n.6, 272 n.11; *Rosenberger*, 515 U.S. at 845-46.

faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."[66]

Conclusion

With our nation's colleges at a crossroads, Proposed Regulations § 75.500(d) and § 76.500(d) can be a positive influence on our Nation's colleges choice of the road they will travel. American universities and colleges can increase campus diversity by respecting religious students' freedoms of speech and religious exercise. Or they can misuse policies to exclude religious student groups from campus. The road colleges choose is important not only to protect religious students and college administrators, to avoid costly litigation and wasteful expenditure of taxpayers' money, and to preserve a diversity of ideas on college campuses, but also to prevent religious intolerance from infecting our broader civil society.

The genius of the First Amendment is that it protects everyone's speech, no matter how unpopular, and everyone's religious beliefs, no matter how unfashionable. When that is no longer true — and we are dangerously close to the tipping point — when public colleges misuse their policies to suppress traditional religious speech and belief, then the pluralism so vital to sustaining our political and religious freedoms will soon cease to exist.

Respectfully submitted,

/s/ Kimberlee Wood Colby
Kimberlee Wood Colby
Director, Center for Law & Religious Freedom
Christian Legal Society

[66] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188–89 (2012).