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March 3, 2010

President David J. Skorton
Cornell University
Office of the President
300 Day Hall
Ithaca, New York 14853

Sent via U.S. Mail and Facsimile (607-255-9924)

Dear President Skorton:

As Director of Legal and Public Advocacy for the Foundation for Individual Rights in Education (FIRE), I write today in part to thank you for your efforts on behalf of the freedoms of expression, association, and religion at Cornell University in the wake of the controversy surrounding Chi Alpha Christian Fellowship last spring. We appreciate both your consideration of our letter of May 12, 2009, and University Counsel James J. Mingle's response of August 5, 2009. We were pleased to note your request for the inclusion of a footnote guaranteeing protection of "free speech, freedom of association and religious freedom" in a proposed revision to the anti-discrimination provisions of Cornell's Campus Code of Conduct.

While FIRE does not believe that the footnote, functioning as a "savings clause," would have provided sufficient security to the rights of student groups like Chi Alpha, we consider your request a welcome recognition of the importance of core constitutional liberties at a prestigious liberal arts university like Cornell. FIRE was further cheered by the University Assembly's decision last fall to abandon the proposed revision, and we believe you deserve significant credit for your leadership on this important issue. It is reassuring to know that your office is prepared to stand in support of fundamental freedoms, even when such a stance is unpopular or inconvenient.

To the same end, FIRE unfortunately must write you again today to register our deep concern about a new resolution recently passed by the Student Assembly (SA) in yet another attempt to restrict freedom of expressive association at Cornell. This resolution now comes before your office for approval. We urge you to act once more to protect the rights of expressive association, free expression, and freedom of religion at Cornell.

If approved, the resolution will deny students at Cornell the right to join with others of like mind in furtherance of common ends, including their own pursuit of truth. Cornell would effectively be dictating that student groups on campus do *not* enjoy basic associational autonomy and, as such, are *not* allowed to require their voting members and leadership to share their groups' fundamental beliefs. Indeed, Cornell students would be subjecting the fundamental rights of their peers with unpopular beliefs to a simple Student Assembly ballot. **As you have recognized in the past, these results are simply untenable at an institution like Cornell, which makes explicit promises of free expression, freedom of conscience, and religious freedom to Cornell students.**

As you may be aware, this resolution, Resolution 44, was enacted by a deeply divided vote of 9-8 on February 18. It reads in pertinent part:

> **Be it therefore resolved**, that the Student Activities Offices' contract for independent student organizations be amended as follows with insertions indicated in bold:
>
> 7. Non-discrimination
>
> The IO ["Independent Organization"] shall not discriminate on the basis of **actual or perceived** age, **ancestry or ethnicity**, color, **creed**, disability, gender, **gender identity or expression, height, immigration or** citizenship **status, marital status**, national origin, race, religion, **religious practice**, sexual orientation, **socioeconomic status, veteran status or weight** when determining its membership **and when determining full rights of membership, which shall include, but is not limited to, voting for, seeking, and holding positions within the IO.** Notwithstanding these requirements, a club sport may restrict membership based on gender, **height, and weight** where selection for such clubs is based upon competitive athletic skill or the activity involved is a contact sport. Organizations may also make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one gender. In determining cases of discrimination it is not sufficient to look merely to the constitution of the IO. Its actual practices and operations are also relevant.

By its plain language, Resolution 44 unequivocally denies student organizations the right to require that those students seeking voting membership or leadership positions *actually share* the group's core beliefs. In so doing, the Student Assembly renders freedom of expressive association an empty right and would force, for example, Christian student groups to accept avowed atheists as voting members, Muslim student groups to accept evangelical Christians, Jewish groups to accept anti-Semites, and so forth.

Further, by characterizing a student organization's right to make belief-based choices about voting membership and leadership as discrimination, Resolution 44 trivializes actual, status-based invidious discrimination. What the drafters and supporters of Resolution 44 deem "discrimination" has in fact been recognized by the Supreme Court as a crucial component of the exercise of the First Amendment right to expressive association, because "freedom of association

plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984). Distinguishing "discrimination" on the basis of *belief* from invidious discrimination based on *status* is critical. The right to exclude members based on status as opposed to belief does not follow from the right to form expressive organizations, because immutable characteristics such as one's skin color, gender, or sexual orientation do not define one's beliefs. However, the right to exclude people who do not share a common *belief* central to the group's purpose *is* fundamental to the right to expressive association.

Because Resolution 44 denies belief-based student groups the power to make belief-based membership decisions, any student groups holding unpopular viewpoints will be vulnerable to takeover and even dissolution by those students who fundamentally disagree with the group's views. This concern is not simply hypothetical. At Central Michigan University (CMU), for example, Young Americans for Freedom (YAF), a conservative political student group, was told by the administration that because of the university's nondiscrimination policy, it could not exclude from membership students who were explicitly seeking to dissolve the group. In February 2007, CMU students started a group on the social networking site Facebook.com entitled "People Who Believe the Young Americans for Freedom is a Hate Group," where students posted messages suggesting ways to destroy YAF. One post suggested that members of the Facebook group "go to their meetings and … *vote eachother* [sic] *onto the board and dissolve the group*." The post further suggested that if YAF attempted to exclude these individuals from their meetings, they would likely "*slip up and break a [CMU] discrimination policy*." (Emphases added.)

When the president of CMU's YAF chapter learned of this plan, he contacted the Associate Director of Student Life to ask if his group could prevent students who disagreed with the group's purpose from joining simply to ruin the group. The Associate Director of Student Life responded that "*you may not require members to be 'like-minded'* as that opens yourself up to discrimination based on political persuasion." (Emphasis added.) By this administrator's understanding of CMU's nondiscrimination policy—which mirrors the understanding advanced by the drafters and proponents of Resolution 44—YAF was powerless to control its own message. Such a result illustrates the absurdity of defining "discrimination" so broadly as to prohibit student groups from requiring that those who would lead the group actually agree with the group's purposes.

In practice, Resolution 44 would grant a majoritarian veto to the Cornell student body over what faiths or belief systems are acceptable on campus. It is hard to imagine a greater threat to the rights of religious and ideological minorities at Cornell. This echoes the concerns we voiced in our letter to you of May 12, 2009:

> Cornell should also be aware that by picking and choosing what religious beliefs student groups are allowed to have, Cornell will effectively be replacing those groups' own religious doctrine and dogma with a different set of doctrine and dogma that is to be enforced by Cornell and its agents. This is a bizarre choice for a university that presumably wishes to maintain a secular identity that is neutral towards the diverse religious beliefs held by its students. Is Cornell or its Student Assembly prepared to, for instance, punish Muslim groups on campus that

> enforce a discriminatory belief that women may not lead prayers in a congregation that includes men? Will Cornell or its agents punish a Catholic organization that enforces a discriminatory belief that women may not be priests, or an Orthodox Jewish organization that enforces a discriminatory belief that women may not be rabbis? If not, is this because Cornell's orthodoxy demands that some kinds of discrimination are religiously valid while others are not? If Cornell wishes to be in the business of picking and choosing which religious beliefs are acceptable, it will inevitably face more questions like these—which is why the vast majority of secular institutions in the United States refuse to interfere with such matters of belief and instead follow a policy of religious tolerance.

Similar concerns were voiced in a recent *Cornell Daily Sun* editorial, which observed:

> [T]he enforcement of this policy needs to be seriously considered. How will the University go about determining if groups' constitutions are discriminatory? For religious groups, will this place the University in the position of judging religious doctrine? This hardly seems like an appropriate solution.

("Refining Resolution 44," Feb. 22.) In response, Resolution 44's authors have argued that these concerns are overblown. In a letter to the *Sun* ("Defining Resolution 44," Feb. 23), Representatives Andrew Brokman and Matt Danzer write:

> Opponents argue that the resolution is too broad and lacks the nuance needed for a successful non-discrimination policy. This misses the point. Let us emphasize that the resolution will not result in inspections of every student group's constitution nor will anyone be judging what religious doctrines are approved, as was alluded to in the editorial. The resolution addresses discriminatory actions and does not censor thought or beliefs.
>
> If students want to form an exclusive club centered around their own values, it is their right to do so. But not on the student body's dime. That is Resolution 44.

But Brokman and Danzer fail to specify how Resolution 44 will result in anything *but* a judgment of which religious doctrines may be approved. Under Resolution 44, religious student groups must renounce core tenets of their faith to conform with the sensitivities of those students who are hostile to those beliefs, or else be denied recognition on account of "discrimination." Again, Resolution 44 effectively puts each religious group's right to exist up to a majoritarian vote—a result that is of course precisely contrary to the religious tolerance that the First Amendment seeks to ensure. Further, as University Assembly Representative John Cetta and Student Assembly Vice President for Finance Chris Basil argue in response ("Resolution 44 misses the point," Feb. 24), denying recognition to belief-based groups excludes those groups in a manner that extends far beyond "the student body's dime":

> This resolution will bar groups espousing ideas that its supporters disagree with from all of the following: (1) accessing funds from the SAFC, GPSAFC and other

> campus sources; (2) office space and/or mailboxes in Willard Straight; (3) inclusion on the list of student organizations on the Student Activities Office (SAO) website; (4) participation in the annual Student Activities Fair/Street Fair; (5) receiving club insurance coverage; (6) conducting fund-raising activities on campus; (7) using university property and services; (8) a home page on the Registered Student Organization server; (9) sponsoring programs and activities; and (10) the event-planning consultation services of the SAO. Under Resolution 44 certain student groups will not only be de-funded but they will be entirely exiled from the marketplace of ideas at Cornell. The disingenuous framing of this resolution as a simple matter of funding poses a grave threat to the campus community. There is much more at stake.

As FIRE pointed out in our May 12 letter, the Supreme Court has made clear that public institutions are required to grant religious organizations equal access to campus facilities (see *Widmar v. Vincent*, 454 U.S. 263 (1981)), and are also required to grant religious organizations equal access—on a viewpoint-neutral basis—to student fee funding. See *Board of Regents v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995). Given Cornell's unique hybrid status as a part-private, part-public institution, FIRE strongly believes that these rulings and others by the Court, which make clear the essentiality of robust First Amendment protections on college and university campuses, apply in full at Cornell. As you know, though many of the colleges at Cornell are considered to be private, at least four colleges are "statutory colleges" under New York state law and receive funding from the state of New York. Moreover, a number of public officials, including the Governor of the State of New York, serve as *ex officio* members of Cornell's Board of Trustees. Cornell has a significant public aspect to its governance. Indeed, Cornell has been classified as a state agency for the purposes of certain state regulations.

Brokman and Danzer further argue that Resolution 44 will in fact prohibit "discrimination" within *any* student group in which not *every* Cornell student is welcome, writing:

> Let us be as clear as possible: Resolution 44 will ensure that student money is withheld from groups that do not provide an opportunity for all students to participate fully. Period.

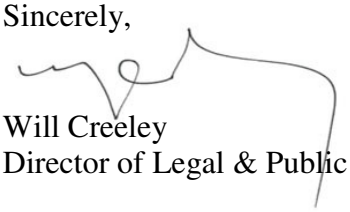
This broad characterization of Resolution 44's scope demonstrates that the policy is intended to effectively institute a "take all comers" rule, wherein *every* belief-based group, and not just religious groups, will be forced to accept all students. FIRE doubts that members of ideological student groups like Students Against Sweatshops, the Anti War Network, Direct Action to Stop Heterosexism, and many other current student groups are aware that under Brokman's and Danzer's interpretation of Resolution 44, they must either accept those students who explicitly and avowedly disagree with their central organizing purposes or else face defunding. As should be readily apparent, such a result is absurd. Yet this is the logical consequence of abandoning the time-honored protection of the right to freedom of expressive association. Of course, this abandonment is precisely what Resolution 44 is intended to accomplish.

As FIRE does, the student body again seeks your leadership. Student Assembly President Rammy Salem, for one, has made clear that he expects you to reject the resolution. Indeed, Salem told the *Sun* that he voted in favor of the resolution not because he supported it, but because doing so "will help continue the dialogue." ("Student Assembly Votes Yes On Anti-Discrimination Clause," Juan Forrer, Feb. 19.) But when the associational rights of those Cornell students holding unpopular or minority viewpoints are threatened by a Student Assembly vote, the desire for further dialogue may not be accomplished by putting violations of those rights into policy. The Student Assembly's vote must now be superseded by your decisive action.

FIRE asks again that Cornell University fulfill its laudable promises of free expression, freedom of conscience, and freedom of religion. We ask that you again demonstrate to students and to the public that the Cornell community is open to the free exchange of ideas and that the expression of disfavored or controversial views will never be restricted on campus.

We request a response to this letter by March 17, 2010. I thank you for your attention and sensitivity to these important concerns, as well as your past leadership, and I look forward to hearing from you.

Sincerely,



Will Creeley
Director of Legal & Public Advocacy

cc:
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Dennis Gaylor, National Director, Chi Alpha Campus Ministries
Rammy Salem, President, Student Assembly, Cornell University
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