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***Re: Denial of Recognition of Young Americans for Freedom***

Dear Sirs:

We represent Young Americans for Freedom at the University of Virginia (YAF-UVA) concerning the recent decision to "temporarily den[y]" its application for Contracted Independent Organization (CIO) status because of the group's requirement that official members and leaders share the conservative principles that YAF-UVA is formed to foster and promote. As explained below, this decision is in violation of Virginia law. It is also unconstitutional. For these reasons we ask that you promptly recognize YAF-UVA, amend the University of Virginia policy to reflect this state law, and ensure that all staff and student government members responsible for enforcing this provision are trained about this change.

By way of introduction, Young America's Foundation (YAF) is the principal outreach organization of the Conservative movement, inspiring thousands of American youth by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. YAF's chapter affiliates are found on hundreds of campuses nationwide, and now hope to bring this message to the grounds of the University of Virginia. ADF's Center for Academic Freedom, is a non-profit legal organization dedicated to ensuring freedom of speech and association for students and faculty so that everyone can freely participate in the marketplace of ideas without fear of government censorship.[1]

[1] Alliance Defending Freedom has achieved successful results for its clients before the United States Supreme Court, including six victories before the highest court in the last six years.

Kevin McMahon, President of YAF-UVA, has submitted a complete application for CIO status to Ty Zirkle, the Vice President for Organizations for the UVA Student Council. On November 5, 2017 Mr. Zirkle emailed Mr. McMahon, informing him as follows:

> "I consulted Student Activities about the [YAF-UVA] constitution and concerns that certain wording was in conflict with the non-discrimination language. In short, recognized CIO's cannot restrict students from joining an organization on the basis of political affiliation, which includes limiting membership to students who support the Sharon Statement. Support for the Sharon Statement can absolutely be included in the mission/purpose section of the constitution and will naturally attract interested students, but it cannot be a membership requirement. Additionally, Student Activities recommended removing some wording from the bylaws that give the executive board the ability to terminate membership on any basis. These edits should not affect the mission or programs of the organization but will bring practices in line with University policy."

The UVA policy referenced above and applied to YAF-UVA states as follows:

> "A student organization is ineligible for CIO status when the organization restricts its membership, programs, or activities on the basis of age, color, disability, gender identity, marital status, national or ethnic origin, political affiliation, race, religion, sex (including pregnancy), sexual orientation, veteran status, and family and genetic information. Notwithstanding these requirements, a CIO may petition to restrict its membership based on gender (e.g. all-male or all-female a cappella groups) or an ability to perform the activities related to the organization's purpose by filing a written request with the Office of the Dean of Students. In evaluating any such requests, the University will look not merely to the constitution of an organization but to its actual practices and operations."[2]

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*See e.g. Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 15-577, 2017 WL 2722410 (U.S. June 26, 2017) (striking down state burden's on ADF's client's free-exercise rights); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curium) (successful result for religious colleges' free exercise rights); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF's client's free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (striking down federal burden's on ADF's client's free-exercise rights); *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state's tuition tax credit program defended by a faith-based tuition organization represented by ADF).

[2] YAF-UVA does not restrict its membership or leadership on any basis other than those listed in its Constitution – specifically agreement with The Sharon Statement – and its events and activities are open to anyone. YAF-UVA does not understand the UVA nondiscrimination

## VIRGINIA LAW

This requirement violates Virginia law. VA Code Ann. § 23.1-400 states as follows:

> A. To the extent allowed by state and federal law, a religious or political student organization may determine that ordering the organization's internal affairs, selecting the organization's leaders and members, defining the organization's doctrines, and resolving the organization's disputes are in furtherance of the organization's religious or political mission and that only persons committed to that mission should conduct such activities.
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> B. No public institution of higher education that has granted recognition of and access to any student organization or group shall discriminate against any such student organization or group that exercises its rights pursuant to subsection A.

Without belaboring the point, the plain text of this law prohibits the University of Virginia from denying recognition to or otherwise discriminating against YAF-UVA because of its requirement that official members and/or officers agree with the principles of the Sharon Statement.[3] On this ground alone, the decision to deny recognition to YAF-UVA was illegal.

## FIRST AMENDMENT

Additionally, the application of the UVA nondiscrimination policy to deny CIO status to YAF-UVA violates the First Amendment. The First Amendment's Free Speech Clause protects the right of expressive associations, like student organizations at public universities, to select their members and leaders based upon their adherence to each individual organization's beliefs.[4] As the Supreme Court recently reiterated, "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed."[5]

This freedom of association protects a student advocacy club's ability to set their own membership and leadership requirements. "Freedom of association . . . plainly presupposes a freedom not to associate."[6] In fact, "[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

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statement to limit or interfere with its expression or advocacy in its programs and activities (i.e. prohibiting it from advocating for its understanding of gender). To the extent this policy would deny YAF that right, YAF would also object to these restrictions on its First Amendment rights.

[3] Notably, YAF is not a "political" organization at all and does not limit membership or leadership to affiliation with any political party nor engage in partisan political activity.

[4] *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.").

[5] *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2282 (2012).

[6] *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

underlie the association's being."[7]

Public colleges and universities consequently violate the rights of students by requiring them to abandon their right to associate with persons who share their beliefs as a condition to receiving the government benefits associated with CIO status and accessing an otherwise open speech forum.[8]

Indeed, UVA—like most colleges and universities—only prohibits "discrimination" based on a narrow list of characteristics, thus *permitting* "discrimination" on a vast array of social and ideological grounds. A pro-choice club may deny leadership positions to pro-life students, and a gun control group may determine that it does not wish to extend membership to NRA members. Yet, by the terms of this policy – and its application here – religious and political student groups are specifically barred from instituting requirements for leadership and voting membership based on the beliefs their organizations seek to promote. Formulating a nondiscrimination policy in this manner blatantly discriminates against these student groups. The discriminatory effect of this policy is only exacerbated by the fact that YAF-UVA is aware of actual "political" CIOs on grounds with membership and leadership standards similar to YAF-UVA's.

Similarly, the Free Speech Clause[9] prohibits public colleges and universities from excluding groups from speech forums based on the content or viewpoint of their expression.[10] Targeting religious or political expression through religious or "political" membership and leadership restrictions, in such a group's founding documents discriminates on the content and viewpoint of its speech. Under the apparent interpretation of the UVA policy here, some advocacy groups may require that members and officers share the group's commitments. But if an advocacy group is deemed "political," as YAF-UVA was here, it may not state its requirements in its own constitution. Likewise, the parallel interpretation of the UVA policy with respect to religious student groups would mean that secular groups may express reasonable philosophical requirements for leaders and members in their constitutions, but religious student groups would be denied this right simply because the views for which they advocate – and thus the standards to which they hold their leaders – are religious. But the First Amendment prevents government from prohibiting speech on "otherwise permissible subjects" simply because "the subject is discussed from a religious [or political] viewpoint."[11]

It is likely because of these concerns about the violation of students' First Amendment rights

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7 *Democratic Party v. Wis. ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981).

8 *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).

9 The application of this policy to religious student groups – particularly where, as here, UVA exempts other groups from its policy – would likewise raise concerns under the Free Exercise Clause for those groups.

10 *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

11 *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001).

that the General Assembly enacted VA Code Ann. § 23.1-400.

Finally, it is important to note that *Christian Legal Society v. Martinez*[12] does not apply here. First, the Commonwealth of Virginia has enacted a state law, VA Code Ann. § 23.1-400, that prohibits the application of the UVA nondiscrimination policy here. Further, *Martinez* is expressly limited to situations in which "access to a student-organization forum" is conditioned "on compliance with an all-comers policy."[13] Indeed, the *Martinez* Court specifically noted that it was not addressing a policy allowing "[a] political . . . group [to] insist that its leaders support its purposes and beliefs," while a "religious group cannot"[14] [or in this case prohibiting the political group from so limiting its membership and leadership while permitting same sex student groups and others to do so – including even other political groups]. The so-called "all-comers" policy in *Martinez* required *all* student groups to open membership to *all* students, with no exceptions.

Most colleges, like UVA, do not employ "all-comers" policies. Rather, they enforce policies that prohibit discrimination on a few protected characteristics. Student groups may thus limit leadership and voting membership on any reasonable basis not listed in the policy, and single-sex a cappella groups and other single sex groups enjoy broad exemptions from the policy that allow them to engage in otherwise-prohibited, gender-based discrimination. Indeed, any group can seek an exemption based on the "ability to perform the activities related to the organization's purpose." This scheme clearly does not require that student organizations accept all comers; accordingly, *Martinez's* holding does not apply.

## CONCLUSION

The denial of CIO status to YAF-UVA violates Virginia law. It also violates the First Amendment. Given the clarity of the state law on point and YAF-UVA's desire to promptly begin to engage in advocacy on grounds at UVA, we ask that you immediately grant its request for CIO status by Wednesday, December 20. In order to ensure that this problem does not recur in the future – potentially leading to litigation in the future – we also ask that you update the UVA nondiscrimination statement to incorporate the requirements of VA Code Ann. § 23.1-400. Finally, we ask that you educate all offices and individuals responsible for enforcing the UVA nondiscrimination statement to avoid this erroneous application of the policy in the future.

Sincerely,

M. Casey Mattox
Senior Counsel
Director, Center for Academic Freedom

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12 *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010).

13 *Id.* at 2984.

14 *Id.* 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); *accord id.* at 2999 (Kennedy, J., concurring) (noting *Martinez* "likely should [have] a different outcome" if Hastings' policy was "content based either in its formulation or evident purpose").