Center for Bio-Ethical Reform

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Gregg L. Cunningham, Executive Director September 2016

Dear Pro-Life Supporter,

I hate nonsensical disputes within the pro-life movement and I will move heaven and earth to avoid them. CBR has its hands full fighting pro-aborts and I have no interest in also fighting pro-lifers. We promote healthy debates among pro-life groups with different strategic and tactical perspectives but we avoid what I call "idiot fights" -- petty squabbles over trivial issues. This letter describes a battle which is neither petty nor trivial, and I do not believe we can responsibly evade it. I apologize that this letter is six rather than the customary four pages in length but the issues concerning which I am writing are both complex and vitally important. They involve CBR's defense of the young people who are the future of our movement. They are being scandalously mistreated and they merit our defense. Our **Center For Bio-Ethical Reform (CBR),** has been receiving numerous disturbing reports from pro-life student groups that a national organization whose corporate name is **Students For Life of America (SFLA)** has begun threatening them with baseless lawsuits for alleged trademark infringement.

CBR has conclusively determined that **SFLA** is attempting to force pro-life students to stop using the phrase "students for life," or, in the alternative, sign over effective operational control of their organizations to **SFLA**. The "licensing" agreement pursuant to which **SFLA** would "permit" continued use of the term "students for life" is flawed, not least, because large numbers of pro-life student groups have used this term for decades before **SFLA** even existed. Many of them are signing these very intrusive contracts out of fear of devastating **SFLA** lawsuits and/or a lack of understanding of the legal implications of the contracts' terms. Registering a phrase which has long been in widespread use by others does not give **SFLA** the right to monopolize the use of that phrase and it certainly does not entitle **SFLA** to threaten those prior and contemporaneous users -- especially students -- who refuse to cease their long-time use.

SFLA is an influential, well-funded corporation whose coercive attempt to dictate the direction of student activism victimizes students whom the pro-life movement should instead be empowering. These students are the future of our movement and they should be mentored respectfully, not bullied disgracefully. **CBR** is therefore partnering with **Purdue Students For Life** and our attorneys at the **American Freedom Law Center (AFLC)** to file a petition to cancel **SFLA's** trademark registration of the phrase "students for life," with the Trademark Trial and Appeal Board (TTAB) of the U.S. Patent and Trademark Office (USPTO), (15 United States Code, Section 1067).

Our trademark cancellation petition is not a lawsuit and will not be conducted in a court of law. It will, however, allege, among other defects, that the **SFLA** trademark registration was improperly obtained in light of the existence of widespread and well known prior and contemporaneous users of the term "students for life" (such as, for instance, **Students For Life of Michigan**). **SFLA's** registration also involved an undeniable ulterior motive which is not among the proper statutory purposes which trademark registrations are intended to serve. **SFLA** registration of the term "students for life" is further invalid because the term, by itself, is merely "descriptive" and wholly "generic."

It must be emphasized that this trademark cancellation petition will target only **SFLA's** illegitimate ownership claims regarding the phrase "students for life." We will file no challenge to **SFLA's** registration of the trademarked terms "**Students For Life of America"** or "**SFLA."** Nor will we seek to cancel its registration of trade and service marks which depict paired candles, or any other marks properly obtained. Our goal is to ensure that everyone, not merely **SFLA**, can continue to use the term "students for life." If we win, **SFLA** will still be able to use the term. If we lose, **SFLA** will continue to threaten lawsuits against anyone else using the term.

A. PRIOR USE GROUNDS FOR CANCELLATION OF SFLA TRADEMARK REGISTRATION

The Trademark Act requires trademark registration applicants to sign a declaration (PTO Form 1478) affirming that "The signatory believes that to the best of the signatory's knowledge and belief, no other person has the right to use the mark in commerce, either in the identical form or in … near resemblance …." It strains credulity to imagine that **SFLA**, when signing this declaration, assumedly with advice of counsel, was unaware that more than 30 other parties were widely known to have been using the mark "students for life" for decades before the time of **SFLA's** first use in commerce (2006).

SFLA should also have known that more than 40 other parties had been using the term by the time **SFLA** registered this mark (2015). And those prior users are merely the ones our researchers have documented to this point, by name and date of first use in commerce. More are likely to be identified as our research continues. These discrepancies constitute a statutory ground for cancelling a registrant's trademark registration, in whole or in part. Noted author and trademark counsel Keith Barritt observes that "Under common law, trademark rights within a certain territory are based on priority of use within that territory. Sometimes a federal registrant is not the first user of a mark in a territory, and that an unregistered prior user may have superior rights …." At a minimum, prior users of the mark "students for life" are unquestionably entitled to concurrent use rights, along with **SFLA**.

B. IMPROPER ULTERIOR MOTIVE GROUNDS FOR CANCELLATION OF SFLA TRADEMARK REGISTRATION

A second statutory ground pursuant to which a trademark registration may be cancelled is a registration motivated by an improper ulterior motive. A legitimate purpose for trademark registration is to accord the registrant the degree of "distinctiveness" in the marketplace required to minimize the likelihood of "confusion" in the minds of consumers who might otherwise mistake one provider of goods or services with another.

SFLA, however, purposely trademarked a name well known to be in widespread use among campus pro-life organizations. **SFLA** then set about threatening student "prior users" with financially ruinous trademark infringement lawsuits if they refused to sign draconian "licensing" agreements -- which agreements effectively surrendered to **SFLA** operational control of "licensed" campus pro-life organizations. This improper ulterior registration motive is prima facie evidence of an invalid registration intent.

These **SFLA** "licensing" agreements are essentially hostile takeover attempts masquerading as intellectual property claims. They go far beyond conventional prohibitions against the usual trademark concerns. They have little to do with the kinds of errors or omissions which might diminish or tarnish a brand. They seek to exploit an enormous disparity in bargaining power between adults and students as a means of imposing on students **SFLA's** peculiar strategic vision -- without the inconvenience of dialogue, debate or negotiation. This sort of strong-arming breaches **SFLA's** fiduciary responsibility to students who in good faith have placed their trust in **SFLA**.

Perhaps the most shocking incident in which **SFLA** President Kristan Hawkins threatened trademark lawsuits to obtain possession of pro-life content which didn't belong to her involved a book written by pro-life authors John Ensor and Scott Klusendorf. Pastor Ensor and Mr. Klusendorf entered into a publishing agreement to write a book titled *Students For Life*, to which Ms. Hawkins said she would write a short forward. She indeed did write the forward and the authors sent her copies of the proposed book covers with the "*Students for Life*" title clearly depicted. In a September 6, 2012 email she admits "I see you all sent me an email in May to review the book design." In an August 16, 2012 email she says "I know I saw a draft of the book cover design." In a March 26, 2012 email she acknowledges forwarding the book title and cover design to her staff and said "Waiting for our team response and will get back to you." Nonetheless, months later, after thousands of copies of the book had already been printed, Ms. Hawkins demanded that the authors and publishers surrender the title "*Students for Life*" or she would sue them.

In a September 9, 2012 email message to the authors she said "**I REALLY, REALLY, REALLY do not want to do this** [lawsuit against you and your publishers] … and don't want to hurt you … but I cannot allow our brand to be harmed, something we have spent millions of donor funds [sic] creating." But she didn't "create" this "brand." It existed long before **SFLA** existed. And it isn't hers in any exclusive sense. When activism becomes a business, you spend donor dollars creating a brand instead of saving babies. And by pretending that this phrase is hers, she has a weapon with which to coerce control over much of the pro-life movement which uses the term "students for life." In the same message she threatened "I don't know what to do at this point besides sending the publishers a cease-and-desist letter and informing him of the legal action we are preparing to take." This sort of abuse of respected pro-life leaders is beyond shameful.

To justify her decision to violate her publishing agreement with Messrs. Klusendorf and Ensor, Ms. Hawkins also complained that the book had religious content, which Ms. Hawkins argued would discredit **SFLA** as a secular organization. In a September 19, 2012 email message she said "Yes, our students are … majority … Christian, but they know we are a secular organization and they appreciate that about us. We cannot have them wondering if we are becoming a religious organization and hurt our trust with them and relationships with students is [sic] the best thing we have." This is a false statement.

In an undated essay at ChristianPost.com, Ms. Hawkins decried the Urbana Student Missions Conference decision to exclude **SFLA** on grounds that they were not "religious." She then goes on for two pages attempting to refute that claim by arguing that SFLA is indeed religious -- and even Christian. She said "… our mission is to reach young Christians with the pro-life message" because she has "heard heartbreaking stories of Christians who had abortions because they had no support from their community and family. That's a huge failure on the church -- in fact, nearly three out of every four women who have abortions report an affiliation with a Christian denomination." In a slam at the Urbana conference sponsors, she laments that "… young Christian students aren't supported in their pro-life views from other Christian organizations, ones that supposedly follow Christ-like teachings of love and compassion and the calling to protect those who cannot speak for themselves."

Ms. Hawkins further complains Urbana excluded **SFLA** but not Black Lives Matter, despite the latter not being religious (she should have added that they are belligerently pro-abortion). She then criticizes Urbana for booting **SFLA** "… because they decided that advancing the pro-life message and trying to change the culture to make abortion unthinkable isn't something our Lord and Creator would like." Without a hint of ironic awareness, Kristan ejects from her conferences anyone who dares call her out for objectionable behavior -- but she squeals when another group kicks her out of theirs. Ms. Hawkins closes with the pleading declaration that "… I am praying that … [Urbana will] read this response and open the doors for communication, allowing Students For Life and the others in the pro-life movement to work with them … advancing the Lord's will …." She says she is secular to justify breaking publishing agreements and that she is religious to force her way into Christian conferences.

None of her trademark objections regarding the Klusendorf/Ensor book *Students For Life* deterred her from forcing the publishers to sell to her the first printing of the book (at a financial loss to the publishers), which she now sells on the **SFLA** website. In an August 15, 2012 email message, she claimed that her board was "concerned about branding confusion, that people will think the book is about **SFLA.**" The publishers told Scott Klusendorf that they intended to recover the loss Ms. Hawkins forced on them by proportionally reducing his and John Ensor's book royalties.

In yet another bullying campaign, Kristan Hawkins is also pressuring pro-life student groups to select only female leaders because she wants the face of the pro-life movement to become progressively less male. This nonsensical policy muscles students into accepting the Planned Parenthood political demand that abortion be defined as a woman's issue concerning which men may be granted no voice. Ms. Hawkins is providing enormous aid and comfort to both Planned Parenthood and Black Lives Matter (the latter by arm-twisting students into apologizing for raising the issue of the obscenely high abortion rate in the African-American community).

COERCIVE "LICENSING" AGREEMENT TERMS

In addition to requiring the maintenance of detailed transaction logs, the aforementioned "licensing" agreements accord **SFLA** the right to conduct highly intrusive audits of student organizations. The agreements also demand that the text of all student publications be submitted to Ms. Hawkins for prior approval. These terms thereby grant **SFLA** the power to mandate or prohibit pro-life projects on hundreds of college campuses. Projects which cannot be promoted obviously cannot be conducted.

The agreements further warn regarding these audits that "If **SFLA** finds any deficiencies and notifies you of these deficiencies, your group must take prompt action to correct them." What does the term "deficiency" mean? Whatever **SFLA** wants it to mean. One version of this agreement empowers **SFLA** to force students to appear before an arbitrator of **SFLA's** own choosing. A second version impliedly authorizes **SFLA** to drag students directly into court. We have copies of these agreements and they are unconscionable.

As noted above, should disputes arise between SFLA and any student group, these "licensing" agreements would also confer upon **SFLA** exclusive control over the selection of arbitrators and mediators. **SFLA** also unilaterally dictates the choice of dispute resolution rules. **SFLA** selects the jurisdictions in which disputes will be adjudicated, and the controlling law by which they are decided. **SFLA** also forces students to give up their right to seek judicial resolution of any arbitrated outcome. The agreements even impose an impossible burden which requires students to indemnify **SFLA** for attorney fees and costs should SFLA accuse them of violating the terms of the agreement. Ms. Hawkins knows these young people can't even afford to hire their own attorneys, much less pay for hers. That is why they cower in the face of her threats.

SFLA may additionally modify or terminate these agreements at will, but students have no concomitant right of termination unless they agree to turn over to **SFLA** their ownership interest in any portion of the name of their organization which includes the phrase "students for life."

STUDENTS FOR LIFE OF AMERICA'S LIKELY ULTERIOR MOTIVE EXPLAINED

Arguably the most alarming example of a prohibited class of projects include any deemed by **SFLA** to be "uncompassionate." This is a highly pejorative, dog-whistle term, universally understood in the pro-life movement to refer to the public display of abortion photos. In a May 18, 2016 letter to student organizations, **SFLA** admits that abortion photo displays are a primary issue of concern in this clause of the agreement. When students asked that the "licensing" agreement be revised to explicitly remove abortion photos from inclusion in the prohibited "uncompassionate" category, **SFLA** declined their request. **SFLA's** assurances to the contrary notwithstanding are meaningless, as the "licensing" agreements specifically limit

controlling terms to those appearing in writing within the agreements themselves. One can only guess what other student projects **SFLA** might arbitrarily decide to prohibit or compel. ***And even if SFLA is shamed into abandoning these coercive agreements, nothing short of cancelling their exclusive trademark registration would prevent them from resurrecting these take-over tactics.***

SFLA falsely claims neutrality concerning the public display of abortion photos on college campuses. They deny that the organization "actively" opposes such imagery, or "publicly" opposes it. These, however, are deliberately misleading representations. In actuality, Kristan Hawkins, **SFLA** president, both publicly and privately, condemns abortion photos and does so unambiguously: In a July 29, 2015 *Cosmopolitan* magazine interview, she said, "Sadly … [abortion photos have] only seen marginal success, as the messenger was always attacked and dismissed." She sees persecution as a threat rather than an opportunity. In a March 25, 2016 Townhall.com post titled "New Strategies for a New Pro-Life Generation," Ms. Hawkins denounced such imagery as a strategy that "… just doesn't cut it anymore." She also asserted that "It's time to start rethinking the strategy of the pro-life movement … especially the use of graphic images."

In this same post she additionally asks rhetorically whether the abortion imagery included in the **Center For Medical Progress** (**CMP**) undercover Planned Parenthood made these videos "the powerful force that they are?" Her very strange answer is "no." One wonders if, even now, she is aware that it was the **CBR** abortion imagery in one of these videos which inspired Republican presidential candidate Carly Fiorina to fiercely condemn abortion in a nationally televised presidential primary debate.

In a February 15, 2016 email message from Ms. Hawkins on the topic of **CBR's** ALL Black Lives Matter abortion photo displays (which was forwarded to **CBR** by a third party), the **SFLA** president said "I do not think that … [**CBR**] coming onto the [Purdue] campus the way … [**CBR**] did with … [abortion photos] in Missouri will be helpful …." She added that "We have a real issue with the way … [**CBR**] forced itself onto the campus without the pro-life student group's permission."

She also complained that as a consequence of **CBR's** campus visit, Missouri students were compelled to endure persecution despite attempting to distance themselves from our exhibit. In a related email message (dated December 7, 2015) to **CBR** from a member of that University of Missouri student pro-life group, we learned that **SFLA** was telling students that Kristan Hawkins opposed the display of **CBR** abortion photos on their campus. The student said "[SFLA] told me more than once that … Students For Life of America told … [CBR] that it was not a good idea to come and tried to discourage it." These same **SFLA**-controlled Missouri students said in a social media post that "The images presented by … [CBR] can be offensive, thus, we do not believe their methods of getting the pro-life perspective across are helpful or conducive to rational dialogue." This complaint was followed (in the aforementioned student email message) with an expression of fear that an earlier **CBR** abortion photo display "made our group look bad…" and noted that the 2012 CBR abortion photo display at Missouri "caused the person who was … [then] serving as vice president to quit because he didn't agree with it." The pro-life student group publicly condemned the CBR abortion photo display because they didn't want to be blamed for it.

The United States Patent and Trademark Office does not govern the use to which trademarks are put once registered, but the agency does have the power to consider or reconsider the propriety of a registrant's "intent" in registering a mark. That intent must reflect a good faith attempt to serve a proper trademark purpose. Inaccurately claiming exclusive ownership of a widely used term as a means of forcibly gaining control of student activism is not a proper "intent" by any reasonable standard.

C. INADEQUATE "DISTINCTIVENESS" AS A GROUND FOR CANCELLATION OF SFLA TRADEMARK REGISTRATION

A third statutory ground by which a trademark registration may be cancelled involves a term of art known as "distinctiveness." A trademark may be cancelled if it is merely "descriptive" of a class of goods or services, as opposed to being "inherently distinctive." It is also possible that, over time, a term which begins its usage as merely descriptive can acquire the requisite distinctiveness by virtue of constant usage.
The term "students for life," however, is clearly not "distinctive," because it simply "describes" a general category of goods and services, and not a unique good, service or seller. Nor can a merely descriptive term "acquire distinctiveness" unless the use of that term, according to the relevant Code provision, is characterized by "… a substantially exclusive and continuous use thereof as a mark by the applicant."

Trademark attorney Keith Barritt adds that "Long and continuous use alone is insufficient to show acquired distinctiveness where use is not substantially exclusive." In the case of **SFLA**, use of the phrase "students for life" was incontestably not exclusive since scores of other users had been employing the term for decades by 2015. On a related note, neither can merely "generic" terms (such as "students for life") be trademarked. The International Trademark Association also notes that trademarks are not possible if they involve common terms "that are the accepted and recognized description of a class of goods or services."

The Washington Post, February 29, 2016, published a story headlined "These college students took on one of America's top trademark bullies -- and won." The article described Monster Beverage, the energy drink giant, as pursuing a "scorched-earth" business strategy designed to bully into submission even the smallest enterprise daring to use the word "monster" in any form. The story notes that faced with "fiercely worded cease-and-desist" letters of the sort regularly fired off by Monster Beverage, "most small businesses quickly turn and run for fear of going bankrupt in court." One of Monster's hapless victims, however, finally received *pro bono* (no fee) legal assistance in fighting back. This defendant was determined to not become "another case of an underdog being taken advantage of." He won, and jubilantly declared, "I have beaten the monster!" **Students For Life of America** is arguably the trademark monster of the pro-life movement. This dispute is not merely some personal, petty squabble. It is about the future direction of pro-life activism in America. The US is, by far, the most influential nation in the global abortion wars. Today's pro-life college students are tomorrow's professional pro-life activists. What they learn now will influence their sense of what is possible and effective and appropriate going forward.

SFLA has every right to urge pro-life students to surrender their First Amendment rights. **SFLA** has every right to urge pro-life students to yield to the oppressive political correctness which is poisoning academia. **SFLA** has every right to urge pro-life students to help Planned Parenthood hide the horror of abortion. **SFLA** has every right to urge pro-life students to cravenly run from conflict and the persecution which conflict invites. But in doing so, **SFLA** must rely solely on the power of persuasion, not coercion. It may not improperly steamroll students by misusing US trademark law. **CBR** fights pro-abortion bullies every day, and we are no less determined to protect students from bullies who are pro-life.

No organization besides **CBR** could or would protect these students. But it is the end of summer, and as usual, donations are way down. Please help us compensate for this annual decrease in giving. Please also pray that the staff at **SFLA** will see this legal crisis as a moral crisis which signals the need to be kind and tender-hearted with innocent students and fellow activists. God never honors harsh, hardness of heart.

Lord bless,

Gregg Cunningham
Executive Director