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

Chancellor Nicholas Zeppos
Vanderbilt University
211 Kirkland Hall
Nashville, Tennessee 37240

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

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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).[1]

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,

[1] 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 (9th 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.
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> 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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