



Center for Law
and Religious Freedom

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COPY

September 23, 2004

VIA HAND DELIVERY AND U.S. MAIL

Ms. Judy Chapman
Director
Office of Student Services
Hastings College of Law
University of California
200 McAllister St.
San Francisco, CA 94102

RE: Processing Registration Packet for the CLS Chapter
Christian Legal Society/University of California Hastings College of Law
Our File No. LE1231

Dear Ms. Chapman:

We represent the Christian Legal Society Chapter of the University of California Hastings College of Law ("CLS chapter") in regard to the group's application to the University for status as a registered student organization. We are concerned that your office's handling of this matter may violate the CLS chapter's federal First Amendment rights.

To assist the Office of Student Services in processing the CLS chapter's registration packet, we include here a brief overview of the membership and leadership policies of the Christian Legal Society and a synopsis of the pertinent law which we believe militate in favor of your office approving the chapter's registration packet.

I. Christian Legal Society and Student Chapters.

Christian Legal Society is a nationwide association of Christian lawyers, law students, law professors, and judges. The organization's purposes include providing a means of society, fellowship, and nurture among Christian lawyers; promoting justice, religious liberty, and biblical conflict resolution; encouraging, discipling, and aiding Christian law students; and encouraging lawyers to furnish legal services to the poor. In furtherance of its purposes, the national Christian Legal Society organization maintains both attorney and law student chapters across the country.

All members of the national Christian Legal Society, including student members, must sign a Statement of Faith indicating that the member holds certain Christian viewpoints commonly regarded in both the Roman Catholic and Protestant evangelical traditions as orthodox.

Any student is welcome to participate in CLS chapter meetings and other activities, regardless of religion, creed, sexual orientation, or membership or non-membership in any other protected class. However, pursuant to the constitution and rules for CLS student chapters of the national Christian Legal Society, the CLS Chapter requires its members and officers to sign and endeavor to live by the national Christian Legal Society's Statement of Faith.

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.

The University of California Hastings College of Law Chapter of the Christian Legal Society has been affiliated with the national Christian Legal Society at least since 1989. Our understanding is that, for the vast majority of this time, the CLS chapter has also been officially recognized by the University as a registered student organization. This year, as a condition of receiving and maintaining registered status, student organizations must affirm their compliance with the University's Nondiscrimination Compliance Code. The policy prohibits student organizations from, among other things, discriminating on the basis of religion and sexual orientation. Because agreement with such a policy is inconsistent with the CLS chapter's Statement of Faith and its membership and leadership decisions based on that Statement of Faith, the CLS chapter requests that your office grant the group an exemption from the religion and sexual orientation portions of the Nondiscrimination Compliance Code and approve the group's registration packet.

II. Overview of Applicable Constitutional Law.

We believe the constitutional law summarized below strongly favors the Office of Student Service's decision to approve the CLS chapter's registration packet and grant the group an exemption from the religion and sexual orientation portions of the Nondiscrimination Compliance Code.

A. First Amendment Right of Expressive Association.

The United States Supreme Court has “long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). This right of association plainly presupposes a right *not* to associate. *Dale v. Boy Scouts of America*, 530 U.S. 640, 648 (2000); *see also Democratic Party v. Wisconsin*, 450 U.S. 107 (1980) (stating “[T]he freedom to associate for common advancement of political beliefs . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people.”)

To determine whether a group is protected by the First Amendment’s expressive associational right, it must be determined whether the group engages in “expressive association” and, if so, whether the forced inclusion of an unwanted person would significantly affect the group’s ability to advocate public or private viewpoints. *Dale*, 530 U.S. at 649-50. In *Dale*, despite the New Jersey Supreme Court’s ruling that the state’s anti-discrimination laws prohibited the Boy Scouts from removing a person from leadership because of his self-identification as a homosexual person, the United States Supreme Court reaffirmed that “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.” 530 U.S. at 648. The Court found that the Boy Scouts engaged in expressive activity by having adult leaders spend time with youth members, instructing and engaging them in outdoor activities in the hope of instilling good values. *Id.* at 649-50. Among the values the Scouts sought to instill was that homosexual conduct is not a healthy form of behavior. The Supreme Court then determined that “the presence of a [homosexual] as an assistant scoutmaster would . . . surely interfere with the Boy Scouts’ choice not to propound a point of view contrary to its beliefs.” *Id.* at 654.

Here, the decision of the CLS chapter to require its officers and members to affirm and endeavor to live by the group’s Statement of Faith is protected by the First Amendment’s expressive associational right. First, the CLS chapter is an expressive association. Like the Boy Scouts in *Dale*, the CLS chapter seeks to affirm and encourage certain values in its members. For the CLS chapter these values include the orthodox Christian beliefs articulated in the group’s Statement of Faith.

Second, a University policy requiring student organizations to unreservedly affirm the University’s Nondiscrimination Compliance Code prevents the CLS chapter from excluding people who disagree with or who cannot affirm its Statement of Faith and, therefore, “impair[s] the ability of the original members to express only those views that brought them together.” *Roberts*, 468 U.S. at 623. One of the chief purposes of the CLS chapter is “cultivating spiritual growth through communal prayer, fellowship, and worship; learning to share one’s faith; and devotional study of the Bible and classic Christian works.” Form CLS Chapter Constitution, ¶ 2.2. The Statement of Faith requirement is the means by which the CLS chapter guarantees that

its meetings include the desired worship and observance. Strict application of the University's Nondiscrimination Compliance Code prevents the CLS chapter from requiring its members and leaders to adhere to orthodox Christian beliefs, including the prohibition of sexual conduct outside the confines of traditional marriage between a man and a woman, and thereby precludes the chapter from protecting the integrity of its group expression. Forcing the CLS chapter to include persons who overtly oppose the organization's tenets and message unquestionably affects the CLS chapter's ability to advocate orthodox Christian beliefs, whether publicly or privately. As such, the Office of Student Services should approve the CLS chapter's registration packet and grant the group an exemption from the religion and sexual orientation portions of the Nondiscrimination Compliance Code.

B. First Amendment Right of Free Speech.

The Free Speech Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." UNITED STATES CONST. Amend. I. Among the forms of constitutionally protected speech is religious expression. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (stating, "[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment"). Accordingly, discrimination against speech because of its religious content is presumed to be unconstitutional. *Capital Sq. Review Bd. v. Pinette*, 514 U.S. 753, 761 (1995) (holding that strict scrutiny applied where expression was rejected "precisely because its content was religious").

In *Widmar*, the United States Supreme Court held that a state university, having made the decision to recognize and make its facilities available to a broad spectrum of student organizations, could not deny such status and benefits to a particular student organization because of the organization's religious speech or activities. *Widmar*, 454 U.S. at 267-68. A religious student group sought to use state university facilities for "prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Id.* at 265, n. 2. The state university adopted a regulation that prohibited the use of university buildings or grounds "for purposes of religious worship or religious teaching." *Id.* at 265. The Supreme Court stated that the university's policy "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion." *Id.* at 269.

For the University of California Hastings College of Law to withhold status as a "registered student organization" because of the CLS chapter's Statement of Faith and the membership and officer decisions based on that statement of faith is to engage in the same discrimination against religious speech that *Widmar* forbids. Registered status carries with it the same bundle of rights that were at issue in *Widmar*, including access to meeting space and funding. Whether the University attempts to deny these benefits to the CLS chapter outright through the adoption of a discriminatory regulation, as in *Widmar*, or indirectly by conditioning the receipt of these benefits on the CLS chapter's willingness to affirm the University's own

views, the effect is the same – discrimination against a student organization because of its religious viewpoints and expression. “It is too late in the day to suppose that the liberties of religion and expression may be infringed by the denial of or placing of a condition upon a benefit or privilege.” *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Because the University’s policy of conditioning recognized status on the CLS chapter’s strict adherence to the Nondiscrimination Compliance Code is unconstitutional, your office should approve the chapter’s registration packet. See *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (holding that when a public university excludes a religious student publication from generally available funds, the university engages in unconstitutional viewpoint discrimination).

In addition to being viewpoint discriminatory, the University’s policy of conditioning registered status on the CLS chapter’s adherence to a nondiscrimination policy also violates the compelled speech doctrine. “[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977). For example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Supreme Court ruled that a private group did not have to include a self-identifying homosexual group in its parade. The Court determined that every person participating in the parade affects the message conveyed by the organizers of the parade. To force the organizers to include an unwanted person in their parade was to alter the expressive content of their parade. Accordingly, the Court rejected the Massachusetts Supreme Court’s application of state anti-discrimination laws regarding sexual orientation to the group’s parade as “violat[ing] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” *Id.* at 573.

Likewise, for the University to deny registered status to the CLS chapter for refusing to include persons who disagree with the group’s religious beliefs forces the group to convey a message contrary to the basic Christian tenets embodied in its Statement of Faith, including the Biblical prohibition on sexual conduct between persons of the same-sex. Because a student organization has a constitutional right “to decline to foster” ideological concepts, particularly those “they find morally objectionable,” the Office of Student Services should approve the CLS chapter’s registration packet and grant the group an exemption from the religion and sexual orientation portions of the Nondiscrimination Compliance Code. *Wooley*, 430 U.S. at 714-15.

C. First Amendment Establishment Clause Claim.

By conditioning recognized status on a student group’s wholehearted endorsement of the University’s Nondiscrimination Compliance Code, the University is failing to maintain neutrality between religious sects in violation of the Establishment Clause. The Establishment Clause forbids the government from making “any law respecting an establishment of religion.” UNITED STATE CONST. Amend. I. It requires “governmental neutrality between religion and religion. The State may not adopt programs or practices which aid or oppose any religion.” *Larson v.*

Valente, 456 U.S. 228, 246 (1982). “[C]learly manifested in the history and logic of the Establishment Clause” is the principle “that no State can pass laws which aid one religion” or that “prefer one religion over another.” *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

Rather than demonstrating neutrality, the University’s insistence that student organizations affirm its Nondiscrimination Compliance Code prefers religious sects that condone homosexual conduct over more orthodox religious sects that believe homosexual conduct is impermissible. Most notably, the University’s policy punishes religious student organizations from more orthodox religious sects by denying recognition and its attendant benefits if the clubs refuse to accept members or officers who either condone or advocate sexual conduct outside the confines of traditional marriage between a man and a woman. Consequently, imposition of the University’s Nondiscrimination Compliance Code on the CLS chapter’s members and officers violates the Establishment Clause of the First Amendment.

D. First Amendment Right of Free Exercise of Religion.

The Free Exercise Clause of the First Amendment, made applicable to the States by incorporation into the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*.” UNITED STATES CONST. Amend. I (emphasis added). The United States Supreme Court has interpreted the Free Exercise Clause such that laws “imposing special disabilities on the basis of religious views or religious status” are presumptively unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 877 (1990); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that a local law targeting the use of animal sacrifice for religious purposes violated the Free Exercise Clause).

The University’s Nondiscrimination Compliance Code imposes a special disability on the basis of religion and, therefore, violates the Free Exercise Clause. A stringent application of the Nondiscrimination Compliance Code forbids student organizations formed to further religious ideals, but not student organizations formed to promote other ideals. For example, an environmentalist group may limit its officers to supporters of conservation and recycling. A Marxist club could require that its members and officers subscribe to the tenets of socialism. In each case, the groups “discriminate” on the basis of shared personal beliefs and the “discrimination” is not regulated by the University’s Nondiscrimination Compliance Code. Yet a religious club, like the CLS chapter, is apparently forbidden by the University’s Nondiscrimination Compliance Code from requiring its members and officers to affirm a common set of religious beliefs. To prohibit religious student organizations from using religiously-rooted criteria in their membership practices imposes a special disability on the basis of religion, which is just what *Smith* and *Lukumi* said the Free Exercise Clause forbids. Accordingly, to accommodate the religious exercise of the CLS chapter, your office should approve the CLS chapter’s registration packet.

E. Fourteenth Amendment Right to Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment provides, "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." UNITED STATES CONST. Amend. XIV. The Equal Protection Clause, like the First Amendment, has been interpreted by the United States Supreme Court to prohibit the government from making distinctions based on religious classifications. *See Niemotko v. State of Maryland*, 340 U.S. 268 (1951) (holding the Equal Protection Clause was violated when the park authority issued a park permit to the Order of Elks for a Flag Day ceremony but refused to issue a park permit to the Jehovah's Witnesses for a "Bible talk"); *see also McDaniel v. Paty*, 435 U.S. at 643 (White, J., concurring) (holding law barring clergy from public office unconstitutional on equal protection ground); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring) (holding law prohibiting "any political or religious meeting in any public park" invalid on equal protection ground) Accordingly, a religious classification is an "inherently suspect distinction." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

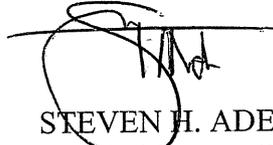
The University's Nondiscrimination Compliance Code violates the Equal Protection Clause by distinguishing between religious student organizations and non-religious student organizations. The University's Nondiscrimination Compliance Code forbids student organizations from using religious criteria in making membership and leadership decisions. While the nondiscrimination provisions apply to all campus organizations, the burden of the religion and sexual orientation provisions of the Nondiscrimination Compliance Code is overwhelmingly borne by religious student organizations. Non-religious student organizations are free to define themselves by requiring that their leaders and members show a firm commitment to the organization's cause. For example, Students Against Drunk Driving can require its officers to take the pledge against drinking; or Students for Social Responsibility can require its officers and members to have a social conscience. Yet religious student organizations cannot require their officers and members to affirm what the majority of Protestants and Catholics consider orthodox Christian beliefs. Such disproportionate treatment between religious student organizations and non-religious student organizations is inherently suspect and, therefore, unconstitutional under the Equal Protection Clause. Consequently, your office should approve the CLS chapter's registration packet to ensure that all student organizations are treated similarly.

For the above reasons, we asked that the University provide written assurance that: (1) the University has created a formal, written exemption for religious student organizations from the religion and sexual orientation portions of the University's Nondiscrimination Compliance Code; (2) the University has adopted a written policy instructing University personnel to cease from requiring religious student organizations to affirm the religion and sexual orientation portion of the Nondiscrimination Compliance Code; and (3) the Office of Student Services has approved the CLS chapter's registration packet and granted the group the status and benefits of a

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registered student organization. If your office fails to provide these written assurances by September 30, 2004, we will commence legal action against the University.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. Aden", is written over a horizontal line.

STEVEN H. ADEN, ESQ.
Chief Litigation Counsel
Center for Law and Religious Freedom

cc: Isaac Fong, CLS Chapter President
Gregory S. Baylor, Esq., CLRF Director