March 1, 2019

Re: Oppose HB 254 – Don’t Permit Discrimination in Public Institutions of Higher Education

Dear Representative:

On behalf of the Kentucky chapter, members, and supporters of Americans United for Separation of Church and State, I write to urge you to oppose HB 254. This bill would require public universities and colleges to fund student groups that discriminate in their membership and leadership and therefore should be rejected.

This Bill Would Undermine “Accept-All-Comers” Policies

HB 254 is an attempt to nullify “accept-all-comers” policies, which the Supreme Court held constitutional in Christian Legal Society v. Martinez.1 These non-discrimination policies withhold funding2 from any public university student group that is not open to all students. The Supreme Court held that such policies do not implicate First Amendment limitations because compliance is a reasonable, viewpoint-neutral condition on access to the school’s forum and funding.3

Under the First Amendment, a public university that has created a limited public forum may not deny access to it based on a group’s viewpoints.4 The school can, however, condition funding for student groups based on reasonable, viewpoint-neutral conditions.5 Under an “accept-all-comers” policy, this means religious groups can discriminate within the school’s forum but cannot receive funding if they do so. In other words, religious groups still have unburdened free exercise and speech rights. They also have the same access rights as all other student groups. They do not, however, have the right to force a public university to subsidize their discriminatory policies—and neither does any other student group. Such a policy does not target the religious nature of any group—organizations of any political, religious, or ideological stripe can access funds provided they adhere to the nondiscrimination policy.

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2 The revenue stream for such funding, which is common at universities throughout the country, is created by a mandatory student activity fee imposed on students.
3 See Christian Legal Society, 561 U.S. at 697.
4 See Id. at 669.
5 Id.
The Bill Would Sanction Discrimination, Not Bar It

Public universities in Kentucky already have non-discrimination policies. For example, the University of Kentucky nondiscrimination policy states that the University “is committed to maintaining an environment free of prohibited discrimination,” which includes “negative or different treatment of an individual based upon . . . race, color, national origin, ethnic origin, religion, creed, age, physical or mental disability, veteran status, uniformed service, political belief, sex, sexual orientation, gender identity, gender expression . . .”6 HB 254, however, would undermine these policies by granting student groups the right to discriminate against student members on the basis of religion. Instead of treating all groups equally, this bill is designed to treat religious groups specially and to force schools to support discriminatory speech and conduct.

All student groups are allowed to control their organizational structure and management based on their beliefs or any other reason. But public institutions of higher education should have the right to safeguard that the mandatory student activity fees paid by all students only support those groups that are open to all students.

Conclusion

The Kentucky legislature must not support divisive legislation that fosters discrimination in America’s public education institutions. Thank you for your consideration on this important matter.

Sincerely,

Nikolas Nartowicz
State Policy Counsel

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6 University of Kentucky Regulations, Administrative Regulation 6:1, Policy on Discrimination and Harassment, (last visited Feb. 28, 2019).