No. 05-3239

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Christian Legal Society Chapter at Southern Illinois University School of Law,
Plaintiff-Appellant,

v.

James E. Walker, in his official capacity as President of Southern Illinois University; Peter C. Alexander, in his official capacity as Dean of Southern Illinois University School of Law; Jessica J. Davis, in her official capacity as Director of Law Student Development; Walter V. Wendler, in his official capacity as Chancellor of Southern Illinois University-Carbondale; and John M. Dunn, in his official capacity as Vice Chancellor of Southern Illinois University-Carbondale,
Defendants-Appellees.

Appeal From The United States District Court
For the Southern District of Illinois
Case No. 05-4070-GPM
The Honorable Chief Judge G. Patrick Murphy

BRIEF OF AMICI CURIAE EVERY NATION CAMPUS MINISTRIES AND FAMILY RESEARCH COUNCIL

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INTEREST OF AMICI CURIAE

Every Nation Campus Ministries (ENCM) is an arm of Every Nation Ministries, a non-profit religious organization with principle offices in Los Angeles, California. ENCM was founded in 1990, and today has over 280 campus ministers working on more than 70 university campuses. The mission of this Christian campus organization is to lead students to Christ and train them for successful living, equipping them with biblical solutions to contemporary problems, while seeking to serve the whole of the university community, and ultimately the world.

In order to effectively accomplish their mission, ECNM publishes a statement of faith and standard of conduct to which it requires subscription by members and leaders of all local campus chapters. ENCM has a particular interest in seeing the First Amendment right of associations to define their message and membership honored by the courts. This motivates its contribution to this case in support of the constitutional rights of Christian student organizations, as it recognizes the implications that the adjudication of this case will have on the practices of its numerous campus organizations as they seek to maintain their integrity and mission.

Family Research Council (FRC) is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life, together with the Judeo-Christian principles upon which our cherished institutions rest. Headquartered in Washington D.C., FRC provides policy analysis, legislative assistance, research and analysis for the legislative, executive, and judicial branches of the federal and state governments. FRC also works to inform the news

media, the academic community, business leaders, and the general public about issues relating to cultural morality that affect the nation.

FRC has participated as amicus curiae in numerous cases before the United States Supreme Court and other federal and state courts, and participates here for its interest in the cause of First Amendment freedoms, and specific associational freedom of religious student organizations, whose ability to maintain standards of morality and theological conviction is critical to their ability to sustain communities that challenge the destructive tendencies of relativism on university campuses. FRC supports these efforts, and seeks to advance the cause of the constitutional rights which guarantee them.

ARGUMENT

I. SIU's Nondiscrimination Policies have no application to CLS.

SIU officials have de-recognized the CLS chapter at SIU School of Law in what was an exercise motivated entirely by viewpoint animus, with no authorization therefore to be found in any of the university's written policies. The Defendants' appeal to certain inapplicable university standards only reinforces the obvious truth that this action by the university is simple discrimination, and not a policy enforcement measure. For neither of the two SIU nondiscrimination policies put forward by SIU and reproduced in the district court's opinion authorize the de-recognition of CLS carried out by the university, as the text of these provisions makes quite clear. It is a conspicuous failure in the district court's analysis that the court did not recognize this fact, or even seek to interact with the text of these provisions.

A. CLS's Doctrinal and Conduct Standards

The Christian Legal Society campus organization at SIU requires that persons eligible for membership or leadership positions in the organization must affirm the following Statement of Faith:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> - One God, eternally existent in three persons, Father, Son and Holy Spirit.
> - God the Father Almighty, Maker of heaven and earth.
> - The Deity of our Lord, Jesus Christ, God's only son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
> - The presence and power of the Holy Spirit in the work of regeneration.

- The Bible as the inspired Word of God.

(Compl. ¶ 3.6, Compl. Ex. B, p. 1.) The organizational interpretation of its Statement of Faith as it pertains to sexual ethics is set forth as follows:

> CLS interprets its Statement of Faith to require that officers and members adhere to orthodox Christian beliefs, including the Bible's prohibition of sexual conduct between persons of the same sex. A person who engages in homosexual conduct or adheres to the viewpoint that homosexual conduct is not sinful would not be permitted to serve as a CLS chapter officer or member. A person who may have engaged in homosexual conduct in the past but has repented of that conduct, or who has homosexual inclinations but does not engage in or affirm homosexual conduct, would not be prevented from serving as an officer or member.

(Compl. ¶ 4.4, Compl. Ex. C.)

B. SIU's Policies

The SIU at Carbondale "Affirmative Action Policy" (as the district court designated it) reads in relevant part as follows:

> It is the policy of Southern Illinois University at Carbondale to provide equal employment and education opportunities for all qualified persons without regard to race, color, religion, sex, national origin, age, disability, status as a disabled veteran or a veteran of the Vietnam era, sexual orientation, or marital status.

(Mem. and Order, p. 3.) The SIU "Board of Trustees policy" consists of the following, in relevant portion:

> No student constituency body or recognized student organization shall be authorized unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity…

(Mem. and Order, p. 3.)

C. The District Court's deficient analysis

The lower court, after reciting the foregoing CLS policy and the two excerpted SIU nondiscrimination policies, and without justifying explanation, remarkably went on

to simply state that "consequently" Plaintiff's recognized group status was revoked. (Mem. and Order, p. 3.) How the revocation of Plaintiff's status was a "consequence" of these excerpted policies is not only *not* evident, to the contrary it is quite clear that neither policy excerpted by the district court justifies SIU's revocation of CLS's official recognition.

1. The Board of Trustees Policy

First, the district court's reproduction of the SIU "Board of Trustees" policy is curious, for the court failed to interact at all with the text of that provision. The policy's prohibition on student organization authorization is not implicated unless the student group violates "state or federal laws concerning nondiscrimination and equal opportunity." Yet unaccountably, the court nonetheless treated this provision as entirely in keeping with its announcement that the SIU policies naturally lead to the CLS de-recognition.

But the text of the Board of Trustees policy allows no such thing. There has been no showing that CLS at SIU has failed to adhere to state and federal nondiscrimination laws. Indeed, no federal or state laws are even mentioned by the district court. This absence in mention is of course necessitated by the fact that there are no federal or state laws that impose nondiscrimination membership and leadership requirements on associations of students at state universities. Still, the district court's failure to address this point only appears evasive, for a state or federal law violation is a prerequisite to applicability of the cited policy. That prerequisite being not fulfilled, the Board of Trustees policy has no application to CLS, thus can not justify its de-recognition.

2. The Affirmative Action Policy

Likewise, the other policy to which the SIU appeals, and to which district assigns significance, the SIU "Affirmative Action Policy" statement, is of no application to the CLS membership and leadership standards. Three observations make this clear.

First, this policy does not direct its admonition to student groups, but rather to the university itself, and what it provides. The policy relates that it is "the policy of Southern Illinois University at Carbondale to provide equal employment and education opportunities for all qualified persons without regard to … religion … [or] sexual orientation." It is SIU itself which is obligated to provide such equal employment and education opportunities; this obligation is not assigned to individual students who associate together. Whatever may be the exclusive or restrictive parameters of fellowship established by a student group, its policies do not implicate the operation of the Affirmative Action Policy, because that group is not SIU.

Indeed, SIU's own policy announcements contain the caution that SIU recognition of a student organization implies no approval, sponsorship or endorsement of the school, and such a student organization does not become an arm of the school thereby. (Compl. ¶ 3.14) Furthermore, it would not be within the realm of constitutional boundaries to even suggest that private action can be treated as state action, so to enable a mechanism by which to squelch First Amendment association and expression. The university's "recognizing" of various student groups (*i.e.*, granting them access to speech forums) enhances debate and the diversity of voices on campus; it does not convert these groups into state actors. As the Supreme Court stated in *Widmar v. Vincent*, 454 U.S. 263, 272 n.10 (1981):

> But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

The Court went on:

> First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy 'would no more commit the University … to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities.'

Id. at 274 (citation omitted). Similarly, the Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 834 (1995) explained that: "It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."

Second, it is not clear that CLS is either an employment or an education opportunity, such that it could fall within those terms of the Affirmative Action Policy. But even if the CLS chapter at SIU were (assuming for sake of argument) an "educational opportunity," it is not an opportunity that SIU has created, nor can it be said that SIU "provides" this opportunity. CLS exists because of the choices of students, not the provision of SIU. SIU has not created a Christian Legal Society, and if students did not maintain this organization it would cease to exist at SIU's Carbondale campus.

Third, the terms of the Affirmative Action Policy call for "provision" of employment and educational opportunities by SIU. It therefore simply cannot be said that SIU by de-recognizing CLS has acted in furtherance of this policy. Perhaps if SIU

were to grant membership status in CLS to persons who violate CLS's doctrinal and behavioral standards it could be said that SIU is providing an equal opportunity to these persons. But no "provision of opportunity" to persons without regard to religion or sexual orientation is accomplished by de-recognizing CLS and depriving it of avenues for expression, as it maintains its policies unchanged. Instead, SIU is merely inflicting punishment on CLS for its views. That is not the command of the Affirmative Action policy.

Thus, an examination of the Affirmative Action Policy as well can not yield the conclusion the district court glibly reached, that the penalty imposed on CLS by SIU is a consequence of the operation of these university policies.

3. Significance of the non-application of SIU written policies to CLS: Defendants de-recognition of CLS is exclusively a product of viewpoint discrimination

The effect of this discussion is important beyond merely identifying the absurdity of assigning responsibility for the university's action to these policies. Rather, the significance arises from the evident fact that since SIU officials have not acted upon CLS so as to enforce the written policies of the University, their actions were rather to give vent to their viewpoint discriminatory position which opposes the organizational principles of CLS. This is prima facie unconstitutional, regardless of the forum designation. *Rosenberger*, 515 U.S. at 828-829 ("Discrimination against speech because of its message is presumed to be unconstitutional. * * * When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. * * * The government must abstain from

regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.")

The inescapable conclusion on the viewpoint-motivated university action is particularly relevant for purposes of removing this case from the (troubled) influence of *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), under which Defendants seek shelter. While a host of critical comments can properly be registered as to the Second Circuit's errors in the analysis in *Wyman*, the point to be related presently is merely that, regardless of the defects of that decision, Defendants' appeal to its holding in defense of their actions is misplaced. The *Wyman* court's evaluation of the face of a Connecticut statute and the purposes for its enactment allowed it to reach the conclusion that that statute was not a viewpoint-discriminatory measure. *Id*. at 94-95. In this case, there is no authorizing law or regulation (neutral or otherwise) for SIU's attack on CLS. Rather, and as shown above, SIU's action was a singular enforcement of prejudice against the viewpoint of CLS, with no authorizing standard therefore.

Moreover, SIU's de-recognition of CLS because of SIU's opposition to its speech is not a pecuniary penalty (like in *Wyman*). It is, rather, a denial to CLS of access to avenues of communication. SIU has banished CLS from several speech forums, in which other equally discriminating student groups (with messages more palatable to SIU) may continue to speak.

It is not *Wyman*, then, that applies (which would be not so persuasive an authority, to begin with), but instead the Supreme Court decision in *Healy v. James*, 408 U.S. 169 (1972), that governs in this circumstance. For in *Healy*, it was the viewpoint-discriminating decision of the University president which denied a student group

(Students for a Democratic Society) official recognition on the Central Connecticut State College, as the president found that the group's principles were philosophically antithetical to the school's policies. *Id*. at 174-75. (This denial of official recognition resulted in the loss, among other things, of the ability to place announcements in the student newpaper and from using various campus bulletin boards. *Id*. at 177.)

In stark contrast to the Second Circuit's novel suggestions in *Wyman* (mimicked by the district court below) which diminished the significance of state discrimination against speech (and attributed significance to the difference between a requirement of inclusion of members, which it called "compulsion," and the removal of certain rights and benefits, which if designated *not* compulsion, *Wyman*, 335 F.3d at 91), the Supreme Court in *Healy* had none of this.

> [T]he Constitution's protection is not limited to direct interference with fundamental rights. * * * [I]n this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. * * * Mr. Justice Stewart has made the salient point: "Freedom such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."

Healey, 408 U.S. at 183. The Court further instructed: "The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. * * * The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." *Id*. at 187-88.

Similarly, in an analogous circumstance, the Supreme Court has rejected a *Wyman*-styled "non-compulsion" excuse to an infringement of First Amendment rights. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), a case addressing Maryland legislation

which disallowed citizens to hold public office without a declaration of belief in God. The Supreme Court found the Maryland religious test oath to unconstitutionally invade the "freedom of belief and religion," and thus could not be enforced against the appellant therein. *Id*. at 496. The State Supreme Court had validated the law because it found it to involve no compulsion: "[t]he petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office.' *Id*. at 495. The United States Supreme Court countered that the fact that

> a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 219, 97 L.Ed. 216. We there point out that whether or not 'an abstract right to public employment exists,' congress could not pass a law providing '* * * that no federal employee shall attend Mass or take any active part in missionary work.

Id. at 495-96. The "no-compulsion" characterization (even independent of its dubious conceptual integrity) has no ability to excuse viewpoint discrimination which effectuates exiling disfavored speakers from a public forum.

II. CLS's Statement of Faith is a necessity in preserving the character of the organization and the truths the group seeks to have advanced, and the utilization of such creeds is of venerable pedigree within the Christian Faith

The Supreme Court has explained that

> [t]he ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government. Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988) (internal quotation marks and citation omitted). This celebrated combining and association *requires* discrimination, because it advances "one's views." The act of communicating "one's views," or a particular proposition, necessarily entails the exclusion of inconsistent propositions. In that sense, then, the speech the Supreme Court here exalts is inescapably discriminating. And for persons gathering to promote certain speech, to be effective this demands that they gather with like-minded compatriots, if the enhanced advocacy sought to be advanced by associating is to be realized. A nondiscrimination policy which disallows religion (and its standards of conduct) to be a relevant factor in defining a Christian group's membership and leadership is destructive of its *raison detre* and palpably at odds with the First Amendment. It bears mentioning also that a prohibition on religious expressive associations is itself a profoundly discriminatory measure.

The Supreme Court explained also in *Healy v. James*, 408 U.S. 169, 181 (1972) that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." But apart from considerations that are associated with that settled First Amendment principle, it is additionally a particular affront to and assault on a Christian group such as CLS for a state entity to deny it a form and function endemic to its Christian composition: defined by certain transcendent doctrinal and ethical standards. The following discussion seeks to show how CLS's creedal requirements are not on the least unusual, and the hostility shown to them by the university is exceedingly inappropriate (though not surprising in light of the competing institutional creed embraced by SIU).

It is an enduring and characteristic practice among Christian churches and organizations to identify the boundaries of fellowship and orthodoxy by creeds. The English word "creed" is derived from the Latin word "credo," which means "I believe." Thus a creed is a statement of belief, or (as CLS designates it) a "Statement of Faith." Creeds "embody the faith of generations, and the most valuable results of religious controversies. They still shape and regulate the theological thinking and public teachings of the churches of Christendom." Phillip Schaff, *Creeds of Christendom*, Vol. I (The History of Creeds), 4 (New York: Harper 1887, 1919). Creeds "are summaries of the doctrines of the Bible, aids to its sound understanding, bonds of union among their professors, public standards and guards against false doctrine and practice." *Id*. at 8.

It is natural that associations of Christians should follow this practice engrained in them through their ecclesiastical culture, but which also is dictated by the nature of the faith they represent. Christianity, after all, is not a shared sentiment or emotion. It is, in addition to a life lived, a statement about reality itself.

> It is fatal to let people suppose that Christianity is only a mode of feeling; it is vitally necessary to insist that it is first and foremost a rational explanation of the universe. It is hopeless to offer Christianity as a vaguely idealistic aspiration of a simple and consoling kind; it is, on the contrary, a hard, tough, exacting, and complex doctrine, steeped in a drastic and uncompromising realism. And it is fatal to imagine that everybody knows quite well what Christianity is and needs only a little encouragement to practice it.

Dorothy Sayers, "Creed or Chaos?" *The Whimsical Christian* (New York: Macmillan, 1978) 34-35. Creeds are an indispensable necessity in such a faith.

The Christian church has been compelled through its history, on the principle of self-preservation, to set forth the doctrines it holds essential, so as to exclude the deviating suggestions of heretical challengers. They have been found necessary in all

ages, and by all branches of the Christian Church. These creeds divide truth from error, define the grounds of fellowship among believers, and serve as tools of instruction as to the nature of God, the world and our place in it.

In the present context, for a Christian group like CLS to set itself apart from the dominant secular convictions of the contemporary academic culture which has a fundamental hostility to the competing claims of the faith CLS represents (as indeed is evidenced in the conflict leading to this lawsuit) is to engage the common practice of Christian organizations throughout the history of the Church. When the modern consensus is that constant innovation is the key to the good, and that deep roots and the instruction of forbears are rightly discarded, a creed which appeals to a reality of fixed and transcendent norms may be offensive to the popular mind, but it is particularly necessary to an association such as CLS, if it is to set itself apart and maintain its identity separate from the prevailing philosophical environment.

The Ecumenical Creeds, so called, are the property of the whole of the Christian church. It is loosely in this ecumenical character that the Statement of Faith of CLS is constructed. The Ecumenical Creeds as identified normally include the Apostles' Creed, the Nicene Creed, the Athanasian Creed, and the Christological statement of the Council of Chalcedon. These creeds broadly contain the fundamental articles of the Christian faith, the latter three being specific refutations of alternative views of God, and thus, of reality. The *Te deum* sung widely by the church throughout its history is itself essentially a creed, and implicitly condemns a variety of variant conceptions of divinity.

Beyond the ecumenical creeds, there are creedal formulations unique to the various branches of the Christian Church. For instance, the Roman Catholic Church

doctrinal standards are found in such repositories as the Canons and Decrees of the Council of Trent, the Roman Catechism, and the Tridentine Confession of Faith. Additionally, certain papal bulls and some private writings have been established as standards, such as the Catechism of Bellarmine, and the bull Unigenitus of Clement XI. In the Greek Church, appeal is made to the Orthodox Confession of Peter Mogilas and the Confession of Gennadius. The Lutheran Church is guided by the Augsburg Confession, Luther's Larger and Smaller Catechisms, the Articles of Smalcald, and the Formula Concordiae. The Reformed or Calvinistic Churches have included as standards the Second Helvetic Confession, the Heidelberg Catechism, the Thirty-nine Articles of the Church of England, the Canons of the Synod of Dort, and the Confession and Catechisms of the Westminster Assembly. This is only a sample of the more broadly recognized creeds and confessions. Creedal formulations are found as far as churches are found. "In Congregational and Baptist churches the custom prevails for each local church to have its own confession of faith or 'covenant,' generally composed by the pastor, and derived from the Westminster Confession, or some other authoritative symbol, or drawn up independently." Schaff, *Creeds of Christendom*, at 7.

"Every well-regulated society, secular or religious, needs an organization and constitution, and can not prosper without discipline." *Id*. at 9. Indeed, as hinted above, SIU itself is properly described as creedal. The Supreme Court seems to have alluded to this idea, for instance, in *Rosenberger*, when it referenced a university's use of a "baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 829. As noted earlier, the Supreme Court's affirmation of association (as recited at the beginning of this section) is meaningless if those associating are prohibited from enforcing a standard of

union that advances the purposes of the association. CLS has determined to organize itself in a manner that reflects its belief and the message it seeks to convey. In the specific application found in this case, CLS relates that ethical standards are established by God, rather than being the product of the speculation or the convention of autonomous humanity.

Such a creedal guideline provides CLS an objective standard of fellowship and discipline within the association. Voluntary subscription to these terms of the creed allows for affiliation on grounds of unified faith and doctrine, rather than simply organizational affiliation. Their standards of orthodoxy serve as a barrier to the entry of error and hostile innovation, and they serve a valuable function in preserving and sustaining a like-minded community so as to make their association more unified, vibrant and effective.

The holding forth of a particular standard, and the refutation of contending proposals, is an institutional necessity and very much the heritage of the Christian faith. It should be no surprise to find this tradition followed by the Christian Legal Society at SIU, and it must be recognized that SIU's penalizing CLS for its policy is an attack on a venerable practice.

III. No state interest is served by SIU's discrimination against CLS

While the action taken by SIU officials is adequately condemned by the foregoing, as an informative supplemental discussion it is helpful to observe that there is no compelling government interest that justifies the action taken by SIU, by which a private religious association has been penalized for making religious belief and conduct standards relevant to its membership and leadership policies. While the

nondiscrimination principle can be sentimentally appealing as a general proposition, it does not work out as a rational policy in all contexts. This case provides a stellar example of one such context, and it shows how eminently discriminating the application of a nondiscrimination requirement can be, when applied outside of sensible and constitutional boundaries. In the specific context implicated in this case, whereby the advancing of common interests is the basis for the group's gathering, for the group to allow ideological strangers to vote and lead the organization may be "non-discriminating," but it also is to abandon the beliefs of the organization, and defeats the very purpose of the association.[1]

As a matter of the constitutional policy behind First Amendment protection of associations, it cannot be that SIU's interest in obliterating religious and sexual conduct standards from operation in private religious associations is even minimally a state interest that may be honored. The point of private associations, as expressed by the Supreme Court in *New York State Club Ass'n v. City of New York*, 487 U.S. at 13, for instance (and as related above), is to "combine with others to advance one' views" and "is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals *as against the government*." (Emphasis added.) *Healy v. James*, 408 U.S. at 181 affirms that the First Amendment protects "the right of individuals to associate to further their personal beliefs." As to those beliefs, the Court in *New York State Club Ass'n* explained that group association undeniably enhances advocacy of points of view, "particularly controversial ones." 487 U.S. at 13.

[1] The State may not exclude speech where, *inter alia*, its restriction is not "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 806 (1985).

Accordingly, it is not within the realm of constitutionally acceptable justifications for its punishment of CLS that SIU opposes the point of view or beliefs of the students who comprise CLS. It is not up to SIU to dictate the points of view which associations may exist to promote.

As a matter of historic judicial cognizance, rather than simply of right policy, SIU's case is similarly weak. There is an absence of precedent to demonstrate that the imposition of such a restriction on religious associations is in the service of a state interest, let alone a compelling state interest. The practice of the federal and state governments are instructive. For if the interest SIU here maintains were indeed compelling, one would expect this to be reflected in government action. It is not.

At the federal level, Congress has enacted no legislation which bans even employment discrimination on the basis of sexual conduct or sexual orientation (while it has banned discrimination on a variety of other bases), let alone disallowed such discrimination in the more intimate realm of private associations. Additionally, Congress has quite rationally exempted religious organizations from the operation of the religious discrimination prohibition found in Title VII. (*See* 42 U.S.C. 2000e-1(a), 2(e).)

Similarly, no state legislature has enacted prohibitions of sexual orientation or conduct discrimination by private associations. Moreover, a vast majority of state legislatures (35 of them) have likewise not provided any penalty for discrimination on the grounds of sexual conduct or orientation by its citizens, in any context. Of the fifteen states (plus the District of Columbia) that have enacted legislation that prohibits discrimination on the basis of sexual orientation in employment or housing, *none* of these states have fashioned their enactments to prohibit discrimination on the basis of sexual

"conduct,"[2] and *all* of these states, as well as the District of Columbia, have granted exemptions to religious organizations from the sexual orientation discrimination prohibitions. *See* Cal. Gov't Code § 12926(d); Conn. Gen. Stat. § 46a-81p; DC ST 1981 § 1-2503(b, d); Haw. Rev. Stat. § 378-3(5); 775 ILCS 5/Art. 2-101(B)(2); Md. Ann. Code art. 49B, § 18(2); Mass. Gen. Laws. Ann. ch. 151B, § 1(5); Minn. Stat. Ann. § 363A.20(2); N.R.S. 613.320(1-b, 2); N.H. Revised Stat. § 354-A:18; N.J. Rev. Stat. Ann. § 10:5-12(a); N.M.S.A. 1978 §28-1-9(c); N.Y. Exec. Law § 296(11); R.I. Gen. Laws § 28-5-6(15); Vt. Stat. Ann. 21 § 495(e); Wis. Stat. Ann § 111.37(2)(a).

Moreover, on the judicial level, "suspect" or "quasi-suspect" class jurisprudence has consistently evaded sexual orientation or behavior. The suspect or quasi-suspect class status accorded particular groups defined on the grounds of sex, race, or national origin, for instance, is an extension of a particular policy consideration that connects such status to immutable characteristics beyond the realm of human choice and individual responsibility. This consideration was expounded by the Supreme Court plurality in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility…" *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

The foundational judicial policy underlying the suspect class analysis can only further immunize CLS from criticism. It is precisely matters of individual responsibility—belief

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[2] We do not know whether any of these states views sexual "orientation" as an equivalent of "conduct" (as SIU seems to do), but this interpretation is not listed as such in their enactments.

and conduct—that define CLS's association. It would be to dispense with customary and widely accepted policy considerations to identify persons for heightened protection because of behavior-based considerations, for this severs the connection between protected status and personal blamelessness. In the associational context, the volitional nature of religious conduct choices are especially relevant.

It is not surprising, then, that we find an absence from federal and state jurisprudence of a recognition of homosexuality or sexual orientation as matters of immutability or proper subjects of suspect or quasi-suspect class categorization. *See, e.g., Steffan v. Cheney*, 780 F. Supp. 1, 6-7 (D.C. 1991) (Supreme Court grants suspect classification to non-chosen class-defining characteristics; is apparent that sexual orientation is at times chosen); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) (homosexuality is primarily behavioral in nature and as such is not immutable); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986) (homosexuals compose neither a suspect nor a quasi-suspect class); *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903 (1985) (legal classification of gays is not suspect); *Rich v. Secretary of Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) ("A classification based on one's choice of sexual partners is not suspect"); see also *Hatheway v. Secretary of Army*, 641 F.2d 1376, 1382 (9th Cir. 1981), *cert. denied*, 454 U.S. 864 (1981); *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327 (9th Cir. 1979); *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1132 (1997) ("Because homosexuals do not constitute a suspect or quasi-suspect class, we subject the military's 'don't ask/don't tell' policy to rational basis

review."); *Department of Health & Rehabilitative Servs. v. Cox*, 627 So.2d 1210, 1219 (Fla. App. 1994) ("We have located no Florida appellate precedent adopting a strict scrutiny review. … In the federal courts, neither homosexual orientation nor homosexual conduct has been determined to be a class requiring strict scrutiny review"); *Opinions of the Justices to the Senate*, 440 Mass. 1201, 1206 n.3, 802 N.E.2d 565 (2004) (court has not recognized sexual orientation as a suspect classification); *Rutgers Council of AAUP Chapters v. Rutgers State Univ*., 298 N.J. Super 442, 453, 689 A2d 828 (N.J. App. 1997) ("We have not created suspect classifications where the federal courts have refused to do so, and therefore, have no reason to view sexual orientation or marital status as deserving of heightened scrutiny"); *High Tech Gays*, *supra*, 895 F.2d 563, 573-74 (1990) ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes. * * * The behavior or conduct of … already recognized classes is irrelevant to their identification. *Id*.").[3]

While in the religious association context, the volitional nature of theological and behavioral determinations are even more relevant than in other contexts, and those associations carry with them First Amendment protections for exclusionary practices, it is nonetheless of moment to observe that even outside the context of these governing considerations, no compelling state interest is judicially identified for protecting specially

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[3] The only exception that counsel has been able to identify to the consensus demonstrated by this litany is the Oregon intermediate appellate court case of *Tanner v. Oregon Health Sciences University*, 157 Or. App 502, 971 P.2d 435 (1998), which is of dubious merit in its finding of suspect class status for sexual orientation, for its notable departure from the standard the Oregon Supreme Court established as prerequisite for suspect class status—requiring an immutable personal characteristic (among other things). *See Hewitt v. State Accident Insurance Fund Corp*., 294 Or. 33, 45, 653 P.2d 970 (1982).

this class. As the earlier discussion shows, even when sexual orientation sees legislative special protection (which, importantly, never intrudes into the realm of private associations), it is always with an accompanying exception excluding application to religious organizations. This survey well demonstrates that the interest SIU here seeks to serve is not one approaching compelling, either as a matter of reasoned policy, or of legislative or judicial example.

CONCLUSION

For the foregoing reasons, Amici respectfully petition this Court to reverse the decision of the district court, with appropriate orders that the relief Plaintiff seeks be granted.

Dated: September 14, 2005.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(b). As measured by the word count provided by Microsoft Word 2002, and in accordance with provisions of Federal Rule of Appellate Procedure 32(a)(7)(b)(3)(iii), this brief contains 5,985 words.

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PROOF OF SERVICE

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