



August 4, 2006

Via U.S. Mail & facsimile (608) 262-3985

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Via U.S. Mail & E-mail at

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Re: University of Wisconsin's Discriminatory Policies on Student Organizations

Dear President Reilly, Ms. Brady, Chancellor Wiley, and Chancellor Erlenbach:

The Alliance Defense Fund's Center for Academic Freedom has been contacted by multiple religious student organizations and concerned students regarding the ongoing violation of their fundamental First Amendment rights to free speech, religious liberty, and free association. Sadly, these violations have continued in defiance of recently-decided (and controlling) federal case law. Alliance Defense Fund ("ADF") is a legal alliance that defends America's first liberty, religious liberty. ADF's Center for Academic Freedom is dedicated to ensuring that religious students enjoy rights to speak, associate, and learn on an equal basis as students of different faiths or no faith at all.

Factual Background

Each of the religious student organizations listed at the end of this letter face a similar problem: the application of university nondiscrimination policies to prevent religious student organizations from using faith-based principles to select members and/or leaders and to fashion rules of conduct for those members and/or leaders. To put it plainly, university officials are taking the position that student organizations that require members or leaders to adhere to a statement of faith are discriminating on the basis of religion and sexual orientation and cannot be recognized.

For example, the University of Wisconsin-Superior (UW-S) has denied the InterVarsity Christian Fellowship's (IVCF) request for recognition because IVCF requires that its leaders adhere to IVCF's "Doctrinal Basis." Further, UW-S officials also stated that IVCF's constitution must include UW-S's non-discrimination statement which, when referring to membership and leadership, states: "no person will be restricted because of age, race, creed, color, gender, sexual orientation, disabilities, national origin, ancestry, marital status, arrest record, or conviction record." UW-S has withheld official recognition until IVCF meets these demands.

At the University of Wisconsin-Madison (UW-M), officials have de-recognized the Knights of Columbus and University of Wisconsin Roman Catholic Foundation in part because of their religious identity, and university policy still requires religious student organizations to comply with an expansive nondiscrimination statement that, among other things, prevents religious organizations from discriminating on the basis of religion.

Legal Analysis

By requiring religious student organizations to adopt and enforce anti-discrimination rules that prevent those groups from using their faith to select members or leaders or crafting rules of conduct for those members or leaders, University of Wisconsin (UW) violates recent, controlling federal court precedent and decades of explicit Supreme Court authority.

I. UW Is Violating Religious Students' Rights to Free Speech and Association and is Defying Controlling Seventh Circuit Authority.

By refusing to recognize religious student organizations unless they modify their leadership criteria and agree to university non-discrimination policies, both UW-S and UW-M are violating student rights to free speech and association established by controlling federal court precedent. Less than one month ago, the United States Court of Appeals for the Seventh Circuit held that a university violates the First Amendment when it dictates the membership and leadership requirements for student organizations. *Christian Legal Society v. Walker*, No. 05-3239, 2006 WL 1881131, *1 (7th Cir. July 10, 2006).

In *Walker*, Southern Illinois University ("SIU") revoked official recognition of the Christian Legal Society ("CLS") because its membership policies, which precluded membership to those who did not share the group's faith or violated the group's misconduct rules, violated SIU's nondiscrimination policies. *Id.* The Seventh Circuit held that because CLS is an expressive student organization, and because the forced inclusion of those who disagreed with CLS's mission or violated its conduct rules would significantly affect CLS's ability to express its religious message, SIU violated CLS's constitutional right to free association by revoking recognition. The court reminded SIU that "[i]mplicit in the First Amendment freedom of speech, assembly, and petition is the freedom to gather together to express ideas—the freedom to associate. *Id.* at *5 (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S.Ct. 1297 (2006)). Indeed, "there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

The court found that requiring CLS to adopt the non-discrimination policy would “impair its ability to express disapproval” of conduct it considers immoral. *Id.* “SIU’s enforcement of derecognition can only be understood as intended to induce CLS to alter its membership standards—not merely to allow attendance by nonmembers—in order to maintain recognition.” *Id.* at *6. Because CLS is a religiously expressive association, *id.* at *6, any infringement on CLS’s right to free association is subject to strict scrutiny, *id.* at *5. The court also found that although SIU has an interest in eradicating discrimination on campus, this interest was not sufficiently compelling to impair the fundamental First Amendment freedoms of expressive organizations, and CLS’s interests in expressive association greatly outweighed SIU’s interest. *Id.* at *7. “[T]he Supreme Court has made it clear that antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint.” *Id.* (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659-61 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 578-79 (1995)). There is a “distinction between rules directed at a student organization’s actions and rules directed at its advocacy or philosophy; the former might provide permissible justification for nonrecognition, but the latter do not.” *Id.* at *8 (citing *Healy v. James*, 408 U.S. 169, 188-94 (1972)). The court enjoined SIU from enforcing its policy.

A similar situation occurred ten years ago at a public high school in New York. In *Hsu v. Roslyn Union Free School District No. 3*, a student sought to form an after-school Christian student organization, the Walk on Water Club (the “Club”). 85 F.3d 839 (2d Cir. 1996). The Club’s constitution had a provision that limited the officers’ positions to Christians only. The school recognized the Club on the condition that the leadership would be open to all students in compliance with school policy that prohibited discrimination on the basis of “race, color, national origin, creed or religion, marital status, sex, age or handicapping condition” in providing “access to ... student activities.” *Id.* at 850. Hsu refused and sued the school, alleging violations of, among other things, free speech and free exercise of religion. The *Hsu* court reversed the school’s decision to deny the Club recognition. The court noted that “the message a group imparts sometimes depends upon its ability to exclude certain people.” *Id.* at 856. Consequently, “when an after-school religious club excludes people of other religions from conducting its meetings, and when that choice is made to protect the expressive content of the meetings, a school’s decision to deny recognition to the club because of the exclusion is a decision based on the ‘content of the speech.’” *Id.* at 859.

UW’s actions are no different from those found unconstitutional in *Walker* and *Hsu*. Forcing Christian groups to accept members or leaders who disagree with their faith would have a devastating impact on their mission. UW-S’s failure to recognize IVCF, and UW-M’s derecognition of Knights of Columbus and Roman Catholic Foundation are blatant violations of the First Amendment and defy controlling Seventh Circuit authority. The University of Wisconsin must take immediate action to restore its students’ rights.

II. UW Is Engaged in Illegal Viewpoint Discrimination.

By refusing to recognize student organizations that disagree with the non-discrimination policy, UW also discriminates on the basis of viewpoint. UW has opened a forum for students to

form student organizations and receive the benefits of recognition. However, UW's policies deny groups recognition when they require members or leaders to share the group's mission and purpose.

UW students face a situation no different from that faced by the student plaintiffs in *Healy v. James*, 408 U.S. 169 (1972), where the Supreme Court held that a college may not require student organizations to conform to the university's values, mission, or message as a condition of recognition. *Healy* recognized that the "denial of official recognition, without justification, to college organizations burdens or abridges [the Constitution's] associational right." *Id.* at 181. When a university refuses to officially recognize a student organization, its actions result in the organization's inability to use campus facilities for meetings and vital communication with the student body or to seek funds from the school budget. The Supreme Court has found those restrictions to be impermissible impediments to free association. *Id.* at 181-82. While "associational activities need not be tolerated where they infringe on reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education," school officials may not deny recognition merely because of their "disagreement with the group's philosophy." *Id.* at 187, 189 (emphasis added); accord *Walker*, 2006 WL 1881131, *8.

The freedom of students to associate with others of a particular viewpoint on campus presupposes their freedom to not associate with those who do not share the same viewpoint. The Supreme Court has said that "implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (emphasis added). It is quite obvious that UW—by forcing religious student groups to open their leadership or membership to individuals who do not subscribe to the group's viewpoint in order to receive recognition—has implemented a policy that "affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648; see also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

A student organization, by its very nature, is designed to "enhance the educational experience" by "'promoting extracurricular activities,' 'stimulating advocacy and debate on diverse points of view,' enabling 'participation in political activity,' 'promoting student participation in campus administrative activity,' and providing 'opportunities to develop social skills.'" See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 223 (2000) (holding that a student fee funding system is constitutional only if the funds are dispensed in a viewpoint neutral manner). It is difficult to conceive how UW's decision to prevent religious student groups from using religious principles to make leadership or membership decisions advances any of the above interests. Instead, UW's requirement actually diminishes diversity and inhibits the free exchange of ideas.

Conclusion

This letter informs you of the law and your obligation to terminate UW's illegal student organization policy. The loss of constitutional freedoms, even for a moment, is an "irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The UW faith community desires to continue

building a strong partnership with UW but cannot do so if it is forced to abandon its most fundamental constitutional rights. Please respond to this letter with confirmation that UW will respect the constitutional rights of its religious students by August 10, 2006.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

David A. French with permission
DAF

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Director, Center for Academic Freedom

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