

Statutory Protection of Campus Access is critical

Statutory language is necessary to protect religious and speech rights. The First Amendment is powerful and crucial, but rights are more clearly and effectively protected with statutory support. The actions of the federal courts demonstrate this fact.

While the U.S. Supreme Court and federal appellate courts have often acted to protect freedoms, they uphold religious protections with more consistency and clarity—and often with greater majorities—when statutory protection is in place. This has been true in cases involving the Religious Freedom Restoration Act (“RFRA”), the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), and Title VII, among others. These cases often have both First Amendment claims and statutory claims, but the courts have regularly preferred to decide these cases based upon the statute than to center their decision on the constitutional questions. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (decision based on RFRA protections); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (decision based on the RFRA exemption from the contraception mandate); *Holt v. Hobbs*, 574 U.S. 352 (2015) (decision based on RLUIPA protections for an inmate’s beard); *EEOC v. Abercrombie*, 575 U.S. 768 (2015) (decision based on the Title VII employer accommodation requirement); *Zubik v. Burwell*, 578 U.S. 403 (2016) (concluding based on RFRA that nonprofit organizations should be accommodated in their religious exercise); *Straights & Gays for Equality v. Osseo Area Schs.*, 471 F.3d 908 (8th Cir. 2006) (decision based on EAA).

While a number of recent cases have clarified protections based on the First Amendment, they are often more narrow and more controversial. *See, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018). In particular, because *Employment Div. v. Smith*, 494 U.S. 872 (1990), is still good law—continuing the assumption that free exercise rights are fragile and limited any time there is a “neutral” law that is considered “generally applicable”—legislative language specifically protecting religious expression and practice is crucial for clarity and consistency in how religious organizations are treated.

Some court decisions have spoken strongly, even recognizing that religious student organizations have clearly established rights not to be treated differently because of their speech, religious beliefs and practices, or religious identity. *See, e.g., InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 864 (8th Cir. 2021); *Fellowship of Christian Athletes v. San Jose Unified Indep. Sch. Dist. Bd. of Educ.*, 82 F.4th 664 (9th Cir. 2023) (en banc). Yet colleges and universities continue to express confusion and put pressure on religious student groups to change their leadership standards or beliefs. Religious student organizations, therefore, must continue to fight legal battles to achieve their First Amendment rights, which can take many years. This is a luxury that students—who often only have a few years at a university during which to build connections and form associations—do not have.

In addition to the practical reason that it is easier for the courts to decide a case when clear legislation is in place, it is also particularly important in this setting exactly because of the reality of how student organizations function. First, many students are unaware of their First Amendment rights and do not even know that they can push back. Second, most students don’t want to be in an antagonistic posture

towards their university or college. This is especially true for religious students, who have the goal of quietly exploring, growing in, and living out their faith within a context of safety and belonging. They are there to learn and to find community, not to fight and to promote or pursue tension. Third, even for those who are willing to go to court, it is incredibly disruptive to their college or university experience. Court cases take years, and their time in college or university is, on average, 2-5 years.

Therefore, legislative language is best, making clear to universities what is expected.

The proposed statutory language does not increase federal oversight in higher education because it is a reasonable, one-sentence solution that does not require a college or university to adopt any particular policy. Colleges and universities should welcome the benefits and cover this language gives them to do the right thing and to promote religious diversity. Colleges and universities may choose whatever policies work best for their campuses; the language simply prohibits them from using their policies to exclude religious student groups from campus because of their religious speech or religious leadership selection.

In fact, it provides protection for colleges and universities that they should welcome. It helps to avoid protracted legal battles that harm students. It gives cover to colleges and universities to help them make the right decision, even if there is controversy or disagreement among the student body. It gives them a backstop established by Congress. In addition, it helps them avoid First Amendment violations because they can stay out of interfering with student organizations choosing their own standards for leadership selection. Finally, it actually protects administrators from losing qualified immunity. *See, Intervarsity v. Univ. of Iowa*, 5 F.4th 855 (8th Cir. 2021).

The ECAA 2025 Bill Language:

None of the funds made available under this Act may be provided to any public institution of higher education that denies to a religious student organization any right, benefit, or privilege that is otherwise afforded to other student organizations at the institution (including full access to the facilities of the institution and official recognition of the organization by the institution) because of the religious beliefs, practices, speech, leadership standards, or standards of conduct of the religious student organization.