CHRISTIAN LEGAL SOCIETY
CENTER FOR LAW AND RELIGIOUS FREEDOM

November 8, 2021

President C. Scott Green
University of Idaho
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Moscow, Idaho 83844-3151

Sent by email: president@uidaho.edu

RE: Time Sensitive Matter—Violation of Students' Rights Under the Federal Constitution, Federal Regulations, And State Statute

Dear President Green:

I write on behalf of the Christian Legal Society ("CLS") chapter at the University of Idaho College of Law. The chapter seeks recognition as an official student organization at the College of Law and has filed the necessary documents to be an officially recognized student organization. Unfortunately, instead of treating the CLS students fairly and with respect, the College of Law's Student Body Association ("SBA") has delayed recognizing the CLS chapter and subjected its student leaders to an unseemly inquisition regarding their religious beliefs, including religious standards for leaders.

I. Demanding that Public University Students Defend Their Religious Beliefs Before the SBA is Unconstitutional Viewpoint Discrimination in Two Basic Ways.

Cross-examining students about their religious beliefs. Every student has a right to attend a public university without having to identify and defend his or her religious beliefs, or lack thereof. There is no more basic right for any American student. Yet, the SBA Board has asked CLS students questions about their religious beliefs in violation of the First Amendment, two federal regulations, and Idaho state law. The withholding of recognition from the CLS chapter, as well as the questions asked by SBA of CLS student representatives, make clear that CLS's religious beliefs are unpopular with many members of the SBA Board, and also with some College of Law administrators. The unpopularity of the CLS students' religious beliefs is the reason for the withholding of recognition.

The SBA's withholding of recognition and its unconstitutional examination of the CLS students' religious beliefs are unconstitutional viewpoint discrimination. University officials "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (exclusion of religious student organization from allocation of student activity fees because of its evangelical Christian beliefs violated the Free Speech Clause). This same regulation of CLS students'

speech because of its "specific motivating ideology or the opinion or perspective of the speaker" is precisely the viewpoint discrimination that the SBA is committing by its withholding recognition of the CLS student organization.

As a result of the SBA's treatment of the CLS students, it has become readily apparent that the SBA is unable to render a fair and unbiased judgment as to whether the CLS chapter should be recognized as a student group. As the Supreme Court held nearly 50 years ago, a public college may not deny a student organization recognition or otherwise "restrict speech or association simply because it finds the views expressed by any group to be abhorrent." *Healy v. James*, 408 U.S. 169, 187-88 (1972). Therefore, university administrators need to step in and grant official recognition to the CLS chapter.

Allocation of student activity fees must be viewpoint neutral. Second, SBA's allocation of student activity fees is also unconstitutional viewpoint discrimination. The allocation of student activity fees must be viewpoint neutral—or the allocation system must cease. In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 221 (2000), the Supreme Court held that "[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech *if the program is viewpoint neutral*[,]" but the Court *refused to "sustain* . . . the student referendum mechanism of the University's program, which appears to permit the exaction of fees in violation of the viewpoint neutrality principle." (Emphasis added).

The Court remanded the case to determine how the referendum worked. Specifically, the Court explained, "it appears that by majority vote of the student body a given RSO may be funded or defunded. . . . To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. *The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.* That principle is controlling here." *Southworth*, 529 U.S. at 235.

II. In 2021, Three Federal Courts Ruled that University Officials Lost Their Qualified Immunity for Threatening to Derecognize Religious Student Organizations Because They Required Their Leaders to Agree with Their Religious Beliefs.

The SBA's unlawful actions pose a serious threat not only to the CLS students, and to the continued allocation of student activity fees, but the SBA's actions also pose a grave legal threat to University of Idaho officials. University administrators are responsible for any unconstitutional and unlawful actions taken by the SBA. University officials are ultimately responsible for the final decision whether to recognize an organization. See, *e.g.*, *Southworth*, 529 U.S. at 233; *Rosenberger*, 515 U.S. at 832. The SBA may play a role in the process, but the final decision cannot be outsourced to the SBA. When the

SBA's actions violate federal and state law, it is the legal duty of the University officials to step in and recognize the CLS chapter and provide it with all the benefits otherwise available to other student groups.

In 2021, three federal court decisions held that college administrators lost their qualified immunity when they unconstitutionally threatened the recognition status of religious student groups because the groups required their leaders to agree with their religious beliefs. It is a common practice—and common sense—not only for religious groups, but also for environmental, pro-abortion or pro-life organizations, and many other advocacy groups, to require that their leaders agree with the organizations' core beliefs.[1]

The law is clearly established: Both federal and state law require that the University recognize the CLS chapter. If the University does not grant recognition to the CLS student group, the University officials who decide to withhold recognition risk losing their qualified immunity and incurring personal liability for their decisions to withhold recognition and any attendant benefits provided to other student organizations.

A. Idaho State Law Requires that the Christian Legal Society Chapter be Recognized as an Official Student Organization at the University.

Idaho is one of sixteen states that, over the past decade, have enacted laws to protect religious student groups' right to choose leaders who agree with their core beliefs.[2] Those states are: Arizona (2011), Ohio (2011), Idaho (2013), Tennessee (2013), Oklahoma (2014), North Carolina (2014), Virginia (2016), Kansas (2016), Kentucky (2017), Louisiana (2018), Arkansas (2019), Iowa (2019), South Dakota (2019), Alabama (2020), North Dakota (2021), and Montana (2021).

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[1] Student organizations meeting at the law school include several advocacy, religious, ethnic, and ideological groups, often promoting controversial viewpoints: Advocacy for Disability Justice; American Civil Liberties Union; American Constitutional Society; Environmental Law Society; Federalist Society; Idaho Trial Lawyers Association; Idaho Veteran Law Association; J. Reuben Clark Law Society; Latino/a Law Caucus; Native American Law Students Association; National Lawyers Guild; OutLaw; Pan-Asian Law Affairs; and Women's Law Caucus.

[2] See Ala. Code 1975 § 1-68-3(a)(8) (all student groups); Ariz. Rev. Stat. § 15-1863 (religious and political student groups); Ark. Code Ann. § 6-60-1006 (all student groups); Idaho Code § 33-107D (religious student groups); Iowa Code § 261H.3(3) (all student groups); Kan. Stat. Ann. §§ 60-5311-5313 (religious student groups); Ky. Rev. Stat. Ann. § 164.348(2)(h) (religious and political student groups); La. Stat. Ann.-Rev. Stat. § 17.:3399.33 (belief-based student groups); Mont. Code Tit. 20, Chap. 25, Pt. 5; N.C. Gen. Stat. Ann. § 116-40.12 (religious and political student groups); N.D. Code § 15-10.4-02(h); Ohio Rev. Code § 3345.023 (religious student groups); Okla. St. Ann. § 70-2119.1 (religious student groups); S.D. Ch. § 13-53-52 (ideological, political, and religious student groups); Tenn. Code Ann. § 49-7-156 (religious student groups); Va. Code Ann. § 23.1-400 (religious and political student groups).

Idaho Code § 33-107D requires:

> (1) No state postsecondary educational institution shall take any action or enforce any policy that would deny a religious student group any benefit available to any other student group based on the religious student group's requirement that its leaders adhere to its sincerely held religious beliefs or standards of conduct.
>
> (2) As used in this section:
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> (a) "Benefits" include without limitation:
> (i) Recognition;
> (ii) Registration;
> (iii) The use of facilities at the state postsecondary educational institution for meetings or speaking purposes;
> (iv) The use of channels of communication of the state postsecondary educational institution; and
> (v) Funding sources that are otherwise available to any other student group through the state postsecondary educational institution.
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> (b) "State postsecondary educational institution" means a public postsecondary organization governed or supervised by the state board, the board of regents of the University of Idaho, a board of trustees of a community college established pursuant to the provisions of chapter 21, title 33, Idaho Code, or the state board for career technical education.

The Idaho Legislature enacted the law in 2013[3] after Boise State University threatened to derecognize religious student groups for requiring their leaders to agree with their religious beliefs. Idaho Code ¶ 33-107D was enacted to prohibit Idaho postsecondary educational institutions from denying recognition and other benefits, including funding, to a religious student organization. Specifically, the CLS chapter at the University of Idaho cannot be denied recognition or benefits "based on the religious student group's requirement that its leaders adhere to its sincerely held religious beliefs or standards of conduct."

Idaho state law clearly establishes that University of Idaho administrators must recognize the Christian Legal Society chapter and grant it any benefits otherwise received by other student groups.

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[3] S 1078 passed the Senate 30-5, and the House 56-11. Idaho Legislature, 2013 Legislation, S 1078, https://legislature.idaho.gov/sessioninfo/2013/legislation/S1078/

B. Federal Regulations Make it a Material Condition of Any Grant that the University Receives Directly or Indirectly from the United States Department of Education that the University Not Deny Recognition and Attendant Benefits to a Religious Student Organization "Because of the Religious Student Organization's Beliefs, Practices, Policies, Speech, Membership Standards, or Leadership Standards."

Two United States Department of Education regulations, 34 C.F.R. §§ 75.500(d) & 76.500(d), set as a material condition on any grants that the University receives from the Department of Education, either directly or through the State or a subgrantee, that the University not deny a religious student organization recognition or other benefits, including funding, "because of its religious beliefs, practices, policies, speech, membership standards, or leadership standards."

Specifically, 34 C.F.R. § 75.500(d) states, and 34 C.F.R. § 76.500(d) is nearly identical:

> (d) As a material condition of the Department's grant, each grantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.

Like Idaho Code § 33-107D, the federal regulations clearly establish that University of Idaho administrators have a duty to recognize the CLS chapter and grant it any benefits otherwise received by other student groups, or risk the loss of Department of Education grants.

C. Three Federal Court Decisions in 2021 Clearly Establish that Education Officials Forfeit Their Qualified Immunity if They Threaten to Derecognize a Religious Student Organization Because it Requires its Leaders to Agree with its Religious Beliefs.

In 2021, the Eighth Circuit Court of Appeals in two separate cases ruled that University of Iowa officials lost their qualified immunity when they violated the First Amendment by derecognizing two religious student groups because they had religious leadership requirements. Derecognition was unconstitutional viewpoint discrimination against the religious student groups. *InterVarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021); *Business Leaders in Christ ("BLinC") v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021). The University's Vice President for Student Life, the

Associate Dean of Student Organizations, and the Coordinator for Student Development forfeited their qualified immunity. *InterVarsity*, 5 F.4th at 861.

Similarly, in the *BLinC* case, the Eighth Circuit held that University officials lost their qualified immunity because they denied recognition to a religious student group because it required its leaders to agree with its religious beliefs, including its beliefs concerning marriage and sexual conduct. The Eighth Circuit held "that the district court erred in granting qualified immunity to the individual defendants on [the religious student group's] free-speech and expressive-association claims." *BLinC*, 991 F.3d at 972. The officials who lost qualified immunity were the Dean of Students, the Assistant Dean of Students, and the Executive Director of the Iowa Memorial Stadium.

Finally, a Michigan federal district court found that Wayne State University officials forfeited their qualified immunity when they threatened to derecognize a religious student group because of its religious leadership requirements. *InterVarsity Christian Fellowship/USA v. Bd. Of Governors of Wayne State Univ.,* --- F. Supp.3d ---, 2021 WL 1387787 (E.D. Mich. 2021). The court held that the defendants, including the Dean of Students and the Coordinator of Student Life, were "not entitled to qualified immunity because the rights violated were clearly established." *Id.* at *32.

III. The CLS Chapter at University of Idaho Wishes to Move Forward.

The CLS chapter wants only to be a positive contributor to their law school community. The CLS students wish to put this regrettable episode behind them. To that end, they will meet one last time with the SBA on November 10. But they will answer questions for no more than ten minutes. *They will not answer any questions that touch upon their religious beliefs, speech, practices, policies, or leadership standards.* They will not answer any disparaging questions, including any questions about CLS's or their religious beliefs, speech, practices, policies, or leadership standards.

The guiding principle is that government actors, including the SBA or any University administrator, cannot question any Americans about their religious beliefs. Like all government officials, student government representatives must heed our Republic's timeless lesson:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *West Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943).

If the SBA fails to recognize the CLS chapter with all the attendant benefits, including funding, on November 10, we respectfully request a response from the University

by November 12 to the effect that University administrators will comply with clearly established federal and state law and grant the CLS chapter official recognition, and the full benefits of recognition, including funding.

If I can be of any assistance, I am happy to schedule a time to talk. Also, going forward, please communicate with me rather than the CLS students. It is important that they be able to concentrate on their studies at this point in the semester and not have to deal further with this unconstitutional treatment.

Thank you for your consideration. I look forward to resolving this matter quickly.

Respectfully,

/s/ Kim Colby

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