1st Amendment
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Representative Matt Hall, Chair
House Oversight Committee
Michigan House of Representatives
The Michigan Capitol
Lansing, Michigan

SUBJECT: House Bills 4435 & 4436

Dear Representative Hall:

My name is Lance Kinzer, and I am the Policy Director for 1st Amendment Partnership, where we are privileged to work with some of the nation's largest faith communities with respect to their common commitment to First Amendment freedoms.

While we believe that all the provisions of HB 4435 & 4436 represent a well-balanced approach to achieving important public policy goals, I am going to focus my testimony on Section 3(vii) of HB 4436 pertaining to "belief-based student organizations."

It is commonplace for belief-based organizations to require their leaders to affirm and live consistently with the principles around which their groups were formed.

For decades, the right of student organizations to do just this was clear as a matter of constitutional law. A long line of United States Supreme Court cases held: that student groups can't be removed from campus merely because of their beliefs (*Healy v. James*, 1972); that belief-based student groups must be provided access to facilities under the same standards as other groups (*Widmar v. Vincent*, 1981), and; that student activity funds cannot be withheld from a group merely because they promote or manifest a particular belief system (*Rosenberger v. University of Virginia*, 1995).

Unfortunately, many universities, including Wayne State University and the University of Michigan, have attempted to take advantage of ambiguity in the case law created by a US Supreme Court case, *Christian Legal Society v. Martinez (2010)*. That case dealt with the very uncommon situation where a university adopts a policy that says no student club can place any restriction whatsoever on their leaders. Almost no university has adopted and applied a true "all-comers" policy. But attempts by universities to expand the scope of *Martinez*, have resulted in needless litigation that harms the very students that universities exist to serve.

Fortunately, the *Martinez* case itself was clear that universities and state legislatures are free to adopt policies that safeguard the right of belief- based student organizations to choose leaders who agree with the club's mission and belief statements. Thirteen states have already passed laws that provide this kind of protection to students attending public colleges and universities.

The protection offered to belief-based student organizations by HB 4436 are common place in analogous provisions of both federal and Michigan law. The basic reasoning of the U.S.

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Supreme Court in the *Widmar* case referenced above was statutorily codified for public secondary schools in 1984 when Congress adopted the *Equal Access Act, 20 U.S.C. 4071*, which protects the right of public high school students to develop associations based on shared values and core convictions.

The U.S. Supreme Court upheld the *Equal Access Act* in a 9-0 decision in *Westside Community Schools v. Mergens (1990)*. In that opinion, the Court was clear that in granting equal access for student associations to use school facilities, the state does not establish religion (nor endorse any viewpoint an organization may hold) – it merely upholds freedom. HB 4436 extends this basic idea, codified for public secondary schools for the last 34 years under the *Equal Access Act*, to public college and university campuses in Michigan.

Moreover, federal and state nondiscrimination law typically recognize the right of religious organizations to choose their leaders on the basis of their religious beliefs. At the federal level, by way of example:

A) *Title VII* explicitly provides that religious associations may use religious criteria in hiring decisions. In three separate provisions, it exempts religious associations from its general provisions on religious discrimination:

1) *42. U.S.C. 2000e-1(a)* (Act does not apply to religious associations with respect to employment of an individual to perform work connected with carrying on the associations' activities);

2) *42 U.S.C. 2000e-2(e)2)* (Act does not apply to a religious educational institution with respect to the employment of employees that share that institutions' religious convictions, where the institution is directed toward the propagation of a particular religion);

3) *42 U.S.C. 2000e-2(e)(1)* (Any employer may hire on the basis of religion where religion is a bona fide occupational qualification)

These exemptions were upheld by the U.S. Supreme Court in *Corporation of Presiding Bishop v. Amos (1987)*. Moreover, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012)*, the Court unanimously rejected the federal government's argument that federal nondiscrimination laws could be used to trump religious association leadership decisions. As Justice Alito and Justice Kagan stressed that while nondiscrimination laws are "undoubtable important", "[r]eligious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."

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B) In Michigan, the Elliott-Larsen civil rights act and subsequent declaratory rulings from the Michigan Civil Rights Commission provide for the accommodation of religious belief and practice even in circumstances that would otherwise impact a protected class.

1) *Michigan Compiled Laws 37.2208* (employment discrimination standards do not apply to an employer with respect to qualifications for employment based on religion, where the qualification is reasonably necessary to the normal operation of business);

2) *Michigan Compiled Laws 37.2403* (educational institution discrimination standards do not apply where a religious educational institution limits admission or gives preference to an applicant of the same religion).

3) Michigan Civil Rights Commission declaratory ruling on contraceptive equity (2006) (sex and pregnancy discrimination in the context of employment standards regarding insurance coverage of contraceptives do not apply to religious employers—mirrors federal Title VII requirements)

The argument that is improper to provide protections (in furtherance of 1st Amendment rights) that may limit the applicability of nondiscrimination policies, is simply inconsistent with current state and federal law, where such protections have long been an important part of those very laws.

HB 4436 merely seeks to make these same kind of common sense accommodations available to belief-based student organizations at public colleges and universities. Such institutions should welcome diverse student groups as a part of a vibrant campus life. By creating a clear standard, HB 4436 promotes this important goal, avoids needless litigation, and makes sure that university administrators cannot decide who is entitled to operate as a student organization based upon which beliefs those administrators favor or disfavor.

Respectfully,

/S/ Lance Y. Kinzer
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Faiths united for religious freedom
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