ALLIANCE DEFENSE FUND
Defending Our First Liberty

April 27, 2012

Dr. Donald O. Straney, Chancellor
Office of the Chancellor
University of Hawaii at Hilo
200 West Kawili Street
Hilo, Hawaii 96720

Leomi Berkgnut, Student Leadership Coordinator
University of Hawaii at Hilo
Campus Center
200 West Kawili Street
Hilo, Hawaii 96720

Re: Protecting Students' Free Speech, Free Association, and Free Exercise Rights at University of Hawaii at Hilo

Dear Dr. Straney and Ms. Leomi:

It has recently come to our attention that University of Hawaii at Hilo maintains a policy that endangers the First Amendment freedoms of its students. If the University interprets its nondiscrimination policy governing the recognition of student organizations to prohibit religious organizations from selecting their members or leaders on the basis of their religious beliefs, then this policy violates the rights of religious students and groups. We write to inform you of this constitutional infirmity with the University's policy and to urge you to rectify it as soon as possible.

By way of introduction, the Alliance Defense Fund (ADF) is a legal alliance that defends religious liberty and other fundamental rights. ADF is dedicated to ensuring that religious and conservative students and faculty may exercise their rights to speak, associate, and learn on an equal basis with all other students and faculty.

I. Religious Student Groups Must Have the Right to Select Members and Leaders who Share their Religious Beliefs

The University's policy governing the recognition of student organizations, found in the Registered Independent Student Organizations Handbook,[1] conditions the establishment of a student organization on a student group's willingness to abide by a nondiscrimination policy. The policy states student organizations are responsible for "[a]voiding any policy or practice that discriminates against any person by reason of race, creed, color, age, national origin, ethnic background, gender, sexual orientation or religion."

[1] University of Hawaii at Hilo, Registered Independent Student Organizations Handbook, *available at* http://hilo.hawaii.edu/campuscenter/riso/documents/RISOHandbook.pdf (last visited Apr. 27, 2012).

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 the organizations' beliefs. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). As the Supreme Court has said, "[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).

Critically, just this year the Supreme Court reaffirmed that, over and above the protections provided by the Free Speech Clause, the Free Exercise Clause guarantees this self-definitional right to religious organizations. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012); *see also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (noting that Free Exercise and Establishment Clauses work together in "protect[ing] 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 Court held 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 held 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 of their groups, they are exercising this essential freedom. Public universities violate these fundamental First Amendment protections by requiring religious student groups to abandon their right to associate with persons who share their religious beliefs as a condition to accessing a wide open student organization speech forum. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (university violated First Amendment when it conditioned access to a free speech forum on 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, which is an analog to the First Amendment, by conditioning Christian student organization's access to a free speech forum on its willingness to abandon requirement that its leaders share its Christian beliefs).

This violation is all the more egregious when a university grants access to its speech forum to other student groups that restrict membership in various ways, while denying access to religious groups that desire to exercise this same right. This is typically what occurs when public universities wrongly interpret their nondiscrimination policies to prohibit religious groups from selecting members and leaders on the basis of their religious beliefs. This is because the nondiscrimination policies at most universities, including University of Hawaii at Hilo, prohibit discrimination based on a very short list of characteristics, thereby *permitting* restrictive membership policies on any basis *not* listed in them. Thus, groups can restrict members on the basis of their political, social, and ideological views, and on any other ground not proscribed by the policy (*i.e.*, academic merit, leadership potential, dedication to community service, etc.). And universities also typically grant a broad exemption for fraternities and sororities to engage in

gender-based discrimination, as University of Hawaii at Hilo does here. In fact, the entire Greek system is predicated on selectivity in membership, and not just on gender grounds. Greek organizations are notoriously selective, denying membership for consequential (i.e., academic achievement, major of study, etc.) and petty (i.e., coming from the wrong family, driving the wrong car, wearing the wrong clothes, etc.) reasons. Under the typical nondiscrimination policy, a university will grant speech forum access to a Democrat club that excludes Republicans, a Planned Parenthood club that rejects pro-lifers, an animal rights group that says "no thanks" to NRA enthusiasts, and dozens of fraternities and sororities that choose members based on gender (and many other grounds), yet may deny access to religious groups that desire to employ similarly restrictive criteria in selecting their members. It is blatant religious discrimination for a public university to enforce its nondiscrimination policy in this manner.

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 to situations like the one we have described above. *Martinez* was expressly limited to "whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution." *Id.* at 2984.[2] Under the "all-comers" policy at issue in *Martinez*, all student groups had to open their membership to all students, with no exceptions. Most universities, like University of Hawaii at Hilo, do not employ all-comers policies. Rather, they enforce policies that prohibit discrimination on a few protected characteristics, thus allowing "discrimination" on any basis not listed in the policy, and also typically grant a broad exemption to fraternities and sororities to engage in gender-based discrimination. Such policies are simply not all-comers policies, and *Martinez* is therefore inapplicable to them.

Other First Amendment doctrines also prohibit public universities from excluding religious groups from speech fora based on their desire to employ religious criteria in selecting their members and leaders. For example, in addition to protecting the right to expressive association discussed above, the Free Speech Clause also prohibits public universities from excluding speakers from a speech forum based on the content or viewpoint of their speech. *See Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). When universities target religious student groups for exclusion from speech fora based on the religious expression contained within their organic documents (i.e., the faith-based membership and leadership restrictions they put in place to maintain control over their religious identities and expression), they are engaging in unlawful content- and viewpoint-based discrimination.

Further, in addition to the protections noted above, the Free Exercise Clause also prohibits public universities from adopting non-neutral and non-generally applicable policies that target religious groups for special disabilities. *See Church of Lukumi Babalu Aye, Inc. v. City of*

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[2] In *Martinez*, the Supreme Court specifically noted that it was not deciding whether it was constitutional for a policy to allow, "[f]or example, [a] political . . . group [to] insist that its leaders support its purposes and beliefs," while a "religious group cannot." *Id.* at 2982. And, notably, the four dissenters in *Martinez* viewed a policy that operated in that manner as resulting in clear-cut viewpoint discrimination. *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").

Hialeah, 508 U.S. 520 (1993). The typical nondiscrimination policy, described above and employed by University of Hawaii at Hilo, could easily run afoul of the holding in *Lukumi* if interpreted to prohibit religious student groups from selecting members and leaders based on their religious beliefs. Under those circumstances, the policy's unlawful targeting of religious groups appears on its face, since the policy includes the term "religion." Moreover, permitting nonreligious groups to select their members and leaders on the basis of their nonreligious beliefs, while denying religious groups this same right, is the epitome of a non-neutral and non-generally applicable law that burdens religious exercise and practice. The same is true of granting fraternities and sororities an exemption from the prohibition on gender-based discrimination, while denying religious groups a similar exemption from the prohibition on religious discrimination.

II. Conclusion.

Public universities are the quintessential "marketplace of ideas," *Healy v. James*, 408 U.S. 169, 180 (1972), and are "one of the vital centers for the Nation's intellectual life," *Rosenberger*, 515 U.S. at 836. A public university should invite robust debate and dialogue on every conceivable issue, be open to the widest possible array of ideas and views, and adopt policies that encourage the fullest possible exercise of First Amendment freedoms.

University of Hawaii at Hilo's nondiscrimination policy for student organizations, if the policy is interpreted so as to bar student organization recognition to religious groups that desire to employ religious belief-based membership and leadership criteria, is inimical to these goals. The University can resolve this problem by simply adopting an exemption from its nondiscrimination policy for religious student groups that select their members and leaders on the basis of their religious beliefs. Failing to take this action would unnecessarily make the University vulnerable to a federal lawsuit and an award of costs and attorneys' fees under 42 U.S.C. § 1988.

I hope this information has been helpful to you. Please notify my office by **May 25, 2012**, that the University will be enacting the above policy revisions. ADF attorneys are available to assist with these revisions, if such assistance is needed. If we do not hear from you by that time, we will begin the process of seeking judicial review of the policies.

Sincerely,

David J. Hacker
Legal Counsel