United States Religious Liberty Commission
Hearing on Religious Liberty in Public Education
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I would like to thank the Commission for holding these vital hearings on protecting religious freedom for all Americans, particularly the religious freedom of students on college and high school campuses. Thank you for inviting me to testify today.

As an attorney for the Christian Legal Society's Center for Law and Religious Freedom, I have worked for over 40 years to protect religious students' right to meet on college and high school campuses. Christian Legal Society, or "CLS," has law student chapters at approximately 130 public and private law schools nationwide. CLS student chapters typically are small groups of students who meet for prayer, Bible study, and worship. All students of any faith or no faith are welcome at CLS meetings. As Christian groups have done for 2000 years, CLS student chapters require their leaders to agree with the CLS statement of faith, signifying their agreement with the traditional Christian beliefs that define CLS.

Hundreds of thousands of college students meet on campuses nationwide in religious student groups. Some are church-affiliated, such as Catholic, Baptist, Lutheran, Assemblies of God, and Seventh-day Adventists. Some are nondenominational, including Cru, InterVarsity, and the Navigators. And some serve Jewish, Muslim, Hindu, and other students of faith.

Religious groups provide spiritual community for students and contribute positively to their campuses. Typically, these groups have religious leadership requirements that help "preserve the integrity of the group's religious identity and mission."[1]

But for 50 years now, religious groups have been discriminated against on both high school and college campuses. School administrators tell religious groups they cannot meet on campus if they require their leaders to agree with their religious beliefs. According to these administrators, it is religious discrimination for a *religious* group to require its leaders to agree with its *religious* beliefs. But it is common sense—and basic religious freedom—for a religious group to expect the students who lead its Bible studies and prayers to share the group's religious beliefs. Indeed, 73% of Americans agree that a religious student group should not be kicked off campus for "requir[ing] its leadership to be members in good standing of its faith community."[2]

[1] Benjamin A. Fleshman, *How Do You Solve a Problem Like* Martinez*?*, 29 Tex. Rev. L. & Pol. (forthcoming 2025) (manuscript at 1), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5176047 ("For the student groups, this requirement is a critical expression of their faith designed to preserve the integrity of the group's religious identity and mission.").
[2] Becket Fund for Religious Liberty, *2022 Religious Freedom Index: American Perspectives on the First Amendment*, 4th ed. (Dec. 2022), at 34 (finding 73% support in the university setting and 72% support in the public high school setting), https://becketnewsite.s3.amazonaws.com/20221207155617/Religious-Freedom-Index-2022.pdf.

1. **Two cases exemplify the exclusion religious student groups face because of their leadership requirements.**

University of Iowa: The University of Iowa recognizes over 600 student organizations. A student group must obtain recognition from the university in order to reserve meeting space, communicate with fellow students through the school's website and activity fair, and apply for student activity fee funding. Without recognition, it is virtually impossible to exist on campus.

Since the 1980s, a CLS student chapter has been recognized at the University of Iowa. Beginning in 1999, on at least 4 occasions, CLS was threatened with derecognition because of its statement of faith. Each time, the University backed down and said CLS's religious standards did not violate its nondiscrimination policy.

But that changed in 2017 when a student applied to be a leader of Business Leaders in Christ, or BLinC. During the interview process, the student made clear that he disagreed with, and would not abide by, BLinC's religious beliefs regarding marriage and sexual conduct. He was told he was welcome to remain a member—but not a leader. In response, the student did the right thing and formed his own religious student group with beliefs he favored. The University recognized his group. Regrettably, however, the student filed a discrimination complaint with the University, which revoked BLinC's recognition.

The University then launched an inquisition into other religious groups on campus. InterVarsity Christian Fellowship was quickly derecognized. After months of trying to reason with University officials, both BLinC and InterVarsity asked a court to protect their First Amendment rights.

During litigation, the University produced a remarkable document, listing the student groups that would be derecognized if the court ruled in favor of the University. The 32 student groups on the chopping block were religious, including Jewish, Muslim, Sikh, Baha'i, and Christian student groups. The only religious group not threatened with derecognition was the religious group founded by the student who complained against BLinC.[3] After four years of litigation, the courts required the University to restore recognition.[4]

California High School: For nearly two decades, students had met at Pioneer High School in San Jose, California, as a chapter of the Fellowship of Christian Athletes or "FCA." Student leaders, but not members, were required to agree with FCA's religious beliefs.

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[3] The court document is at https://becketnewsite.s3.amazonaws.com/2019-02-01_UI-Notice_and_RSO-Registration-List.pdf. Excluded groups included: Chabad Jewish Student Association; Christian Legal Society; Christian Medical Association; Cru; Hillel; Imam Mahdi Organization; J. Reuben Clark Law Society; Latter-day Saint Student Association; Muslim Students Association; Multiethnic Undergrad Hawkeye InterVarsity; Newman Catholic Student Center; Orthodox Christian Fellowship; Sikh Awareness Club.

[4] *Business Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969 (8th Cir. 2021); *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5th F.4th 855 (8th Cir. 2021). *See also*, *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ*., 534 F. Supp. 3d 785 (E.D. Mich. 2021) (Wayne State University's derecognition of InterVarsity, which had been on its campus for 75 years, violated First Amendment).

In April 2019, a teacher posted FCA's religious beliefs regarding marriage and sexuality on his classroom whiteboard. Next to FCA's beliefs, he wrote, "I am deeply saddened that a club on Pioneer's campus asks its members to affirm these statements. How do you feel?" The two FCA student leaders sitting in his class were insulted and deeply hurt to see FCA's religious beliefs being publicly disparaged by their teacher during class.[5]

The school "Climate Committee" determined that FCA's requirement that its leaders agree with its religious beliefs clashed with the "core values of [Pioneer High School] [such as] inclusive[ness] [and] open-mindedness." The District revoked FCA's recognition.

At the beginning of the next school year, the FCA students again sought recognition. Their request was denied. However, the new Satanic Temple Club was recognized the same day. FCA students continued to meet unofficially but were denied the benefits of recognition. Throughout that school year, student protestors disrupted FCA meetings. Other students harassed FCA student leaders in the hallways. The school newspaper harassed the students by taking hundreds of close-up photos of students attending an FCA meeting. Daily, the FCA student leaders dreaded going to school.

After trying to reason with their school, two student leaders and FCA sued under the Free Speech and Free Exercise Clauses, as well as under the federal Equal Access Act of 1984. The school district claimed that its nondiscrimination policy outweighed the students' rights.

The district court sided with the school district. But on appeal, a 3-judge panel and an 11-judge panel, ruled in favor of the FCA students. After four years of negotiations and litigation, FCA was finally again recognized.[6]

2. In the mid-1990s, education officials turned from the Establishment Clause to nondiscrimination policies to justify their discrimination against religious student groups.

In the 1970s, school administrators began to discriminate against religious student groups. University of Missouri administrators denied a religious student group recognition and meeting space because its meetings included religious worship and teaching. Providing an empty classroom's heat and light to a religious group, in the University's view, violated the Establishment Clause. In 1981, the Supreme Court rejected this twisting of the Establishment Clause. Instead, it ruled that freedom of speech and association required the University to recognize religious student groups.[7] In 1995, the Court similarly required the University of Virginia to give religious student groups the same access to student activity fees that other groups enjoyed.[8]

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[5] *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Ed.*, 82 F.4th 664, 672-679 (9th Cir. 2023) (en banc).

[6] An FCA student chapter was derecognized at a Washington, D.C. public high school after a teacher filed a discrimination complaint against the group because of FCA's religious beliefs. *Fellowship of Christian Athletes v. District of Columbia*, 743 F. Supp. 3d 73 (D.D.C. 2024) (derecognition violated the Religious Freedom Restoration Act and the Free Exercise Clause).

[7] *Widmar v. Vincent*, 454 U.S. 263 (1981).

[8] *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

Congress required public high schools to allow religious student groups to meet when it passed the Equal Access Act of 1984.[9] The Supreme Court upheld the Act and gave it a broad interpretation to end school officials' discrimination against religious students.[10]

With the Establishment Clause no longer a credible mechanism for discriminating against religious groups, some administrators turned to nondiscrimination policies to exclude religious groups. Nondiscrimination policies intended to *protect* religious students on campus were misused to *punish* students for being religious.

3. In 2010, a closely divided Supreme Court blindsided religious student groups in *Christian Legal Society v. Martinez.*[11]

A CLS student chapter turned to the Supreme Court when it was denied recognition because a law school claimed its religious requirements for its leaders violated its nondiscrimination policy.[12] But rather than address whether the school's *written* nondiscrimination policy could be used to deny CLS recognition, the Court sidestepped the issue by focusing solely on an *unwritten* and novel "all-comers" policy that first appeared during litigation. The law school claimed its "all-comers" policy denied to all student groups the right to have belief-based leadership requirements. Purportedly, the "Democratic Caucus cannot bar students holding Republican political beliefs from . . . seeking leadership positions."[13]

Justice Ginsburg's majority opinion was joined by Justices Stevens, Kennedy, Breyer, and Sotomayor. Justice Ginsburg emphasized that the Court was not ruling on the law school's nondiscrimination policy, as written, but only on the novel "all-comers" policy. The Court said that an "all-comers" policy was constitutionally permissible, but not required. The Court held that the "all-comers" policy must be applied uniformly to all student groups and sent the case back for the lower courts to determine whether the law school had selectively enforced its "all-comers" policy, which would be unconstitutional.[14]

Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas, dissented. They explained that a nondiscrimination policy could not violate a religious student group's free speech and association.[15] They believed the "all-comers" policy was pretextual and selectively enforced.

In reality, "all-comers" policies are virtually non-existent because they are inherently unworkable. An "all-comers" policy must be applied uniformly and without exception to all

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[9] 20 U.S.C. §§ 4071-74.
[10] *Board of Education of Westside Comm. Sch. v. Mergens*, 496 U.S. 226 (1990).
[11] *Christian Legal Society, Chapter at University of California, Hastings Law School v. Martinez*, 561 U.S. 661 (2010). For a detailed analysis of the numerous flaws in the *Martinez* decision, see U.S. Commission on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties* 181-212 (2016) (statement of Kimberlee Wood Colby), https://www.usccr.gov/files/pubs/docs/Peaceful-Coexistence-09-07-16.pdf.
[12] At the time, CLS required leaders and members of its law school chapters to agree with its Statement of Faith but has since changed its policy to require only leaders to agree.
[13] *Martinez*, 561 U.S. at 675.
[14] *Id.* at 697.
[15] *Id.* at 706, 738 (Alito, J., dissenting).

student groups. Schools cannot do this because they are unwilling to shut down fraternities and sororities that select leaders and members on the basis of sex.

Scholars have characterized *Martinez* as an "outlier" and "an anomalous exception."[16] Leading religious freedom scholars have criticized the Court's disturbing departure from 30 years of decisions protecting students' free speech and association.[17]

Indeed, only two years after *Martinez*, the Court unanimously upheld religious organizations' right to choose their leaders without interference from federal nondiscrimination laws.[18] 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."[19]

4. Many schools have relied on *Martinez* to justify their discrimination against religious student groups.

A recent, comprehensive study "confirms that in the fifteen years since *Martinez*, more than twice as many religious student groups have been derecognized than in the twenty years beforehand."[20] In addition, "more than three times as many student groups have faced intense pressure from their schools because of their religious membership or leadership criteria."[21] As the study concludes, "*Martinez* may not have started the fire. But it *did* pour on the gasoline, leading to an explosion of derecognitions across the United States."[22]

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[16] Thomas C. Berg, *Religious Liberty in a Polarized Age* 102-103 (2023) ("The Court has ruled that the government can't exclude religious groups because of their speech but can exclude them because they use religiously based criteria to select their leaders—the very persons who present the group's speech.").

[17] *See, e.g.*, Michael W. McConnell, *Freedom of Association: Campus Religious Groups*, 97 Wash. U. L. Rev. 1641 (2020); Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 Regent U. L. Rev. 283, 296-301 (2012); John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 Hastings L.J. 1213, 1233-1242 (2012); John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 Conn. L. Rev. 149, 196 (2010); Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194, 197 (Cambridge Univ. Press, 2012)*;* Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 428-29 (2011); Mary Ann Glendon, *Religious Freedom: A Second-Class Right?*, 61 Emory L. J. 971, 978 n.26 (2012); Carl H. Esbeck, *Defining Religion Down:* Hosanna-Tabor, Martinez*, and the U.S. Supreme Court*, 11 First Amendment L. Rev. 1 (2012); William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of* Christian Legal Society v. Martinez, 261 W. Educ. L. Rep. 473, 481-95 (2010).

[18] See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020); *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Ind. Rev. Comm.*, 605 U.S. 238 (2025); Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-1(a) (religious associations' right to employ only "individuals of a particular religion"); 2000e-2(e)(2) (same for religious educational institutions); 2000e-2(e)(1) (any employer with a bona fide occupational qualification). *See also*, *Of Priests, Pupils, and Procedure: The Ministerial Exception as a Cause of Action for On-Campus Student Ministries*, 133 Harv. L. Rev. 599 (2019).

[19] *Hosanna-Tabor*, 565 U.S. at 196

[20] Fleshman*, supra* note 1, (manuscript at 2).

[21] *Id.*

[22] *Id.* (manuscript at 20) (emphasis in original).

Many education officials view *Martinez* as a green light to exclude religious groups. Some claim to have an "all-comers" policy even though they don't. Others believe that *Martinez* approved using nondiscrimination policies to exclude religious groups. It did not.

Martinez has done serious harm to religious students. When a recognition issue arises, negotiating with administrators can consume an entire academic year. The derecognized group experiences great difficulty reaching new members and organizing activities.[23] "Derecognition challenges the validity of the group and its beliefs, branding the group and its members with the stigma of official disapproval."[24] Student governments conduct inquisitions into religious student groups' beliefs.

Student leaders are distracted from their coursework. Many fear that defending their disfavored religious beliefs will harm their grades, consideration for honors and scholarships, and graduate school or job references.[25]

Litigation, which is lengthy, burdensome, and costly, is particularly unattractive when students are unlikely to see its fruits during their short time at the school. After *Martinez*, litigation requires extensive discovery to show selective enforcement or pretext.[26] Student leaders are subject to grueling depositions, facing hours of hostile questions about their religious beliefs.

5. Religious groups benefit students and their campuses.

Religious student groups contribute immense good to their campuses. They enhance genuine campus diversity. But more importantly, they provide emotional and spiritual support for the students who participate in their activities. Their weekly meetings provide a spiritual home for students adjusting to college for the first time. They provide a place where students can be open about their faith (and their doubts) and learn what faith teaches about problems they face.

According to a 2019 Pew Research Center report, "[p]eople who are active in religious congregations tend to be happier and more civically engaged than either religiously unaffiliated adults or inactive members of religious groups."[27] It notes that "one factor may be particularly

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[23] *InterVarsity Christian Fellowship/USA,* 5 F.4th at 862 (8th Cir. 2021) ("Intervarsity struggled with recruiting members, organizing activities, and spent money and other resources in fighting its deregistration.").

[24] Fleshman, *supra* note 1 (manuscript at 32). For a powerful, first-person account of the stigma attached to derecognized religious student groups, see Tish Harrison Warren, *The Wrong Kind of Christian*, Christianity Today (Aug. 27, 2014) (Vanderbilt University "[a]dministrators compared Christian students to 1960s segregationists."), https://www.christianlegalsociety.org/wp-content/uploads/2025/08/Christianity-Today-Article.pdf.

[25] Student testimony concerning such negative effects appears in *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcomm. On the Const. & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 94808 (2015), https://www.govinfo.gov/content/pkg/CHRG-114hhrg94808/pdf/CHRG-114hhrg94808.pdf. The students' statements are at https://bit.ly/39Dg1EL (pp.48-75).

[26] In one case, "over 23,000 pages of documents were exchanged during litigation and eight depositions were taken" along with "two motions for preliminary injunction, cross-motions for summary judgment, and an appeal." Order, *BLinC v. Univ. of Iowa*, 3:17-cv-00080 (S.D. Ia. Nov. 10, 2021), ECF No. 147, at 3.

[27] Pew Research Center, *Religion's Relationship to Happiness, Civic Engagement and Health Around the World: In the U.S. and Other Countries, Participation in a Congregation is a Key Factor*" 5 (2019),

important: The social connections that come with regular participation in group events, such as weekly worship services, Bible study groups, Sabbath dinners and Ramadan iftars."[28] Another study concluded, "[r]eligious participation on campus is itself a form of social integration. Faith communities are instrumental in the formation of friendships and intimacy with other people, and these supportive networks, in turn, provide a wide range of psychological and spiritual benefits."[29]

Religious participation "improves academic performance of [high school] kids from all social class backgrounds by boosting their grades and preparing them for college."[30] And "[a]s emerging adults, [religiously intense students] experienced few symptoms of emotional, physical, and cognitive despair." Other "research focused on student involvement in college suggest[s] that quality involvement leads to higher levels of student learning and development."[31]

Religious groups are one part of the solution to the loneliness epidemic young people face. A 2023 Harvard report on young adults' loneliness offered this conclusion:

> [W]hile we are not arguing here for or against young people becoming more religious, there are important structures, traditions, and practices in many religious communities that create meaning and purpose, that enable young people to feel part of a larger human experience that transcends their achievements, and that mitigate loneliness. We need to more intentionally cultivate these practices in secular life.[32]

Finally, our civil society benefits when religious student groups are welcome to campus. The lessons taught *and modeled* on campus about free speech and free exercise of religion permeate our broader civil society. Colleges must *model* for their students the crucial lesson that the First Amendment protects every person's free speech and religious exercise, especially the

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https://www.pewresearch.org/wp-content/uploads/sites/20/2019/01/Wellbeing-report-1-25-19-FULL-REPORT-FOR-WEB.pdf.

[28] *Id.* at 12.

[29] Alyssa N. Bryant, *The Effects of Involvement in Campus Religious Communities on College Student Adjustment and Development*, 8 J. of College & Character 1 (2007).

[30] Ilana M. Horwitz, *God, Grades, and Graduation: Religion's Surprising Impact on Academic Success* 175 (2022); *id.* at 176 (calling for "an openness by college admissions counselors to view religious and ideological diversity as valuable when admitting applicants.").

[31] Cindy A. Kilgo *et. al*., *The Estimated Effects of College Student Involvement on Psychological Well-Being*, 57 J. of Coll. Student Dev. 1043 (Nov. 2016).

[32] Richard Weissbourd, *et al*., Harvard Grad. Sch. of Ed., *On Edge: Understanding and Preventing Young Adults' Mental Health Challenges* 4 (2023), https://mcc.gse.harvard.edu/reports/on-edge. See Horwitz, *God, Grades, and Graduation*, at 179-80 ("As emerging adults, [religiously intense students] experienced fewer symptoms of emotional, physical, and cognitive despair. . . .They feel less anxious, healthier, and more optimistic about life. . . . [They] are simply more resilient. This is driven by their involvement in a religious social community but also their steadfast belief in God.").

speech and beliefs of those with whom we disagree. Cancelling a religious student group because of its religious beliefs is precisely the wrong lesson for school administrators to teach students.

And what lesson are international students learning when they see American government officials dictating to religious student groups what qualifications they may—and may not—have for their leaders? Many international students come from countries where the government does just that. It is essential that they learn on American campuses that religious groups have the God-given right to determine their leadership without government interference.

6. Policy recommendations:

1. Congress should pass the Equal Campus Access Act (lead sponsors Senator Lankford and Chairman Walberg) to protect religious student groups on public college campuses.

2. The Department of Justice should urge the Supreme Court to overrule *Christian Legal Society v. Martinez* and *Employment Division v. Smith* (the case *Martinez* cites to deny CLS's free exercise claim) in all Supreme Court briefs involving religious organizations' right to determine their leaders and employees outside the education context. It should file Statements of Interest in any lower court case, either within or outside of the education context, in which a governmental entity invokes *Martinez* to justify its actions.

3. The Department of Education should strengthen current regulations (34 C.F.R. §§ 75.500 (d) & 76.500(d)) that protect religious student groups. These regulations were finalized in November 2020 but were threatened with rescission in 2023-24.

4. The Department should restore the religious leadership protections found in its 2020 *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, 85 Fed. Reg. 3257, 3272 (Jan. 21, 2020).