



April 2, 2013

The Honorable Bill Haslam
State Capitol
First Floor
Nashville, TN 37243

Dear Governor Haslam:

On behalf of ACLU members and supporters in Tennessee, I write to urge you to reconsider your support for SB802/HB534 and veto the legislation when it arrives on your desk. This bill is not necessary to protect the associational rights of students and would require public universities to provide their name and funding to discriminatory student organizations in violation of their First Amendment right to academic freedom.

SB802/HB534 prohibits public universities from denying recognition and funding to religious student organizations that discriminate against people who do not "[profess] the faith of the group and [comport] themselves in conformity with it" by prohibiting them from joining or serving in leadership positions.

This legislation is intended to override the United States Supreme Court decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010). In that case, the Court considered whether a public university may require a student club to comply with the university's non-discrimination policy in order to receive official recognition and university funding. At issue was Hastings College of Law's general policy barring student groups that receive official recognition from discriminating. The Christian Legal Society (CLS) is a student club that excludes lesbian and gay students, as well as anyone else who does not subscribe to CLS' specific religious beliefs, from membership. CLS was ineligible for official recognition and university funding at Hastings because of its membership requirement, although it was otherwise free to meet on campus. The case challenged the constitutionality of the law school's non-discrimination policy as applied to CLS.

The Court ruled in favor of Hastings College of Law. The decision affirmed a school's right to require student clubs seeking school recognition and funding to adhere to the school's non-discrimination policy, provided the requirement applies to all student clubs equally. Student clubs have a right to discriminate, but the United

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States Constitution does not require that they receive government funding to subsidize the discrimination, or government recognition to legitimize it.

Schools Should Not Be Required to Recognize Discriminatory Organizations

Access to education plays a central role in professional and personal development, and it is of the utmost importance that government strives to eliminate discrimination in education. Tennessee universities' non-discrimination policies serve to remediate and prevent pervasive discrimination against historically disadvantaged groups by ensuring that university resources support groups that offer an opportunity to participate in campus life to all students. Public universities have a compelling interest in not promoting discrimination based on religion and sexual orientation.

One of the primary goals of public universities should be to ensure that educational opportunities are available to all students. Participation in student organizations is a significant way that students obtain meaningful leadership opportunities, professional and personal contacts, and other important benefits. Exclusion from student organizations can substantially harm students, denying them access to class information, study-group opportunities, professional networks, and alumni associations. Government resources should not be used to perpetuate this type of inequality.

When a public university seeks to ensure that the advantages associated with official recognition, including financial subsidy, are granted only to those organizations that do not deny the full benefits of membership and leadership on the basis of religion or sexual orientation, it furthers a compelling interest in preventing government resources from being used to enable discrimination.

Denial of Recognition to Discriminatory Student Organizations Does Not Violate Their First Amendment Rights

Student organizations' right to freedom of speech and freedom of expression is not an issue in this legislation. Under the First Amendment, students at public universities have the right to form clubs and organizations that deny membership based on race, sex, national origin, sexual orientation, disability, or any other characteristic. Public universities may not prohibit students from forming such groups or disseminating their messages. The First Amendment protects the right of student organizations to hold and advocate whatever ideas they choose.

The right to freedom of association does not include the right to government sponsorship or funding of that association, as the Supreme Court explained in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010). The Court explained that officially recognized student organizations constitute a limited public forum. The University may impose conditions for participation in that forum as long as those conditions are reasonable and viewpoint neutral. An anti-discrimination policy is reasonable because it ensures that the leadership, educational, and social opportunities afforded by recognized student organizations are available to all students.

Moreover, an antidiscrimination policy is viewpoint-neutral, because it applies only to an organization's conduct, not the views it espouses. Under such a policy, a recognized student group may promote the view that homosexuality is a sin, or that Catholicism is the one true faith. It simply may not engage in discriminatory conduct.¹

The issue is not whether student organizations are free to believe and associate as they like – they can; the issue addressed in this bill is whether they have a right to be funded to “operate” in a discriminatory manner and they do not have that right.

Prohibiting Antidiscrimination Policies Interferes with Universities' Academic Freedom

The Supreme Court has recognized the fundamental importance of academic freedom to the survival of a free society. “This means the exclusion of governmental intervention in the intellectual life of a university.” *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring). “It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Id.* at 263. Moreover, “[a] college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process.” *Christian Legal Society*, 130 S.Ct. at 2988-89. The


¹ In this way, an antidiscrimination policy is entirely different from the policy struck down in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), in which a university refused to fund a student newspaper because of its religious **viewpoint**.

government should not interfere with a university's determination that its mission is best served by recognizing and funding student organizations that meet certain reasonable, viewpoint-neutral criteria, including a requirement that they not discriminate in membership.

In summary, the ACLU of Tennessee urges you to veto SB802/HB534 because it is not necessary to protect students' freedom of speech and associational rights and public universities should not be required to fund and lend their name to discriminatory conduct. Without this legislation, student organizations that wish to discriminate are free to do so and to do so on public campuses. They simply will not be entitled to be funded by state tax dollars or student fees to engage in these discriminatory acts. We urge you to veto this legislation as an unnecessary and unconstitutional intrusion on the academic freedom of Tennessee's public universities.

Thank you for your consideration.

Sincerely,


Hedy Weinberg
Executive Director