



*Seeking Justice with
the Love of God*

February 15, 2024

The Honorable Charles Trump, Chair
Senate Judiciary Committee
Room 210W, Building 1
State Capitol Complex
Charleston, WV 25305

By email: charles.trump@wvsenate.gov

Re: SB 503 – Protecting belief-based student organizations from certain types of discrimination

Dear Chairman Trump:

I am reaching out to you about a bill, SB 503, currently in the judiciary committee. Christian Legal Society supports SB 503, which will provide much needed protection for the ability of belief-based student organizations, including religious students, to meet on college/university campuses. By passing SB 503, the Legislature will conserve taxpayer dollars by preventing costly litigation that has resulted in other states when public universities adopted policies to exclude belief-based student groups because the groups require their leaders to share their core beliefs. This problem has arisen on many college campuses nationwide and, in the 2015-2016 school year, at a public university in West Virginia.

Attached to this statement are actual letters from university officials or student government representatives to belief-based groups, particularly religious groups, threatening to exclude the groups from campus because of the groups' requirement that their leaders agree with the groups' beliefs, in these instances their religious beliefs. (Attachments B, C, D, E, G, I, and K). These letters exemplify the problem that SB 503 will prevent in West Virginia. As this letter will explain:

- SB 503 is a commonsense measure to protect belief-based student organizations that wish to meet on West Virginia college campuses.
- SB 503 allows West Virginia public universities to maintain whatever policies they choose so long as their policies permit belief-based student organizations to choose their leaders according to the groups' beliefs.
- SB 503 conserves scarce tax dollars by preventing costly litigation against colleges that adopt policies that exclude belief-based groups.
- SB 503 would add West Virginia to the expanding list of 16 states—Alabama, Arizona, Arkansas, Idaho, Iowa, Kansas, Kentucky, Louisiana, Montana, North

Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, and Virginia—that have enacted similar protections for religious or belief-based student groups.¹ (Attachment AA lists the key provisions of these states’ laws.)

I. For Four Decades, Christian Legal Society Has Defended Religious Student Organizations’ Access to College Campuses.

Christian Legal Society (“CLS”) is a national association of Christian attorneys, law students, and law professors. CLS has attorney chapters located in cities throughout the U.S. and student chapters at law schools nationwide, including at West Virginia University. CLS law student chapters typically are small groups of students who meet for weekly prayer, Bible study, and worship at a time and place convenient to the students. All students are welcome at CLS meetings. As Christian churches have done for nearly two millennia, CLS requires its leaders to agree with a statement of faith, signifying agreement with the traditional Christian beliefs that define CLS.

CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected regardless of the current popularity of their speech or religious beliefs. For that reason, CLS was instrumental in the passage of the federal Equal Access Act of 1984, 20 U.S.C. §§ 4071 *et seq.*, that protects the right of all students, including religious student groups and LGBT student groups, to meet for “religious, political, philosophical or other” speech on public secondary school campuses.²

Christian Legal Society’s religious liberty advocacy arm, the Center for Law & Religious Freedom, has worked for over forty years to secure equal access for religious student groups in the public education context, including higher education. Its staff has testified twice before the Subcommittee on the Constitution and Civil Justice of the Judiciary Committee of the United States House of Representatives on the issue of protecting religious student organizations on college campuses.³

¹ 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); Mont. Code Ann. § 20-25-518 (religious, political, or ideological); N.C. Gen. Stat. Ann. § 116-40.12 (religious and political student groups); N.D. § 15-10.4-02(h) (student organizations’ beliefs); 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).

² *See, e.g.*, 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement). *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 LGBT student group).

³ Hearing Before the Subcomm. on the Constitution and Civil Justice of the Comm. on the Judiciary, House of Representatives: *First Amendment Protections on Public College and University Campuses*, Rep. No. 114-31 (June 2, 2015) at 39-48 (statement of Kimberlee Wood Colby); Hearing Before the Subcomm. on the Constitution and Civil Justice of the Comm. on the Judiciary, House of Representatives: *State of Religious Liberty in the United States*, Rep. No. 113-75 (June 10, 2014) at 49-76 (statement of Kimberlee Wood Colby).

II. Religious Student Associations Need the Protection that SB 503 Will Provide.

SB 503 is a commonsense measure intended to protect religious student associations' meetings on college campuses by prohibiting public college administrators from denying them meeting space because a religious student association requires its leaders or members to:

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

Of course, it is common sense—and basic religious freedom—for a religious association to expect its leaders to agree with the association's religious beliefs, practices, standards of conduct, and mission. It should be common ground that *government officials*, including college administrators, should not interfere with religious associations' religious beliefs, practices, standards of conduct, or mission.

Unfortunately, this is a recurrent problem on many college campuses across the country, from California to Idaho, from Oklahoma to Ohio. SB 503 would prevent such problems from recurring in West Virginia by protecting belief-based student organizations. In so doing, West Virginia would join a growing list of states that have adopted similar protections for religious and other belief-based student associations.

A. In its landmark decision in *Widmar v. Vincent*, the U.S. Supreme Court held that the University of Missouri - Kansas City could not condition campus access on religious groups' promise not to engage in religious speech.

In the late 1970s, some university 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, social, or philosophical beliefs. The administrators claimed that merely providing heat and light in these unused classrooms gave impermissible financial support to the students' religious beliefs, even though free heat and light were provided to all student groups. The administrators also claimed that college students were "impressionable" and would believe that the university endorsed religious student groups' beliefs, despite the fact that hundreds of student groups with diverse and contradictory ideological beliefs were allowed to meet.⁴

In the landmark case of *Widmar v. Vincent*, the Supreme Court rejected these arguments by the University of Missouri - Kansas City (UMKC).⁵ In an 8-1 ruling, the Court held that UMKC violated the religious student associations' speech and association rights by "discriminat[ing] against student groups and speakers based on their desire to use a generally open forum to

⁴ For example, West Virginia University currently has over 450 recognized student organizations. See <https://studentengagement.wvu.edu/student-organizations> (last visited Feb. 14, 2024).

⁵ 454 U.S. 263 (1981).

engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment.”⁶ In other words, religious student groups have a First Amendment right to meet on public university campuses for religious speech and association.

The Court then held that the federal and state establishment clauses were not violated by allowing religious student associations access to public college campuses.⁷ The Court ruled that college students understand that simply *allowing* a student group to meet on campus does not mean that the University *endorses or promotes* the students’ religious speech, teaching, worship, or beliefs. As the Court observed in a subsequent equal access case that protected high school students’ religious meetings, “the proposition that schools do not endorse everything they fail to censor is not complicated.”⁸

The Supreme Court has reaffirmed *Widmar*’s reasoning in numerous cases.⁹ In each case, the Court ruled that an educational institution did not endorse a religious association’s beliefs simply because it provided the religious association with meeting space. Access does not equal endorsement.

B. Discrimination against religious student groups continues.

After the Supreme Court made clear that the Establishment Clause could not justify exclusion of religious student groups, some university administrators began to claim that university nondiscrimination policies were violated if the religious student groups required their leaders to agree with their religious beliefs. These administrators began to threaten religious student groups with exclusion from campus if they required their leaders to agree with the groups’ religious beliefs.¹⁰

It is common sense and basic religious freedom—not discrimination—for religious groups to expect their leaders to share the groups’ religious beliefs. Nondiscrimination policies serve valuable and important purposes. Ironically, one of the most important purposes of a college’s

⁶ *Id.* at 269.

⁷ *Id.* at 270-76.

⁸ *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (holding that the federal Equal Access Act protects high school students’ right to meet for religious speech in public secondary schools and extensively citing *Widmar*).

⁹ *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (University of Virginia violated the free speech and association rights of a religious student group when it denied a religious student publication the same funding available to sixteen other nonreligious student publications); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (applying *Widmar* analysis to public secondary schools); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (requiring school district to allow a religious community group access to a school auditorium in the evening); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (requiring school district to allow a religious community group access to elementary school after school). In 1984, Congress applied *Widmar*’s reasoning to public secondary schools when it enacted the Equal Access Act, 20 U.S.C. §§ 4071-74.

¹⁰ 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 because of its religious requirements); 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’s threat to derecognize CLS chapter).

nondiscrimination policy is to protect *religious* students on campus. Something has gone seriously wrong when college administrators use nondiscrimination policies to punish religious student groups *for being religious*. Exclusion of religious student groups actually undermines the purpose of a nondiscrimination policy and the good it serves.

Such misuse of nondiscrimination policies is unnecessary. Nondiscrimination policies and students' religious freedom are eminently compatible, as shown by the many universities with nondiscrimination policies that explicitly recognize the right of religious groups to require that their leaders share the groups' religious beliefs.¹¹

Unfortunately, some universities have chosen to misuse their nondiscrimination policies to exclude religious student associations from campus. Alternatively, some universities have excluded religious student associations by claiming to have what they call "all-comers" policies, which purport to prohibit all student associations from requiring their leaders to agree with the associations' political, philosophical, religious, or other beliefs. However, a true "all-comers" policy rarely, if ever, actually exists.

By way of example, in the 2015-2016 academic year, Indiana University announced that it intended to change its policy. Under the new policy, the university specifically stated that a religious student group "would not be permitted to forbid someone of a different religion, or someone non-religious, from running for a leadership position within the [religious group]."¹² Only after months of criticism from alumni and political leaders, as well as the threat of litigation, did Indiana University revert to its prior policy of allowing religious student groups to choose their leaders according to their religious beliefs.

Also in the 2015-2016 academic year, a religious student organization at Southeast West Virginia State University had its recognition revoked by the student government because it refused to insert a newly required nondiscrimination statement into its constitution. The group tried to persuade the student government to allow religious groups to have religious leadership requirements; however, the student government voted *against* adding language to its bylaws to protect religious groups' right to have religious leadership requirements.¹³ After this vote, additional religious groups communicated to the administration that they would not remove their religious leadership

¹¹ For example, the University of Florida has an excellent policy that embeds protection for religious student groups in its nondiscrimination policy: "A student organization whose primary purpose is religious will not be denied registration as a Registered Student Organization on the ground that it limits membership or leadership positions to students who share the religious beliefs of the organization. The University has determined that this accommodation of religious belief does not violate its nondiscrimination policy." Similarly, the University of Texas provides: "[A]n organization created primarily for religious purposes may restrict the right to vote or hold office to persons who subscribe to the organization's statement of faith." The University of Houston likewise provides: "Religious student organizations may limit officers to those members who subscribe to the religious tenets of the organization where the organization's activities center on a set of core beliefs." The University of Minnesota provides: "Religious student groups may require their voting members and officers to adhere to the organization's statement of faith and its rules of conduct." These policies are in Attachment A.

¹² Indiana University's statement is Attachment B.

¹³ The student government voted not to add the following language to its bylaws: "A student organization which has been formed to further or affirm the religious beliefs of its members may consider affirmation of those beliefs to be a part of the criteria for the selection of the organization's leadership."

requirements from their constitutions. After several months, the administration sent the religious organizations letters stating that the student government had voted to “abandon their non-discrimination statement and to replace it with the University’s non-discrimination statement.” University policies, however, still lack written protection for the right of religious groups to have religious leadership requirements.

In 2021, student governments at the University of Idaho and the University of Virginia similarly tried to penalize religious student groups because they required their leaders to agree with their religious beliefs. Because the Idaho and Virginia legislatures had the foresight to pass laws to protect religious student groups on public university campuses, the university administrators expeditiously reversed the student governments’ discriminatory actions against the religious student organizations in both instances. The universities not only avoided needless litigation, but also sent religious students (and their parents) the reassuring message that they were welcome on their campuses.

SB 503 would allow West Virginia’s public universities and colleges to have whatever policies they wish. SB 503 would only require that whatever policy a college chooses to have must respect belief-based student groups’ right to choose their leaders according to their core beliefs. SB 503 thereby would protect West Virginia public colleges/universities, and the taxpayers that fund them, from costly litigation. Equally importantly, SB 503 would protect religious students from discrimination on West Virginia campuses and secure their basic freedoms of speech and religion.

C. SB 503 would avoid the problems that other states have experienced and that some states have addressed through similar legislation.

1. California State University excluded religious student associations with religious leadership requirements from its 23 campuses, including religious groups that had met on its campuses for over forty years.

The California State University comprises 23 campuses with 437,000 students. In 2014, Cal State denied recognition to several religious student associations, including Chi Alpha, InterVarsity, and Cru. For example, the student president of a religious student association that had met on the Cal State Northridge campus for forty years received a letter that read:

This correspondence is to inform you that effective immediately, your student organization, Rejoyce in Jesus Campus Fellowship, will no longer be recognized by California State University, Northridge.¹⁴

The letter then listed seven basic benefits that the religious student association had lost because it required its student leaders to agree with its religious beliefs, including: (1) free access to a room on campus for its meetings; (2) the ability to recruit new student members through club fairs; and (3) access to a university-issued email account or website. As the letter explained, “[g]roups of students not recognized by the university . . . will be charged the off-campus rate and will not be

¹⁴ The letter is Attachment C.

eligible to receive two free meetings per week in [university] rooms.” As a result, some religious student groups faced paying thousands of dollars for room reservations and insurance coverage that were otherwise free to other student groups.

The problem arose because Cal State re-interpreted its nondiscrimination policy to prohibit religious student groups from having religious leadership requirements. But in announcing that religious student groups could not have religious leadership requirements, Cal State explicitly and unfairly allowed fraternities and sororities to continue to engage in sex discrimination in selecting their leaders and members.

2. The Tennessee General Assembly passed legislation similar to SB 503 after Vanderbilt University excluded fourteen Catholic and evangelical Christian organizations from campus, including a Christian group because it required its leaders to have a “personal commitment to Jesus Christ.”

In 2011, Vanderbilt University administrators informed the CLS student chapter at Vanderbilt Law School that the *mere expectation* that its leaders would lead its Bible studies, prayer, and worship was “religious discrimination.” CLS’s requirement that its leaders agree with its core religious beliefs was also deemed to be “religious discrimination.”¹⁵

Vanderbilt told another Christian student group that it could remain a recognized student organization only if it deleted five words from its constitution: that its leaders have a “personal commitment to Jesus Christ.” The students left campus rather than recant their commitment to Jesus Christ.¹⁶

Catholic and evangelical Christian students patiently explained to the Vanderbilt administration that nondiscrimination policies should protect, not exclude, religious organizations from campus. But in April 2012, Vanderbilt denied recognition to fourteen Christian organizations.¹⁷ While religious organizations could not keep their religious leadership requirements, Vanderbilt permitted fraternities and sororities to engage in sex discrimination in selecting leaders and members. After Vanderbilt adopted its new policy, the University of Tennessee reportedly claimed to have a similar policy. In response, the Tennessee General Assembly enacted T.C.A. § 49-7-156 to protect the right of a religious student association on a public college campus to “require[] that only persons professing the faith of the group and comporting themselves in conformity with it qualify to serve as members or leaders.”¹⁸

¹⁵ Vanderbilt’s email to CLS is Attachment D.

¹⁶ Vanderbilt’s email is Attachment E.

¹⁷ The excluded groups are as follows: 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.

¹⁸ T.C.A. § 49-7-156 is Attachment F.

3. The Kansas Legislature passed legislation similar to SB 503 in order protect religious student associations at Kansas public universities.

In 2016, the Kansas Legislature enacted K.S.A. §§ 60-5311 – 60-5313 in order to ensure that Kansas taxpayers’ money would not be spent on unnecessary litigation resulting from its public universities misinterpreting existing policies – or adopting future policies – to exclude religious groups from campus because they had religious leadership requirements. In 2004, the CLS student chapter at Washburn School of Law had allowed an individual student to lead a Bible study. But it became clear that the student did not hold CLS’s traditional Christian beliefs. CLS told the student he was welcome to attend future CLS Bible studies, but that he would not be allowed to lead them. Even though the student admitted that he disagreed with CLS’s religious beliefs, he filed a “religious discrimination” complaint with the Washburn Student Bar Association, which threatened to penalize CLS for its refusal to allow a student who disagreed with its religious beliefs to lead its Bible study. Only after CLS filed a federal lawsuit did the Student Bar Association reverse course.

4. The Oklahoma Legislature passed legislation similar to SB 503 in order to protect religious student associations at Oklahoma public universities.

In 2011, the University of Oklahoma Student Association sent a memorandum to all registered student organizations that would prohibit religious student associations’ religious leadership and membership criteria.¹⁹ After unwelcome publicity, the university disavowed the student government’s memorandum. In 2014, the Oklahoma Legislature enacted language similar to SB 503. The “Exercise of Religion by Higher Education Students Act,” 70 Okl. St. Ann. § 2119, protects students’ religious expression at Oklahoma universities and colleges. It protects religious student organizations from exclusion from state college campuses because of their religious expression or because they require their leaders to agree with the organizations’ core religious beliefs.²⁰

5. The Idaho Legislature passed legislation similar to SB 503 after Boise State University threatened religious student associations with exclusion.

In 2008, the Boise State University student government threatened to exclude several religious organizations from campus, claiming that their religious leadership requirements were discriminatory. The BSU student government informed one religious group that its requirement that its leaders “be in good moral standing, exhibiting a lifestyle that is worthy of a Christian as outlined in the Bible” violated the student government’s policy. The student government also found that the group’s citation in its constitution of Matthew 18:15-17 violated the policy. The student government informed a religious group that “not allowing members to serve as officers due to their religious beliefs” conflicted with BSU’s policy.²¹ In response to a threatened lawsuit, BSU agreed to allow religious organizations to maintain religious leadership criteria.

¹⁹ The memorandum is Attachment G.

²⁰ 70 Okl. St. § 2119 is Attachment H.

²¹ The letters are Attachment I.

In 2012, however, BSU informed the religious organizations that it intended to adopt a new policy, which would exclude religious organizations with religious leadership requirements. In response, the Idaho Legislature enacted Idaho Code § 33-107D to prohibit colleges from “tak[ing] any action or enforc[ing] any policy that would deny a religious student group any benefit available to any other student group based on the religious student group’s requirement that its leaders adhere to its sincerely held religious beliefs or standards of conduct.”²²

In 2021, the University of Idaho College of Law student government delayed recognizing the CLS student organization because of its religious leadership requirements. After CLS’s counsel wrote a letter to the University administration noting the Idaho law, the University administration granted recognition to the CLS students as an official student organization.

6. The Ohio Legislature passed legislation like SB 503 after The Ohio State University threatened to exclude religious student associations if they required their leaders to share the associations’ religious beliefs.

In 2003-2004, the CLS student chapter at the OSU College of Law was threatened with exclusion because of its religious beliefs. After months of trying to reason with OSU administrators, a lawsuit was filed, which was dismissed after OSU revised its policy “to allow student organizations formed to foster or affirm sincerely held religious beliefs to adopt a nondiscrimination statement consistent with those beliefs in lieu of adopting the University’s nondiscrimination policy.” Religious groups then met without problem from 2005-2010. In 2010, however, OSU asked the student government whether it should change its policy to no longer allow religious groups to have religious leadership and membership requirements. The undergraduate and graduate student governments voted to remove protection for religious student groups.²³

In response, in 2011, the Ohio Legislature prohibited public universities from “tak[ing] any action or enforc[ing] any policy that would deny a religious student group any benefit available to any other student group based on the religious student group’s requirement that its leaders or members adhere to its sincerely held religious beliefs or standards of conduct.” Ohio Rev. Code § 3345.023.²⁴

7. The Arizona Legislature passed legislation to protect religious student associations and students’ religious expression.

In 2011, Arizona enacted A.R.S. § 15-1863, which protects religious student associations’ choice of their leaders and members.²⁵ In 2004, Arizona State University College of Law had threatened to deny recognition to a CLS student chapter because it limited leadership and voting membership to students who shared its religious beliefs. A lawsuit was dismissed when the University

²² Idaho Code § 33-107D is Attachment J.

²³ The student government resolutions are Attachment K.

²⁴ Ohio Rev. Code § 3345.023 is Attachment L.

²⁵ A.R.S. §§ 15-1862-64 is Attachment M.

agreed to allow religious student groups to have religious leadership and membership requirements.²⁶

8. The Virginia General Assembly, North Carolina General Assembly, Kentucky Legislature, Louisiana State Legislature, and Arkansas General Assembly also have passed legislation to protect religious student associations' religious freedom.

To protect religious student organizations that had sometimes been threatened with exclusion from various University of North Carolina campuses, the North Carolina General Assembly enacted N.C.G.S.A. §§ 115D-20.1 & 116-40.12. The law prohibits colleges from denying recognition to a student organization because it “determine[s] that only persons professing the faith or mission of the group, and comporting themselves in conformity with, are qualified to serve as leaders of the organization.” N.C.G.S.A. § 116-40.12. The Virginia General Assembly passed a similar law in 2013 (Va. Code Ann. § 23-9.2:12), as did the Kentucky Legislature in 2017 (Ky. Rev. Stat. Ann. § 164.348 (4)), the Louisiana State Legislature in 2018 (LSA-R.S. 17:3399.33), and the Arkansas General Assembly in February 2019 (A.C.A. § 6-60-1006).

D. SB 503 aligns with federal and state nondiscrimination laws that typically protect religious organizations' ability to choose their leadership on the basis of religious belief.

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. To the contrary, federal and state nondiscrimination laws typically *protect* religious organizations' ability to choose their leaders on the basis of their religious beliefs.

The leading example, of course, is the federal Title VII, which explicitly provides that religious associations' use of religious criteria in their employment decisions does not violate the Civil Rights Act of 1964 and its prohibition on religious discrimination in employment. In three separate provisions, Title VII exempts religious associations from its general prohibition on religious discrimination in employment. 42 U.S.C. § 2000e-1(a) (does not apply to religious associations “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on” of the associations' activities); 42 U.S.C. § 2000e-2(e)(2) (educational institution may “employ employees of a particular religion” if it is controlled by a religious association or if its curriculum “is directed toward the propagation of a particular religion”); 42 U.S.C. § 2000e-2(e)(1) (any employer may hire on the basis of religion “in those certain instances where religion ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”).

In 1987, the Supreme Court upheld the constitutionality of Title VII's exemption against an Establishment Clause challenge.²⁷ Concurring in the opinion with Justice Marshall, Justice Brennan insisted that “religious organizations have an interest in autonomy in ordering their

²⁶ *Christian Legal Society Chapter at Arizona State University v. Crow*, No. 04-2572 (D. Ariz. Nov. 17, 2004).

²⁷ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

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.”²⁸

In 2012, in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*,²⁹ the Supreme Court *unanimously* rejected the federal government’s argument that federal nondiscrimination laws could be used to trump religious associations’ leadership decisions. The Court acknowledged that nondiscrimination laws are “undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.”³⁰ 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.”³¹

E. SB 503 will conserve taxpayers’ dollars by preempting costly lawsuits.

SB 503 would help West Virginia’s colleges avoid costly litigation for which the taxpayers and students foot the bill.³² SB 503 would protect colleges from adopting policies that are highly problematic. Such policies expose colleges – and state taxpayers – to costly lawsuits. As seen in Section C, sometimes the impetus for policies that harm religious groups comes from student government rather than university administrators. SB 503 would provide administrators with a substantive reason for resisting student government’s potential harassment of, and discrimination against, religious student associations.

Judge Kenneth Ripple of the U.S. Court of Appeals for the Seventh Circuit has explained why misinterpretation of nondiscrimination policies places a particular burden on religious groups:

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

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

²⁸ *Id.* at 342-43 (Brennan, J., concurring).

²⁹ 132 S. Ct. 694 (2012).

³⁰ *Id.* at 710.

³¹ *Id.* at 713 (Alito, J., concurring).

³² Prof. John D. Inazu, “*The Perverse Effects of the ‘All Comers’ Requirement.*” Sept. 15, 2014, Library of Law and Liberty Blog, available at <http://www.libertylawsite.org/2014/09/15/the-perverse-effects-of-the-all-comers-requirement/>.

exercise of religious freedoms do not possess the same means of accommodating the heavy hand of the State.

*The net result of this selective policy is therefore to marginalize in the life of the institution those activities, practices and discourses that are religiously based. While those who espouse other causes may control their membership and come together for mutual support, others, including those exercising one of our most fundamental liberties—the right to free exercise of one's religion—cannot, at least on equal terms.*³³

Conclusion

SB 503 is needed to ensure that religious and other belief-based student organizations continue to be welcome and respected on West Virginia campuses. If university students are taught that the government can dictate to religious and other belief-based groups what beliefs their leaders may or may not hold, religious freedom will be diminished not just for the religious students on campus, but eventually for all West Virginians whose religious freedom will be at risk if their fellow citizens hold such an impoverished understanding of this most basic human right.

Yours truly,

/s/ Steve McFarland

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³³ *Alpha Delta Chi v. Reed*, 648 F.3d 790, 805-806 (9th Cir. 2011) (Ripple, J., concurring) (emphasis added).