



April 17, 2019

The Honorable Matt Hall, Chairman
House Oversight Committee
Room 326
House Office Building
124 North Capitol Avenue
Lansing, Michigan 48933
By email: MattHall@house.mi.gov

Re: Hearing on HIB 4436 to protect religious student organizations at Michigan's public institutions of higher education

Dear Chairman Hall:

The Christian Legal Society supports HIB 4436, which will provide much needed protection for religious students' ability to meet on college campuses. By passing HIB 4436, the Legislature will conserve taxpayer dollars by ensuring that they are not spent on the costly litigation that could result if public universities adopted policies to exclude religious student groups from campus because they require their leaders to share their core religious beliefs. This problem has arisen on many college campuses nationwide, including problems at Wayne State University and the University of Michigan. *See infra* p.5.

Attached to this statement are actual letters from university officials or student government representatives to religious groups across the country, threatening to exclude religious groups from campus because of the religious groups' requirement that their leaders agree with the groups' religious beliefs. (Attachments B, C, D, E, G, I, and K). These letters exemplify the problem that HIB 4436 will prevent in Michigan. I respectfully request that this letter and its attachments be included in the record for the hearing on HIB 4436 before the House Oversight Committee, currently scheduled for April 18, 2019.

As this letter will explain:

- HIB 4436 is a commonsense measure to protect religious students who wish to meet on Michigan college campuses.
- HIB 4436 allows Michigan public universities to maintain whatever policies they choose so long as their policies permit religious student organizations to choose their leaders according to their religious beliefs.
- HIB 4436 conserves scarce tax dollars by preventing costly litigation against colleges that otherwise adopt policies that exclude religious groups.
- HIB 4436 would add Michigan to the growing list of states – Arizona, Arkansas, Idaho, Iowa, Kansas, Kentucky, Louisiana, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, and Virginia -- that have enacted similar protections for religious students. (Attachment AA lists the provisions and citations for these states' laws.)

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

The Christian Legal Society ("CLS") is a national association of Christian attorneys, law students, and law professors, including attorneys in Michigan. CLS has student chapters at law schools nationwide, including at Michigan State University College of Law, University of Michigan Law School, and Western Michigan University Thomas M. Cooley Law School. 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.¹

As the current Director of the Christian Legal Society's religious liberty advocacy arm, the Center for Law and Religious Freedom, I have worked for over thirty years to secure equal access for religious student groups in the public education context, including higher education. I have 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.²

II. Religious Student Organizations Need the Protection that HIB 4436 Will Provide.

HIB 4436 is a commonsense measure intended to protect religious student organizations' meetings on college campuses by prohibiting public college administrators from denying them benefits or privileges available to other student organizations because a religious student organization requires its leaders or members to:

- affirm and adhere to the organization's sincerely held religious beliefs;
- comply with the organization's sincerely held religious beliefs;
- comply with the organization's standards of conduct; or
- further the organization's mission or purpose.

¹ 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).

² 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).

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

Unfortunately, this is a recurrent problem on many college campuses across the country, from California to Idaho to Oklahoma to Ohio. HIB 4436 would prevent such problems from occurring in Michigan by protecting Michigan students' basic religious freedom. In so doing, Michigan would join a growing list of states (Arizona, Arkansas, Idaho, Iowa, Kansas, Kentucky, Louisiana, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, and Virginia) that have adopted similar protections for religious student associations. Currently, Michigan is the only state in the Federal Court of Appeals for the Sixth Circuit that does not protect religious student organizations at public university campuses. *See* Attachment AA (providing language of Ohio Rev. Code § 3345.023; Ky. Rev. Stat. Ann. § 164.348 (4); and Tenn.C.A. § 49-7-156).

- A. In its landmark decision in *Widmar v. Vincent*, the 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.³

The Supreme Court rejected these arguments when made by the University of Missouri -- Kansas City in the landmark case of *Widmar v. Vincent*.⁴ 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 engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment."⁵ 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.⁶ The Court ruled that

³ For example, the University of Michigan currently lists over 1500 recognized student organizations. *See* <https://maizepages.umich.edu/organizations>.

⁴ 454 U.S. 263 (1981).

⁵ *Id.* at 269.

⁶ *Id.* at 270-76.

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."⁷

The Supreme Court has reaffirmed *Widmar's* reasoning in numerous cases.⁸ 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.⁹

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. Indeed, one of the most important purposes of a college's 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.¹⁰

⁷ *Board of Education 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).

⁸ *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (University of Virginia violated a religious student association's rights of free speech and association when it denied a religious student publication the same funding available to sixteen other nonreligious student publications); *Board 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.

⁹ 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).

¹⁰ 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

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.

Religious students on some Michigan public university campuses have been threatened with exclusion because of their religious beliefs. At Wayne State University, in 2017, a religious student organization that had been a recognized student group at the university *since 1956* was derecognized because it required its leaders to agree with its religious beliefs. After a federal lawsuit was filed, the university restored recognition to the student organization; but the lawsuit remains unresolved.¹¹ The *Detroit News* editorialized that Wayne State had “err[ed] in ousting [the] Christian group.”¹²

In 2012, the University of Michigan reportedly derecognized a religious student group because it required its leaders to agree with its religious beliefs.¹³ The University disputed that was the reason for derecognizing the group; and in 2013, it restored recognition to the religious student group.

In the 2015-2016 academic year, Indiana University announced that it intended to change its policy. Under the new policy, religious student groups would no longer be allowed to choose their leaders according to their religious beliefs. 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].”¹⁴ 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.

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.

¹¹ Information about the case is available at <https://www.becketlaw.org/case/intervarsity-christian-fellowship-v-wayne-state-university/>.

¹² Ingrid Jaques, *WSU Errs in Ousting Christian Group*, *The Detroit News* (Mar. 12, 2018), <https://www.detroitnews.com/story/opinion/columnists/ingrid-jacques/2018/03/12/editors-note-wsu-errs-ousting-christian-group/32875005/>. WXYZ-TV News ran a story, March 8, 2018, on the situation that included its poll in which 78% of the respondents said that religious groups should be allowed to require their leaders to follow the groups’ faith. <https://www.youtube.com/watch?v=ZQO8CR660TA>.

¹³ Information about the situation is available at <https://intervarsity.org/page/university-michigan>

¹⁴ Indiana University’s statement is Attachment B.

In 2018, the University of Iowa threatened to exclude dozens of religious student groups because they required their leaders to agree with the groups' religious beliefs. Last month, the Federal District Court for the Southern District of Iowa entered final judgment against the University of Iowa in favor of a religious student group that had been derecognized because it required its leaders to agree with its religious beliefs.¹⁵ On March 27, 2018, Iowa Governor Kim Reynolds signed into law protections for religious student groups on public university campuses. See Attachment AA (providing language of enacted Iowa SF 274).

HIB 4436 allows Michigan's public universities and colleges to have whatever policies they wish. All HIB 4436 requires is that, whatever policy a college chooses to have, it must respect religious student groups' right to choose their leaders according to their religious beliefs. HIB 4436 thereby protects Michigan's public colleges, and the taxpayers that fund them, from costly litigation. Equally importantly, HIB 4436 protects religious students from discrimination on Michigan campuses and secures their basic freedoms of speech and religion.

C. HIB 4436 would avoid the problems that other states have experienced, which have been 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 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 (formerly Campus Crusade for Christ). 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.¹⁶

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

¹⁵ *Business Leaders in Christ v. University of Iowa*, 360 F.3d 885 (S.D. Ia. 2019), notice of appeal filed, No. 19-1696 (8th Cir., Apr. 3, 2019).

¹⁶ The letter is Attachment C.

Cal State had re-interpreted its nondiscrimination policy to prohibit religious student groups from having religious leadership requirements. But it explicitly allowed fraternities and sororities to continue to engage in sex discrimination in selecting their leaders and members. That is, Cal State denied religious organizations the right to select their leaders according to their religious beliefs, but it allowed fraternities and sororities to select their leaders and members on the basis of sex.

2. The Tennessee General Assembly passed legislation similar to HIB 4436 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 Christian Legal Society 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 “religious discrimination.”¹⁷

Vanderbilt told another Christian student group that it could remain a recognized student organization only if it deleted five words from its constitution: “personal commitment to Jesus Christ.” The students left campus rather than recant their commitment to Jesus Christ.¹⁸

Catholic and evangelical Christian students patiently explained to the Vanderbilt administration that nondiscrimination policies should protect, not exclude, religious organizations. But in April 2012, Vanderbilt denied recognition to fourteen Christian organizations.¹⁹ 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.”²⁰

3. The Kansas Legislature passed legislation similar to HIB 4436 in order to 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

¹⁷ Vanderbilt’s email to CLS is Attachment D.

¹⁸ Vanderbilt’s email is Attachment E.

¹⁹ The excluded groups are: 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.

²⁰ T.C.A. § 49-7-156 is Attachment F.

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 HIB 4436 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.²¹ After unwelcome publicity, the university disowned the attempt. In 2014, the Oklahoma Legislature enacted the "Exercise of Religion by Higher Education Students Act," 70 Okl. St. Ann. § 2119, to protect 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.²²

5. The Idaho Legislature passed legislation similar to HIB 4436 after Boise State University threatened to exclude religious student associations that required their leaders to share the associations' religious beliefs.

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 also 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.²³ In response to a threatened lawsuit, BSU reversed course and agreed to allow religious organizations to maintain religious criteria for leaders.

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 from campus. In response, the Idaho Legislature enacted Idaho Code § 33-107D to prohibit public 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."²⁴

²¹ The memorandum is Attachment G.

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

²³ The letters are Attachment I.

²⁴ Idaho Code § 33-107D is Attachment J.

6. The Ohio Legislature passed legislation like HIB 4436 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.²⁵

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 § 3345.023.²⁶

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.²⁷ In 2004, Arizona State University College of Law had threatened to deny recognition to a CLS student chapter because it limited leadership to students who shared its religious beliefs. A lawsuit was dismissed when the University agreed to allow religious student groups to have religious leadership and membership requirements.²⁸

8. The Iowa Legislature, South Dakota Legislature, 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, among other things, 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

²⁵ The student government resolutions are Attachment K.

²⁶ Ohio Rev. Code § 3345.023 is Attachment L.

²⁷ A.R.S. §§ 15-1862-64 is Attachment M.

²⁸ *Christian Legal Society Chapter at Arizona State University v. Crow*, No. 04-2572 (D. Ariz. Nov. 17, 2004).

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). In the past two months, the Iowa Legislature and the South Dakota Legislature have passed protections for religious student organizations.²⁹ See Attachment AA (providing language for each of these state laws).

D. HIB 4436 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.³⁰ Concurring in the opinion, Justice Brennan insisted that "religious organizations have an interest in autonomy in ordering their 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."³¹

In 2012, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,³² 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."³³ In their concurrence, Justice Alito and Justice Kagan stressed that

²⁹ <https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=SF%20274>;
<https://legiscan.com/SD/text/HB1087/2019>.

³⁰ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

³¹ *Id.* at 342-43 (Brennan, J., concurring).

³² 132 S. Ct. 694 (2012).

³³ *Id.* at 710.

“[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.”³⁴

E. HIB 4436 will conserve taxpayers’ dollars by preempting costly lawsuits.

HIB 4436 will help Michigan’s colleges avoid costly litigation for which the taxpayers and students foot the bill.³⁵ HIB 4436 protects 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. HIB 4436 provides administrators with a substantive reason for resisting student government’s potential harassment of, and discrimination against, religious student associations. HIB 4436 steers college administrators in the right direction and helps insulate them from pressure that special interest groups may sometimes exert to penalize student groups that do not share their views.

Judge Kenneth Ripple of the Federal Court of Appeals for the Seventh Circuit explained why misinterpretation of nondiscrimination policies places a particular burden on religious groups, when he wrote:

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 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

³⁴ *Id.* at 713 (Alito, J., concurring).

³⁵ 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/>.

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.³⁶

Conclusion

HIB 4436 is needed to ensure that religious students continue to be welcome and respected on Michigan campuses. If university students are taught that the government can dictate to religious groups what religious 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 Michigan citizens whose religious freedom will be at risk if their fellow citizens hold such an impoverished understanding of this most basic human right.

Thank you for holding this hearing and considering this statement.

Yours truly,

/s/ Kimberlee Wood Colby
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³⁶ *Alpha Delta Chi v. Reed*, 648 F.3d 790, 805-806 (9th Cir. 2011) (Ripple, J., concurring) (emphasis added).