ALLIANCE DEFENSE FUND
Defending Our First Liberty

June 25, 2012

Mr. Sandy Gordon, University Counsel
The University of Alabama
Office of Counsel
222 Rose Administration Bldg.
Tuscaloosa, AL 35487-0106

Re: Students' Associational Rights at The University of Alabama

Dear Mr. Gordon:

It has come to our attention that The University of Alabama requires student groups to open leadership and voting membership positions "to all students of The University . . . without regard to race, religion, sex, disability, or national origin, except in cases of designated fraternal organizations." *Student Handbook*, Guidelines for Non-Fraternal Student Organizations, Membership. Prohibiting religious student organizations from taking students' religious beliefs into account when selecting their members and leaders, while allowing fraternities and sororities to discriminate on a broad host of grounds, violates the First Amendment. We write to inform you of this constitutional infirmity and to urge you to rectify this policy as soon as possible.

By way of introduction, the Alliance Defense Fund (ADF) is a legal alliance that defends the right to hear and speak the Truth through strategy, training, funding, and direct litigation. ADF is committed to ensuring that students and faculty with conservative, religious beliefs are free to exercise their First Amendment rights to speak, associate, and learn on an equal basis with other members of the university community. Public universities are, "after all, organs of the State" and when they "regulate student speech, they act as agents of the State" and are bound by the First Amendment. *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring).

Religious Student Groups Have the Right to Select Members and Leaders Who Share Their Religious Beliefs

The University conditions access to its student-organization speech forum on a student group's willingness to abide by its nondiscrimination policy, which states: "Membership in registered student organizations shall be open to all students of The University of Alabama, without regard to race, religion, sex, disability, or national origin, except in cases of designated fraternal organizations exempted by federal law from Title IX regulations concerning discrimination on the basis of sex." *Student Handbook*, Guidelines for Non-Fraternal Student Organizations, Membership. As set out below, this policy violates the First Amendment rights of religious student organizations.

1000 HURRICANE SHOALS RD. N.E. SUITE D-1100 · LAWRENCEVILLE, GEORGIA 30043
PHONE 770-339-0774 FAX 770-339-6744 WEB WWW.TELLADF.ORG

The First Amendment's Free Speech Clause protects the right of expressive associations, including student organizations at public universities, to select their members and leaders based upon their adherence to the organizations' beliefs. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."). As the Supreme Court recently explained, "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox v. Serv. Emps. Int'l Union*, No. 10-1121, __ S. Ct. __, 2012 WL 2344461 (June 21, 2012).

This freedom of association protects religious clubs' ability to set their own membership and leadership requirements. As the Supreme Court has explained, "[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981). For this reason, the First Amendment protects "expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 444-45 (1963).

Over and above the protections provided by the freedom of association, the Supreme Court established just this year that the Free Exercise Clause prevents government from "interfering with the freedom of religious groups to select their own" leaders. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694, 703 (2012); *see also Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (noting the Free Exercise and Establishment Clauses work together to "protect[] religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits"). In *Hosanna-Tabor*, the Supreme Court recognized that the Free Exercise Clause protects the right of religious groups to select those responsible for "conveying [their] message and carrying out [their] mission" and deemed it unlawful for the government to interfere with such decisions. *Id.* at 708-09.

When religious student groups select individuals who share their religious beliefs to be voting members and leaders, they are exercising this religious freedom. Public universities consequently violate the rights of religious students by requiring them to abandon their right to associate with persons who share their beliefs as a condition to accessing an otherwise open speech forum. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (concluding a university violated the First Amendment when it conditioned access to a free speech forum on a Christian student organization's willingness to abandon its faith-based membership and leadership restrictions); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996) (school district violated Equal Access Act, an analog to the First Amendment, when it conditioned a Christian student organization's access to a free speech forum on its willingness to abandon a requirement that its leaders share its Christian beliefs).

This violation is all the more clear when a university grants other student groups, such as fraternities and sororities, exemptions from nondiscrimination policies that are specifically denied to religious groups. The entire Greek system is based on discrimination in membership, not just on gender grounds. Greek organizations are notoriously selective, denying membership for reasons both consequential (*i.e.*, academic achievement, commitment to volunteer work, etc.) and petty (*i.e.*, coming from the wrong family, driving the wrong car, wearing the wrong clothes, etc.). Dozens of fraternities and sororities are thus allowed to choose members based on a protected ground—gender—and a host of other traits that are irrelevant to Greek organization's philosophy and purpose.

Indeed, The University of Alabama—like most universities—only prohibits discrimination based on a narrow list of characteristics, thus *permitting* discrimination on a vast array of political, social, and ideological grounds. A Democrat club may exclude Republicans, a Planned Parenthood club may rejects pro-lifers, and an animal rights group may say "no thanks" to NRA enthusiasts. Yet, religious groups are specifically barred from instituting requirements for leadership and voting membership based on core tenants of their faith. Formulating a nondiscrimination policy in this manner blatantly discriminates against religious student groups.

The Free Exercise Clause prohibits public universities from adopting policies that target religious groups for special disabilities. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (explaining that "the Free Exercise Clause" prohibits government from "discriminate[ing] against some or all religious beliefs or regulat[ing] or prohibit[ing] conduct because it is undertaken for religious reasons"). Not only does the University allow discrimination on a host of grounds that are irrelevant to maintaining the purposes and ideals of Greek organizations, but it specifically precludes religious student groups from making membership and leadership decisions designed to preserve key articles of their faith. This is the epitome of a non-neutral and non-generally applicable regulation that uniquely burdens religious belief and practice.

In the same vein, the Free Speech Clause prohibits public universities from excluding groups from speech forums based on the content or viewpoint of their speech. *See Rosenberger v. Rector & Visitors Univ. of Va.*, 515 U.S. 819 (1995) ("It is axiomatic that the government may not regulate speech based on it substantive content or the message it conveys."). Targeting religious expression, such as faith-based membership and leadership restrictions, in religious group's founding documents discriminates on the content and viewpoint of their speech. Secular groups may express reasonable philosophical requirements for leaders and members in their constitutions. Religious student groups are denied this right simply because their speech regarding philosophical requirements is religious in nature. But the First Amendment prevents government from prohibiting speech on "otherwise permissible subjects" simply because "the subject is discussed from a religious viewpoint." *Good News Club v. Milford Cent. School*, 533 U.S. 98, 112 (2001).

It is important to note that the Supreme Court's decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), is not applicable here. *Martinez* is expressly limited to situations in which "access to a student-organization forum" is conditioned "on compliance with

an all-comers policy."* *Id.* at 2984. The "all-comers" policy in *Martinez* required *all* student groups to open membership to *all* students, with no exceptions. Most colleges, like The University of Alabama, do not employ all-comers policies. Rather, they enforce policies that prohibit discrimination on a few protected characteristics. Discrimination is thus allowed on any reasonable basis not listed in the policy, while fraternities and sororities enjoy broad exemptions from the nondiscrimination policy that allow them to engage in prohibited, gender-based distinctions. *See Student Handbook*, Guidelines for Non-Fraternal Student Organizations, Membership (approving non-religious "[s]election criteria" that is "relevant to the goals and objectives of the organization" and exempting "fraternal organizations" from the ban placed on discriminating "on the basis of sex"). This scheme clearly does not require that student organizations accept all comers; accordingly, *Martinez's* holding does not apply.

We hope this information will assist the University in promptly correcting its membership policy for religious student organizations so that no need for litigation to protect student expression will arise. Our attorneys are happy to work with the University to formulate a policy that fully complies with the First Amendment. Consequently, if the University is serious about reforming its policy and avoiding the need for litigation, we ask that you contact us by **July 9, 2012**. If we do not hear from you by that time, we will begin the process of seeking judicial review of the University's policy.

Cordially,

J. Matthew Sharp
Litigation Staff Counsel

* The *Martinez* Court specifically noted that it was not addressing the constitutionality of a policy allowing "[a] political . . . group [to] insist that its leaders support its purposes and beliefs," while a "religious group cannot." 130 S. Ct. at 2982. Notably, the four dissenters in *Martinez* viewed such a policy as clearly engaging in viewpoint discrimination. *See id.* at 3010 (Alito, J., dissenting); *see also id.* at 2999 (Kennedy, J., concurring) (*Martinez* would "likely [have] ha[d] a different outcome" if CLS could have shown that Hastings' policy was "content based either in its formulation or evident purpose").