



*Seeking Justice with the Love of God*

February 8, 2012

Mr. Mark F. Dalton  
Chairman  
Vanderbilt University Board of Trust  
305 Kirkland Hall  
Nashville, Tennessee 37240

Chancellor Nicholas Zeppos  
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Dear Chairman Dalton, Chancellor Zeppos, and Members of the Board of Trust:

The purpose of this letter is to identify a solution to the current impasse between the religious students and the Administration. The letter will also touch upon four key points. First, as explained below, the Administration now acknowledges that no federal or state law, regulation, or court ruling requires it to adopt a policy prohibiting religious groups from having religious criteria for their leaders and members. Second, as detailed below, the Administration further acknowledges that it has asked the religious groups' leaders to agree to a policy that is unwritten, unknown, and undefined. Third, quite recently, the Administration has suggested that it is adopting an "all-comers" policy that will dramatically affect the way in which all student groups may select their leaders and members, particularly the selection processes of fraternities, sororities, political groups, and a cappella groups, among others. Fourth, the letter briefly concludes with concerns about the effect of the policy on students, athletic recruits, alumni, and donors, as articulated by former student body president Joseph Williams, quarterback Jordan Rodgers, a student who works in the "call center," and a medical student.

**A straightforward solution:** The current impasse between religious students and the Administration would be easily resolved if a single sentence were placed in both the University's written nondiscrimination policy and the affirmation form: "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."<sup>1</sup>

Restoring the status quo that prevailed at the University until ten months ago, this statement reflects the common sense understanding that religious groups should have leaders who share the groups' core religious beliefs. Nondiscrimination policies serve important purposes. But to use a nondiscrimination policy that is supposed to *protect* religious students to

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<sup>1</sup> This language is from the University of Florida's "Student Organization Registration Policy Update" found at <https://www.union.ufl.edu/involvement/index.asp>.

*penalize* those students actually undermines the University's nondiscrimination policy and the essential good it serves.

The statement would restore religious liberty and authentic pluralism to campus. The University would again welcome all religious groups, including those that require their leaders to agree with their religious beliefs.<sup>2</sup>

**Expecting religious groups to accept nonreligious leaders is unreasonable:** Ten months ago, several religious student organizations were told that their constitutions, which had been approved in prior years, were no longer acceptable and that they must submit new constitutions in order to retain recognition as student organizations. The organizations submitted revised constitutions in an attempt to meet the Administration's demands without compromising the integrity of their religious beliefs. Nonetheless, their approval was "deferred" for the 2011-2012 academic year.

The Administration withheld approval based on the groups' practice, common to many religious groups, of requiring their leaders to affirm that they share the groups' core religious beliefs. By way of example, the Administration informed the Christian Legal Society student chapter that its registration was deferred because its revised constitution provided that "[e]ach officer is expected to lead Bible studies, prayer, and worship at Chapter meetings." The Administration stated: "This would seem to indicate that officers are expected to hold certain beliefs. Again, Vanderbilt policies do not allow this expectation/qualification for officers."

Over these past ten months, additional religious groups have stepped forward to say that they too have faith requirements for their leaders and will have to leave campus if this new policy interpretation is uniformly enforced this April when groups renew their recognition. Father John Sims Baker, Catholic affiliated chaplain for Vanderbilt Catholic, explained to Chancellor Zeppos, by letter dated October 24, 2011:

According to the proposed interpretation of the nondiscrimination policy, the university maintains that any student is qualified to lead Vanderbilt Catholic regardless of religious profession. Religious profession is, however, a rational basis for determining leadership in a religious organization. It is not invidious discrimination. Vanderbilt Catholic cannot bend on this principle. I have consulted Bishop Choby, and he is in agreement. The Catholic Church could not sponsor an organization at Vanderbilt under these conditions.

In last week's town hall meeting, the Administration reiterated that religious student groups may not have religious criteria for their leaders and may not use religious criteria to

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<sup>2</sup> Approximately one-sixth of the students at Vanderbilt belong to a religious student group.

remove an officer who no longer shares a group's religious beliefs. In response to a student asking whether a Muslim group could replace its president if she converted to Christianity or Judaism, the Administration affirmed the Muslim group could not replace its president. (Town hall video ("THV") 28:34-31:50).<sup>3</sup> The Administration even volunteered that the question was not "far-fetched" because a Christian group at Vanderbilt had recently faced the same issue when its president became an atheist. (THV 31:11-31:50).

The town hall meeting confirmed that the Administration does not comprehend the role that Bible study, prayer, and worship leaders serve. In earlier meetings with administrators, the students have tried to explain why it matters deeply to the religious groups that the students who lead their Bible studies, prayer, and worship hold the same core beliefs as the group. But the groups' explanations have simply not been heeded by the Administration. (THV 1:42:18-1:46:39; 3:11:46-57).

At the town hall meeting, for example, the provost expressed his opinion that a non-Christian faculty member was the best person on campus to teach the Bible. (THV 2:37:55-2:39:50). But this misses the point. For many religious groups, the Bible is not studied simply to gain intellectual knowledge of its contents. The main purpose is for each person in the group to understand the Bible's instruction as it applies to how a person lives and the life choices he or she makes. Likewise, prayer and worship are not intellectual exercises but spiritual disciplines best led by leaders who share the groups' faith. As one student put it, a Bible study is not a book club. (THV 1:35:26-1:35:51). Another student observed that a Bible study leader is not a professor. (THV 1:24:40-1:35:02; 2:37:55-2:39:50).

The Administration does not have to agree with the religious groups as to the purpose of their Bible studies or the criteria for their leaders. But if religious diversity and religious liberty are to be respected at Vanderbilt, the Administration should respect the religious groups' purposes and criteria, and allow them to choose their leaders according to their religious beliefs.

**No federal or state law, regulation, or court ruling requires the University to prohibit religious groups from having religious criteria for their leaders, and such criteria are absolutely legal.** On occasion, the Administration has justified its change in policy by claiming that federal funding, or some unidentified federal law, required it to prohibit religious student groups from having religious leadership criteria. But the Administration now agrees that religious student groups' religious criteria are, in its words, "legal discrimination." (THV 1:41:00-1:41:35; 2:00:00-09). The Administration also agrees that no federal or state law, regulation, or court ruling requires it to adopt its current policy. (THV 1:40:25-1:42:20; 3:08:43-3:10:15).

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<sup>3</sup> The town hall webcast is at <http://www.youtube.com/watch?v=pUdGSHoXLuo>.

Indeed, a medical student asked the Administration to identify any other medical school that had lost funding because it allowed religious student groups to choose their leaders according to their religious beliefs. The Administration could not identify any. (THV 3:07:38-3:10:15).

Six preeminent religious liberty scholars confirm that no federal or state law is violated by allowing the groups to have religious requirements. Professor Douglas Laycock sent a letter to Chancellor Zeppos, on December 2, 2011, on behalf of the scholars. Subsequently, Professor Laycock won a *unanimous* decision in the United States Supreme Court when it ruled that nondiscrimination laws cannot be used to prohibit religious groups from deciding who their leaders will be. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, No. 10-553, 2012 WL 75047 (U.S. Jan. 11, 2012). While the case involved a religious school's employment decision regarding a teacher, it spoke broadly of "a religious group's right to shape its own faith and mission through its appointments" and "the selection of those who will personify its beliefs." *Id.* at \*11.

**As the Administration has admitted, it is asking the student leaders to agree to a policy whose contents are unknown, unwritten, and undefined.**

Plainly it is unfair for the Administration to threaten student groups with exclusion from campus because they refuse to agree to a policy that is unwritten, unknown, and undefined. The Administration repeatedly conceded that it had sent "mixed signals" about what its policy actually is. (THV 1:10:30-1:11:30; 1:11:52-1:13:01; 1:19:01-27). The provost explained that the policy could not be reduced to writing because it had too many "permutations." (THV 2:48:20-2:53:01).

The Administration's claims regarding its policy have evolved constantly over the past ten months. For many years, the University's written nondiscrimination policy explicitly protected religious association rights.<sup>4</sup> On December 8, 2010, the Administration deleted this explicit protection for "religious association" from the policy without any warning to the religious student groups. This past week, the Administration informed the Faculty Senate of its desire to delete the religious association protection from the Faculty Manual.

Until April 2011, the nondiscrimination policy was never interpreted or applied to prohibit religious groups from having religious criteria for their leadership or membership. Last April, several religious groups' recognition was deferred. The Administration was not

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<sup>4</sup> The Student Handbook's long-time equal opportunity policy is at [http://www.vanderbilt.edu/student\\_handbook/2010-2011/101208/?page\\_id=4#equal](http://www.vanderbilt.edu/student_handbook/2010-2011/101208/?page_id=4#equal). The Student Handbook policy with the protection for religious association deleted on December 8, 2010, is at [http://www.vanderbilt.edu/student\\_handbook/2010-2011/110803/university-policies#equal](http://www.vanderbilt.edu/student_handbook/2010-2011/110803/university-policies#equal). The Faculty Handbook's equal opportunity policy, which still includes protection for religious association, although that is under threat of removal by the Administration, is at [http://www.vanderbilt.edu/facman/facman\\_final.pdf#III](http://www.vanderbilt.edu/facman/facman_final.pdf#III) (p. 68-69).

forthcoming as to the primary reason for the deferral until its August email announcing that religious groups no longer may require their leaders to agree with their religious beliefs or even require that the leaders conduct the groups' Bible studies, worship, or prayer. From August 2011 through January 2012, the Administration maintained that the religious groups were in violation of the University's *written nondiscrimination policy*.

Then last week, at the town hall meeting, the Administration shifted gears and claimed it was implementing an *unwritten "all-comers policy."* While the Administration claimed that it had "always" had an all-comers policy "for many years," the students who met with the Administration for the past ten months stated during the meeting that they had never been told about the existence of such a policy. Furthermore, throughout the meeting, the administrators could not answer basic questions about how the policy was implemented. (THV 2:48:20-2:53:01). The vice-chancellor several times spoke in terms of the University facing a choice of what its policy would be, implying that the all-comers policy actually is still not a final policy. (THV 1:40:00-1:42:20; 1:59:27-2:02:52). When students stated that they had not been told of the existence of such a policy, the administrators acknowledged that the University had given the students "mixed signals" for ten months. (THV 1:10:30-1:11:30; 1:19:10-20).

At bottom, it does not matter whether the policy is a nondiscrimination policy or an all-comers policy. Either way, the solution remains the same: the Administration simply needs to restore the status quo and affirm that religious student groups may choose their leaders according to their religious beliefs. But the Board should understand that the Administration has earned the students' distrust by asking them to agree to a policy that is unwritten, undefined, and constantly evolving. (THV 2:48:20-2:53:01 (student demonstrates that the administrators have not been able to explain the policy for months, including at the town hall meeting); 21:20-25:20 (Joseph Williams, 2009 student body president and current CLS member, expresses frustration that religious groups have tried to work with the Administration, but the Administration kept telling them their efforts are "not enough"); THV 1:07:28-1:10:20 (CLS student president Justin Gunter outlines Administration's evolving explanations of policy)).

**An all-comers policy would harm nonreligious groups, including fraternities, sororities, political groups, and a cappella groups.**

If serious, the Administration's shift to an "all-comers" policy has radical ramifications for the University, because an all-comers policy must be applied to all student groups across the board, without exception, if it is applied to religious groups. (THV 1:40:35-1:41:35). Fraternities, sororities, political groups, same-sex a cappella clubs, and all other student groups must accept members and leaders using only "performance-based" criteria. The Administration acknowledged that an all-comers policy is incompatible with the current Greek system. (THV 2:53:05-2:54:30; 45:45-50:49). Sororities and fraternities epitomize sex discrimination. Even more fundamentally, the Greek system is the antithesis of an all-comers policy, based as it is on selection of members through the highly subjective "rush" system. In response to a student's

question about fraternities' "secretive" selection process, the Administration readily agreed it would have to "look into" their selection processes.<sup>5</sup> As the Administration also agreed, an all-comers policy requires the College Republicans to accept a Democratic student as chair, and vice versa. (THV 9:15; 21:20-25:20; 28:34-31:50).

**Religious groups play an important role in the lives of many Vanderbilt students, athletes, alumni, and donors.** During the town hall meeting, a student, who works in the Vanderbilt Call Center, stated that for the past several months, each time he has worked, he has had at least one, and on occasion six, donors tell him that they were withholding donations due to their unhappiness with the University's "political correctness." (THV 50:51-52:40).

Many current and future alumni view the Administration's new policy as an attack on their religious beliefs. Quarterback Jordan Rodgers passionately explained the importance of religious student groups to the football team. (THV 1:55:54-2:05:11). His teammate, who served on a players' panel to answer prospective recruits' questions, observed that the most frequently asked question by recruits and their parents was about the quality of religious life at Vanderbilt. He expressed deep concern that the Administration's current policy could harm recruitment for the football team. (THV 1:03:01-1:05:16). Joseph Williams, student body president in 2009 and now a CLS member in the law school, spoke with deep emotion about the policy's effect on religious students. (THV 21:20-25:20). The student president of the Medical Christian Fellowship at the Vanderbilt School of Medicine asked what he should tell prospective medical students who ask about the spiritual life here. (THV 19:14-20:06).

For the sake of this highly respected and much beloved University, the religious students respectfully request that religious liberty and pluralism be restored to the Vanderbilt campus by the Administration's written reaffirmation that religious groups are free to choose their leaders according to their religious beliefs and to expect those leaders to conduct their Bible studies, prayer, and worship.

Respectfully,

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<sup>5</sup> The Administration frequently invokes Title IX's exemption for fraternities and sororities, but that response is a red herring. Title IX gives fraternities and sororities an exemption *only* from Title IX itself, which prohibits sex discrimination in higher education. It does not give fraternities and sororities a blanket exemption from all nondiscrimination laws or policies, including a university's own nondiscrimination policy or an all-comers policy. If the University's policy does not explicitly exempt fraternities and sororities, they are not exempt from the University's nondiscrimination policy and, by definition, cannot be exempt from an all-comers policy.



Douglas Laycock

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December 2, 2011

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Dear Chairman Dalton, Chancellor Zeppos, and Members of the Board of Trust:

We write as law professors who have taught courses on religious liberty and written extensively on religious liberty matters, both in the courts and academia. We have watched the situation at Vanderbilt University with growing concern. Because many of us teach at private universities, we are sensitive to the autonomy that each university exercises over its academic sphere. At the same time, as professors who have spent many years defending religious liberty, we believe that all universities, public or private, should model religious liberty on their campuses in order to strengthen our national commitment to religious pluralism.

Specifically, we write to express our collective opinion that no court decision, administrative regulation, or federal or state statute requires Vanderbilt to prohibit religious student groups from requiring their leaders to share the groups' religious beliefs. Instead, we believe that a healthy respect for religious liberty necessitates allowing religious groups to have leaders who agree with the groups' religious beliefs. Leaders frequently determine whether a group will accomplish its goals and how the group will be perceived by the campus community. Leaders directly affect a group's expression of its values and sense of identity. For those reasons and many others, a university should allow religious groups breathing space in their choice of leaders.

Quite simply, it makes no sense for a university to require groups to accept as leaders persons who do not share their beliefs. A Talmud study group does not invidiously discriminate when it chooses a Jewish discussion leader rather than a Baptist. This is simply the free exercise of religion. Of course the University has an important interest in prohibiting religious discrimination where religion is irrelevant. But it is fundamentally confused to apply a rule against religious discrimination to a religious association. The University has changed a prohibition on religious discrimination from a protection for

religious students into an instrument for excluding religious students. In so doing, the University has turned its prohibition on religious discrimination on its head.

The ability of religious groups to choose their leadership is among our most highly protected freedoms. As Justice Brennan wrote, “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.’” *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 341-42 (1987) (Brennan, J., concurring), quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981).

The Supreme Court decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), neither requires nor justifies the University’s change in policy. The *Martinez* decision requires no university, public or private, to adopt any policy or to take any action. But even had the *Martinez* case required any action by a public university, it would still have had no legal effect on a private university such as Vanderbilt.

Even for public universities, the *Martinez* ruling has been recognized to be quite limited in what it *permits*. In *Martinez*, the Court narrowly and conspicuously confined its decision to an unusual policy, unique to a California law school, that required *all* student groups to allow any student to be a member and leader of the group, regardless of whether the student agreed with—or actively opposed—the values, beliefs, or speech of the group. Moreover, the Court held it was not enough for a university to adopt an all-comers policy; the policy must actually be uniformly applied to all student groups.

The Court plainly stated that its decision did not apply to a nondiscrimination policy that prohibited specific enumerated types of discrimination, such as Vanderbilt has. Justice Ginsburg emphasized that “[t]his opinion, therefore, considers *only* whether conditioning access to a student organization forum on compliance with *an all-comers policy*” is permissible and does not address a written nondiscrimination policy that protects specific, enumerated classes. *Id.* at 2984 (emphasis added); *see also, id.* at 2993 (policy was “one requiring *all* student groups to accept *all* comers”) (original emphasis).<sup>1</sup>

Therefore, far from ruling that a nondiscrimination policy may be used to prohibit religious student groups from requiring their officers to adhere to the groups’ statements of faith or rules of conduct, the Court left the issue untouched. Instead four Supreme Court justices explicitly stated that a nondiscrimination policy *cannot* be constitutionally applied to religious groups’ leadership choices. *Id.* at 2009-13 (Alito, J., dissenting,

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<sup>1</sup> Justice Stevens, who has subsequently retired, was the only justice who expressed the view that a written nondiscrimination policy could be constitutionally applied to religious student groups’ selection of leaders, although he too observed that the Court “confines its discussion to the narrow issue” of the all-comers policy. *Id.* at 2995 (Stevens, J., concurring). Justice Kennedy concurred with the majority but emphasized that the decision was only concerned with an all-comers policy. *Id.* at 2999 (Kennedy, J., concurring). At oral argument, Justice Kennedy expressed concern that application of an enumerated nondiscrimination policy to a religious group’s selection of leaders would be constitutionally problematic. Tr. of Oral Arg. 6.



joined by Roberts, C.J., Scalia, J., and Thomas, J.). These justices explained that application of a nondiscrimination policy to prohibit religious groups from choosing their leaders according to their religious viewpoints would actually be unconstitutional viewpoint discrimination.

Notably, the senior vice president and general counsel for claims management at United Educators Insurance, described as “a prominent adviser to colleges on issues related to legal risk,” cautioned university counsel that they should “not be lulled into thinking their policies on student groups are immune to legal challenges based on the U.S. Supreme Court’s decision.” According to *The Chronicle of Higher Education*:

The ruling ... focused on a type of policy ... found at only a minority of colleges: an “accept all comers” policy requiring any student group seeking official recognition to be open to anyone who wishes to join. More common at colleges ... is a policy of allowing student groups to have requirements for membership and leadership as long as those requirements are not discriminatory.

Peter Schmidt, *Ruling Is Unlikely to End Litigation over Policies on Student Groups*, Chron. Higher Educ. (June 30, 2010) at <http://chronicle.com/article/Many-Colleges-Student-Group/66101/>.

Two lower courts, the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), and the Ninth Circuit in *Alpha Delta Chi v. Reed*, 648 F.3d 790 (9<sup>th</sup> Cir. 2011), have reached differing results on whether a public university may apply its enumerated nondiscrimination policy to prohibit religious groups from choosing leaders according to their religious beliefs. In *Walker*, the Seventh Circuit held that a university’s application of a nondiscrimination policy to a religious group was unconstitutional, stating it had “no difficulty concluding that [a university’s] application of its nondiscrimination policies in this way burdens CLS’s ability to express its ideas.” 453 F.3d at 863.

The Ninth Circuit noted that the Supreme Court in *Martinez* “expressly declined to address whether [its] holdings would extend to a narrower nondiscrimination policy that, instead of prohibiting *all* membership restrictions, prohibited membership restrictions only on certain specified bases, for example, race, gender, religion, and sexual orientation.” 648 F.3d at 795, *citing Martinez*, 130 S. Ct. at 2982, 2984. Judge Ripple in his concurring opinion also declared that “this case is not controlled by the majority opinion in *Christian Legal Society*.” Believing it was bound by a Ninth Circuit decision, the panel upheld application of a nondiscrimination policy to a religious group’s selection of officers.

Judge Ripple wrote separately to explain the heavy burden an unnecessarily wooden interpretation of a nondiscrimination policy places on religious groups:

Under this policy, most clubs can limit their membership to those who share a common purpose or view: Vegan students, who believe that the institution is not

accommodating adequately their dietary preferences, may form a student group restricted to vegans and, under the policy, gain official recognition. Clubs whose memberships are defined by issues involving “protected” categories, however, are required to welcome into their ranks and leadership those who do not share the group's perspective: Homosexual students, who have suffered discrimination or ostracism, may not both limit their membership to homosexuals and enjoy the benefits of official recognition. The policy dilutes the ability of students who fall into “protected” categories to band together for mutual support and discourse.

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 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.

In summary, no court decision requires a public university to diminish religious groups' ability to choose their leaders according to their religious beliefs. Even if a decision required such action of a public university, however, it would not require it of a private university such as Vanderbilt.

No federal or state statute or regulation requires Vanderbilt (or any other public or private university) to place such a prohibition on religious student groups. If such a requirement existed, our own universities would be required to place such restrictions on religious groups, which they have not done. Leading public universities allow religious groups to select their leaders and members according to their religious beliefs. Just by way of example, we would note that the University of Florida, the Ohio State University, and the University of Texas at Austin all have policies allowing religious groups to select their leaders according to their religious beliefs. Any federal law or regulation that

required Vanderbilt to adopt its new policy would apply equally to those universities, as well as our own universities. But no such law or regulation exists.

We would urge Vanderbilt University to respect religious liberty, rather than marginalize religious student groups. Allowing religious students to maintain their unique religious identities promotes a healthy intellectual, social, and religious diversity on campus. Without distinctive religious groups, the University would be impoverished.

Respectfully,

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