
**LEFT WITHOUT A PRAYER:
CAN ANTIDISCRIMINATION REGULATIONS
PROTECTING GAYS SURVIVE?**

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INTRODUCTION

In *Boy Scouts of America v. Dale*, the Supreme Court of the United States reaffirmed its commitment to protect the First Amendment right to freedom of association. Unfortunately, it did so by holding that states could not protect gays from discrimination by forcing public associations to admit them. In *Christian Legal Society v. Walker*, a panel of the Seventh Circuit applied *Dale* to invalidate the antidiscrimination policy of the Law School at Southern Illinois University, as applied to a Christian student group wishing to exclude gays. However, the Seventh Circuit did not merely apply *Dale*; it extended it by holding that a school could not even deny official recognition to a student group that chose to discriminate against gays.

This Note will briefly discuss the history of public accommodations and antidiscrimination laws, and how such laws came into conflict with the First Amendment right to free association. I will then examine the Seventh Circuit's decision in *Christian Law Society* and explain how the Seventh Circuit's expansion of *Dale* could potentially render invalid nearly all public accommodations and

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antidiscrimination laws protecting gays, reversing years of progress in removing discrimination based on sexual orientation.

I. BACKGROUND

A. *Public Accommodations and Antidiscrimination Laws*

After the Civil War, Congress¹ and a number of states² enacted statutes outlawing discrimination in places of public accommodation.³ In response to the Supreme Court's 1883 invalidation⁴ of the Civil Rights Act of 1875, several states, including Illinois,⁵ enacted public accommodations laws restricting discrimination based on race.⁶ These state laws protected the rights of racial minorities and other groups from discrimination in public accommodations until the federal government passed the Civil Rights Act of 1964.⁷ Illinois has since

¹ Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* Civil Rights Cases, 109 U.S. 3 (1883).

² Between 1865 and 1875, Massachusetts, New York, and Kansas, along with several Southern states under Northern control, passed public accommodations laws. Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 216, 238-39 (1978).

³ The 1875 Act banned discrimination on the basis of race in, among other places, "inns, public conveyances, . . . theatres, and other places of public amusement." Civil Rights Act of 1875, § 1, 18 Stat. at 336.

⁴ The Supreme Court held that the Fourteenth Amendment did not grant Congress the power to pass prospective laws enforcing civil rights against infringement by non-state actors, and that any legislation passed by Congress pursuant to the Fourteenth Amendment must "necessarily be corrective in character." *Civil Rights Cases*, 109 U.S. at 17-18.

⁵ Illinois' current public accommodations and antidiscrimination laws can be found at 775 ILL. COMP. STAT. §§ 5/1-101 to 5/10-104 (2001).

⁶ Colorado, Connecticut, Indiana, Illinois, Iowa, Michigan, Minnesota, Nebraska, New Jersey, Ohio, and Rhode Island passed public accommodations laws in 1884 and 1885. MILTON KONVITZ, *A CENTURY OF CIVIL RIGHTS* 157 (Greenwood Press 1983) (1961).

⁷ The current federal civil rights laws can be found at 42 U.S.C. §§ 1981 to 2000h-6 (2000).

broadened the scope of its antidiscrimination laws to protect more disadvantaged groups,⁸ and to provide that protection in a greater number of public places.⁹

Public and private law schools have instituted antidiscrimination policies protecting sexual-orientation since the late 1970s,¹⁰ and today, nearly every accredited law school in the country has a broad antidiscrimination policy.¹¹ Southern Illinois University (“SIU” or the “University”) has two such policies: the Affirmative Action/Equal Employment Opportunity Policy,¹² and a separate policy promulgated by the SIU Board of Trustees.¹³ These two policies will be referred to in this Note as the “EEO Policy” and the “Unlawful Discrimination Policy,” respectively.

B. *The First Amendment and the Right to Association*

The First Amendment prohibits Congress from passing any law “respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or the right of the

⁸ For example, women, Vietnam veterans, the elderly, and homosexuals. 775 ILL. COMP. STAT. § 5/1-102.

⁹ 775 ILL. COMP. STAT. § 5/5-101(A) (2001).

¹⁰ Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269, 280 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *rev'd and remanded*, 126 S. Ct. 1297 (2006).

¹¹ These policies vary from school to school, but typically contain language stating the law school’s commitment to a “policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, or sexual orientation.” *Id.*

¹² “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.” Christian Legal Soc’y Chapter at S. Ill. Univ. Sch. of Law v. Walker, No. 05-4070-GPM, 2005 WL 1606448, at *2 (S.D. Ill. Jul. 5, 2005)

¹³ “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.” *Id.*

people peaceably to assemble.”¹⁴ Although the First Amendment does not explicitly grant a right to associate, the Supreme Court recognized that group association “undeniably enhance[s]” the rights to free speech, freedom of religion, and free assembly.¹⁵ The freedom of an individual “to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”¹⁶ As such, the Court has held that the First Amendment implicitly grants the freedom “to associate with others in a wide variety of political, social, economic, educational, religious, and cultural ends.”¹⁷

The Court’s early freedom of association jurisprudence developed in cases arising from outwardly expressive groups, like the NAACP and political parties.¹⁸ For members of minority groups or individuals with dissident opinions, the right to freedom of expression was enhanced by the ability to gather together with like-minded individuals to make their ideas visible to a greater audience.¹⁹ Underlying the reasoning in these cases was the concern for privacy of association, which the Court considered often “indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”²⁰ For members of political parties, the ability to associate

¹⁴ U.S. CONST. amend. I.

¹⁵ NAACP v. Ala. ex rel. Patterson, 357 U.S. 449, 460 (1958); *accord* Bd. of Dir. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

¹⁶ Roberts, 468 U.S. at 622 (1984); *see also* NAACP, 357 U.S. at 460-61 (“state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny”).

¹⁷ Roberts, 468 U.S. at 622.

¹⁸ Brown v. Socialist Workers '74 Campaign Comm. of Oh., 459 U.S. 87 (1982) (Socialist Workers Party); Cousins v. Wigoda, 419 U.S. 477 (1975) (Democratic Party); NAACP v. Button, 371 U.S. 415 (1963); NAACP, 357 U.S. 449.

¹⁹ Roberts, 468 U.S. at 622.

²⁰ NAACP, 357 U.S. at 462.

with one another free from state interference was essential to the party's ability to successfully promote its political beliefs.²¹

In *Healy v. James*, the Supreme Court held that the right to freedom of association extended to student groups on college and university campuses because students did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²² The Court acknowledged that school officials could proscribe certain conduct to maintain order on college campuses, but that “First Amendment protections should apply with [the same] force on college campuses [as] in the community at large.”²³ In *Healy*, Central Connecticut State College (“CCSC”) students wishing to form a local chapter of Students for a Democratic Society (“SDS”) were denied official recognition by the CCSC’s president because the national SDS organization had been involved in violent demonstrations at other colleges.²⁴ However, the connections between the local chapter and the national organization, beyond their shared name, was limited; the CCSC chapter proclaimed independence from the national organization, and expressed disagreement with certain of the national organization’s statements.²⁵ Because the CCSC SDS was in violation of no rule issued by the school, the Court held that it had been denied official recognition merely on the basis of the president’s disagreement with the philosophy of the CCSC SDS.²⁶ So long as the viewpoints expressed by CCSC were not aimed at “inciting or producing imminent lawless action and . . . likely to incite or produce such action,”²⁷ CCSC SDS could not be denied official

²¹ *Brown*, 459 U.S. at 91-92.

²² 408 U.S. 169, 180 (1972) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

²³ *Healy*, 408 U.S. at 180.

²⁴ *Id.* at 171-72.

²⁵ *Id.* at 186-87.

²⁶ *Id.* at 187.

²⁷ *Id.* at 188 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

recognition without also being denied its fundamental First Amendment right to associate.²⁸

After the Court had established that there existed a constitutional right to associate for First Amendment purposes, it recognized a corresponding right to define the boundaries of that association: that freedom of association “plainly presupposes a freedom not to associate.”²⁹ For example, in a case involving a conflict between the national Democratic Party and a Wisconsin election law requiring open primaries,³⁰ the Supreme Court sided with the national party, holding that, for the purposes of the national party convention, the national party had a First Amendment right to decide the method in which its members were selected so they would best promote the national party’s message.³¹ The Court noted that an essential function of a political party is to express viewpoints on issues important to its members and to make collective decisions concordant with those viewpoints.³² The inclusion of persons with viewpoints opposed to those of the party’s members could distort this collective decision-making and substantially interfere with the party’s ability to collectively advance its members’ interests.³³ Following this reasoning, the Court held that the Wisconsin open primaries law violated the Democratic Party’s right to exclude certain individuals from its political association.³⁴

The Court realized that the right to exclude, if exercised injudiciously, could be used as a tool to perpetuate discrimination, since “the very exercise of the freedom to associate by some may

²⁸ *Healy*, 408 U.S. at 187-88.

²⁹ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

³⁰ In an “open” party primary, voters may vote for a party’s candidates without being members of that party. *Democratic Party of U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 111-12 (1981). According to the invalidated Wisconsin law, delegates at a party’s national convention were required to cast their votes in accordance with the outcome of the open primary election. *Id.* at 112.

³¹ *Id.* at 122.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 125-26.

serve to infringe that freedom for others.”³⁵ This language predicted the Court’s later decisions in *Roberts v. United States Jaycees* and *Rotary International v. Rotary Club of Duarte*, where the Court denied the United States Jaycees’ and the Rotary Club’s attempts to dress up their discrimination against women in First Amendment clothing.³⁶ In *Roberts*, the Court held that the right to expressive association may be limited by “regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”³⁷ The Court applied this test to the challenged state public accommodations statutes in both cases, and twice held that preventing discrimination against women was a compelling state interest unrelated to the suppression of ideas.³⁸ Before reaching that conclusion, however, the Court also noted in both cases that any impairment of the associations’ abilities to express their chosen messages by the challenged statutes was slight.³⁹

This check on the scope of the right to expressive association was short-lived, however. In 1995, the Court held that a Massachusetts public accommodations statute could not compel the organizers of the Boston Saint Patrick’s Day parade to allow a gay, lesbian, and bisexual group to march in the parade over the organizers’ objections.⁴⁰ However, the Court did not analyze *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* as it had prior expressive association cases, primarily because it involved a parade.⁴¹ Because a

³⁵ *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556, 575 (1974).

³⁶ 468 U.S. 609 (1984); 481 U.S. 537 (1987).

³⁷ *Roberts*, 468 U.S. at 623.

³⁸ *Rotary*, 481 U.S. at 549; *Roberts*, 468 U.S. at 628-29.

³⁹ Admitting women would not require Rotary to abandon its various civil-service activities. *Rotary*, 481 U.S. at 548. Any diminution of the Jaycees’ message resulting from the admission of women was “attenuated at best.” *Roberts*, 468 U.S. at 627.

⁴⁰ *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995).

⁴¹ *Id.* at 568-70.

parade is inherently and quintessentially expressive,⁴² and each group marching expresses a message, the Court reasoned that selection of those groups marching in the parade is entitled to the same First Amendment protections given to cable operators or newspaper editors.⁴³ Thus, the organizers of the Saint Patrick's Day parade could prevent a group from marching if the parade organizers disagreed with the message of the group.⁴⁴

Five years later, the Court decided *Boy Scouts of America v. Dale*,⁴⁵ currently the leading case on both the doctrine of expressive association, and the use of that doctrine by public groups to discriminate against homosexuals. In that case, the Boy Scouts were held by the New Jersey Supreme Court to be a place of public accommodation and were therefore compelled by New Jersey's public accommodations statute to reinstate James Dale, a scoutmaster whom the Scouts had expelled because he was homosexual.⁴⁶ The Supreme Court reversed the decision of the New Jersey Supreme Court and held that the New Jersey statute unconstitutionally infringed the expressive association rights of the Boy Scouts because the presence of Dale within its ranks caused the Scouts to express a message that was contrary to the message that the Scouts wished to express, namely, that homosexuality is acceptable.⁴⁷

Distilling its prior expressive association jurisprudence, the Supreme Court articulated a three-element test for expressive association claims in *Dale*: a state action violates a particular group's First Amendment right to expressive association when (1) that group is an "expressive association,"⁴⁸ (2) that group's ability to advocate

⁴² *Id.* at 568-69; *see also* *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (A peaceful protest march is "an exercise of [First Amendment] rights in their most pristine and classic form.").

⁴³ *Hurley*, 515 U.S. at 570 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

⁴⁴ *Hurley*, 515 U.S. at 575.

⁴⁵ 530 U.S. 640 (2000).

⁴⁶ *Id.* at 644-47.

⁴⁷ *Id.* at 653.

⁴⁸ *Id.* at 648.

“public or private viewpoints” is significantly impacted by the state action at issue,⁴⁹ and (3) the interest furthered by the state action at issue does not justify the burden on the group’s expressive association.⁵⁰ The Court appeared to give credence to the concern it voiced in *Gilmore v. City of Montgomery*, that the freedom of association should not be used as a means to uphold invidious discrimination,⁵¹ when it noted that an expressive association cannot “erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”⁵² However, the Court undermined that statement just a few lines before making it when it held that it was required to give substantial deference to an association’s view of what would impair its expression.⁵³ The Court held that the Boy Scouts had sufficiently demonstrated that promotion of homosexuality as a “legitimate form of behavior” was contrary to the message they wished to express, and that retaining Dale as a scoutmaster would force them to express that message to the Boy Scouts’ membership as well as the community at large.⁵⁴

What began as a recognition of the right for small, politically unpopular groups to assemble and make their viewpoints heard⁵⁵ has become a means of judicially-enforced discrimination against the politically unpopular minority of gay Americans.⁵⁶

⁴⁹ *Id.* at 650.

⁵⁰ *Id.* at 658-59.

⁵¹ 417 U.S. 556, 575 (1974).

⁵² *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000).

⁵³ *Id.*

⁵⁴ *Id.* at 654.

⁵⁵ *See generally* *Brown v. Socialist Workers '74 Campaign Comm. of Oh.*, 459 U.S. 87 (1982); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

⁵⁶ *See generally* *Dale*, 530 U.S. 640; *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

II. CHRISTIAN LEGAL SOCIETY V. WALKER⁵⁷

A. *Factual and Procedural Background*

The Christian Legal Society (“CLS”) is a national organization of lawyers and law students dedicated to practicing law in a manner consistent with the teachings of the Bible.⁵⁸ The Christian Legal Society has chapters at law schools across the country, including the law school at Southern Illinois University at Carbondale (“SIU” or the “University”).⁵⁹ CLS requires members and officers to affirm a statement of faith,⁶⁰ and CLS members must agree to follow a strict

⁵⁷ 453 F.3d 853 (7th Cir. 2006).

⁵⁸ CLS’s mission is “[t]o be the national grassroots network of lawyers and law students, associated with others, committed to proclaiming, loving and serving Jesus Christ, through all we do and say in the practice of law, and advocating biblical conflict reconciliation, legal assistance for the poor and the needy, religious freedom and the sanctity of human life.” Christian Legal Society, Vision and Mission, <http://www.clsnet.org/clsPages/vision.php> (last visited Dec. 2, 2006). CLS describes its purpose as “[t]ransforming the legal profession for good one heart and mind at a time by enlisting lawyers and law students everywhere to faithfully serve Jesus Christ in the diligent study and ethical practice of law by ministering to the poor, reconciling people in conflict, defending life and protecting the religious liberties of all people.” *Id.*

⁵⁹ Christian Legal Society, Law Student Ministry Contact List, <http://www.clsnet.org/lsmPages/keyContactLst.phpd>.

⁶⁰ The statement of faith reads as follows:

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.

Christian Legal Soc’y Chapter at S. Ill. Univ. Sch. of Law v. Walker, No. 05-4070-GPM, 2005 WL 1606448, at *1 (S.D. Ill. Jul. 5, 2005), *available at* <http://www.clsnet.org/clsPages/statement.php>.

interpretation of Christian dogma, which proscribes homosexual conduct as immoral.⁶¹

The CLS chapter at SIU⁶² was recognized as an official student organization, and as a result of this recognition, CLS received various benefits.⁶³ These benefits included access to the law school's bulletin boards, private meeting space within the law school, access to the law school's website and publications, access to the school's email lists, eligibility for funding through the law school, and the right to use the SIU name.⁶⁴ On March 25, 2005, CLS was notified by the Dean of SIU Law School that, because homosexuals were not allowed to be members, it was in violation of the EEO Policy and the Unlawful Discrimination Policy, and its status as an officially recognized student organization was revoked.⁶⁵

CLS filed suit in the United States District Court for the Southern District of Illinois seeking an injunction restoring its status as an officially recognized student organization alleging, inter alia, that SIU's actions had violated CLS's First Amendment rights to freedom of speech and freedom of expressive association.⁶⁶ The district court noted that a school does not run afoul of the First Amendment when it denies official recognition to a student group "that reserves the right to violate any valid campus rules with which it disagrees,"⁶⁷ and found the EEO Policy to be facially neutral and otherwise valid.⁶⁸ Because of the early stage of the case, the court could not yet determine whether the EEO Policy had been applied neutrally to CLS.⁶⁹ As such, the district court denied CLS's motion for a preliminary injunction, finding that CLS had failed to demonstrate the necessary likelihood of

⁶¹ *Christian Legal Soc'y*, 2005 WL 1606448, at *1.

⁶² For the remainder of this Note, "CLS" will refer to the SIU chapter.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at *2.

⁶⁶ *Id.*

⁶⁷ *Id.* (citing *Healy v. James*, 408 U.S. 169, 193-94 (1972)).

⁶⁸ *Christian Legal Soc'y*, 2005 WL 1606448, at *2.

⁶⁹ *Id.* at *2 n.2.

success on its First Amendment claims, calling it, “at best ... a close question.”⁷⁰ CLS appealed and filed a motion for an injunction pending appeal, which was granted by the seventh circuit.⁷¹

B. The Seventh Circuit Decision

A divided panel of the seventh circuit reversed the district court’s denial of CLS’s motion for a preliminary injunction and remanded the case to the district court with direction to enter a preliminary injunction on behalf of CLS.⁷² Writing for the majority, Judge Sykes, joined by Judge Kanne, held that CLS had demonstrated a likelihood of success on the merits of both of its First Amendment claims: expressive association and the denial of access to a public forum.⁷³ Judge Wood, in dissent, argued that CLS had not met its burden of proof and that the record was too incomplete to hold that the district court’s findings were an abuse of discretion.⁷⁴

The majority first questioned whether the district court was correct in finding that CLS had, in fact, violated any stated SIU policy.⁷⁵ There was no indication in the record or on oral argument that CLS had violated any state or federal antidiscrimination laws, so CLS could not have violated the Unlawful Discrimination Policy.⁷⁶ The majority also questioned whether the EEO Policy applied to CLS, as CLS did not employ anyone, nor was CLS a “mouthpiece[]” of SIU.⁷⁷ Judge Wood responded in her dissent that the EEO Policy applied to CLS because it requires that the University grant all “educational opportunities” without discrimination.⁷⁸ Because participation in student organizations can be central to the educational experience in

⁷⁰ *Id.* at *3.

⁷¹ *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (2006).

⁷² *Id.* at 867.

⁷³ *Id.*

⁷⁴ *Id.* at 876 (Wood, J. dissenting).

⁷⁵ *Id.* at 860.

⁷⁶ *Id.*

⁷⁷ *Id.* at 860-61.

⁷⁸ *Id.* at 872 (Wood, J. dissenting).

universities,⁷⁹ SIU would have to provide equal access to all student organizations to give effect to the EEO Policy.⁸⁰ Regardless, the majority doubted that CLS had violated the EEO Policy because CLS did not discriminate based on sexual orientation, but rather excluded individuals from membership based upon their “belief and behavior.”⁸¹ This argument was moot, according to the dissent, since the record was silent regarding whether CLS had ever admitted as a member an individual who had repented past homosexual behavior.⁸² Further, given the liberty interest in private sexual autonomy recognized by the Supreme Court in *Lawrence v. Texas*,⁸³ Judge Wood argued that SIU could validly interpret the EEO Policy to apply to discrimination based on homosexual conduct as well as status.⁸⁴

Next, the court addressed CLS’s expressive association claim. Relying heavily on *Dale, Roberts*, and *Healy*, the majority concluded that SIU’s application of the EEO Policy forced CLS to accept homosexuals as members, and therefore significantly affected CLS’s ability to express its viewpoint that homosexuality is immoral.⁸⁵ The dissent disagreed, arguing that SIU merely decided to withdraw certain benefits from CLS because CLS was not in compliance with the EEO Policy.⁸⁶

The court then determined that SIU had violated CLS’s free speech right by revoking CLS’s right to enter a public forum it was

⁷⁹ See *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 222-23 (2000); *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 824 (1995).

⁸⁰ *Christian Legal Soc’y*, 453 F.3d at 873 (Wood, J. dissenting).

⁸¹ *Id.* at 860. According to CLS, a person who was homosexual, but repented past homosexual conduct and agreed not to engage in homosexual conduct in the future, could be admitted as a member. *Id.* at 858.

⁸² *Id.* at 873 (Wood, J. dissenting).

⁸³ 539 U.S. 558 (2003). The Supreme Court, holding invalid a Texas statute criminalizing homosexual sodomy, noted that homosexual couples have the same autonomy to choose private, intimate relationships as do heterosexual couples. *Id.* at 574.

⁸⁴ *Christian Legal Soc’y*, 453 F.3d at 873 (Wood, J. dissenting).

⁸⁵ *Id.* at 863.

⁸⁶ *Id.* at 873-74 (Wood, J. dissenting).

entitled to access.⁸⁷ Although the record was too incomplete⁸⁸ to address the proper level of scrutiny⁸⁹ under which to evaluate the forum created by SIU, the majority nonetheless concluded that under any level of scrutiny, SIU had violated CLS's free speech rights because it had applied the EEO Policy to CLS in a viewpoint-discriminatory fashion.⁹⁰ The dissent reasoned that if the record was insufficiently developed to decide on the level of scrutiny, it was likewise insufficiently developed to determine that SIU had unfairly applied the EEO Policy.⁹¹

III. ANALYSIS

A. *The Seventh Circuit misapplied the Supreme Court's expressive association jurisprudence, extending First Amendment protection beyond the sorts of activities typically covered*

In reaching its decision regarding CLS's expressive association claim, the majority relied extensively on the Supreme Court's expressive association cases, specifically *Dale*, *Hurley*, *Roberts*, and *Healy*.⁹² However, the cases relied upon by the majority are distinguishable in three important respects: first, CLS was not compelled to associate with anyone, nor was CLS forced to modify the content of its expression; second, SIU did not prevent CLS from associating on or around the SIU campus; and finally, SIU has a compelling interest in eliminating invidious discrimination within its educational community. Based on the first two facts, the Seventh Circuit should have held that SIU's enforcement of the EEO Policy did not significantly impair CLS's associational rights. The third fact

⁸⁷ *Id.* at 867.

⁸⁸ *Id.*

⁸⁹ See generally *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-107 (2001); *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 829-30 (1995); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), for discussions of the levels of scrutiny afforded to differing public fora.

⁹⁰ *Christian Legal Soc'y*, 453 F.3d at 866-67.

⁹¹ *Id.* at 874-75 (Wood, J. dissenting).

⁹² *Id.* at 861-64.

should have led the Seventh Circuit to the conclusion that any violation of CLS's associational rights was justified. The majority's misapplication of the Supreme Court's expressive association jurisprudence overextended the protections properly granted to expressive associations to the potential detriment of all state antidiscrimination policies.⁹³

1. CLS's claim was distinguishable from prior expressive association cases because CLS was not compelled to admit anyone as a member.

To succeed in an expressive association claim, a group must first show that it is expressive association.⁹⁴ The group must then demonstrate that its "ability to advocate public or private viewpoints" has been significantly impacted by government action.⁹⁵ In *Roberts*, the Supreme Court recognized that "forc[ing] [a] group to accept members it does not desire" may violate the group's associational freedom because it significantly interferes with the internal structure and affairs of the group.⁹⁶ Although the Jaycees were forced to include women by the public accommodations statute at issue in *Roberts*, the Supreme Court nonetheless held the statute to be valid because the state's interest in ending discrimination against women was important,⁹⁷ and the Jaycees' associational freedoms were not significantly impaired.⁹⁸ The Supreme Court's subsequent expressive association decisions also involved compelled association: the Boy Scouts were required under a New Jersey public accommodations law to reinstate Mr. Dale as an assistant scoutmaster,⁹⁹ and the organizers

⁹³ For an examination of recent developments in the expressive association doctrine as contrary to antidiscrimination laws, see Jed Rubenfeld, Essay, *The Anti-Discrimination Agenda*, 111 YALE L.J. 1141, 1156-1163 (2002).

⁹⁴ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). SIU did not contest CLS's status as an expressive association. *Christian Legal Soc'y*, 453 F.3d at 862.

⁹⁵ *Dale*, 530 U.S. at 650.

⁹⁶ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

⁹⁷ *Id.* at 625.

⁹⁸ *Id.* at 627.

⁹⁹ *Dale*, 530 U.S. at 646.

of Boston's St. Patrick's Day Parade were forced to allow a group of gay and lesbian individuals to march in their parade.¹⁰⁰ In a recent case addressing an expressive association claim, the Court held there was no violation of expressive association rights caused by granting military recruiters mandatory access to a law school campus because military recruiters did not "become members of the school's expressive association."¹⁰¹

Nowhere in its complaint did CLS allege that it had been compelled by SIU to admit anyone,¹⁰² and the district court found no such compulsion.¹⁰³ Although the majority acknowledged that there was no actual compulsion, it held SIU's withdrawal of recognition was constitutionally equivalent to a compelled association, and therefore violated CLS's expressive association rights.¹⁰⁴ The majority relied on *Healy* to reach the conclusion that SIU could not use the threat of derecognition to force CLS to accept openly gay students as members and officers.¹⁰⁵ However, the majority's reliance on *Healy* for this proposition was puzzling, as the facts in *Healy* did not involve a student association compelled to admit members, but rather a student association prevented from associating at all.¹⁰⁶

While the majority correctly noted that First Amendment rights are protected from indirect as well as direct interference,¹⁰⁷ a state may make certain value judgments and implement those judgments through

¹⁰⁰ *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 563-64 (1995).

¹⁰¹ *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1312 (2006).

¹⁰² Verified Complaint, *Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, 2005 WL 1606448 (S.D. Ill. Jul. 5, 2005) (No. 05-4070-GPM).

¹⁰³ *Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, No. 05-4070-GPM, 2005 WL 1606448, at *2 (S.D. Ill. Jul. 5, 2005).

¹⁰⁴ *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 864 (2006).

¹⁰⁵ *Id.*

¹⁰⁶ *Healy v. James*, 408 U.S. 169, 176 (1972).

¹⁰⁷ *Christian Legal Soc'y*, 453 F.3d at 864 (citing *Healy*, 408 U.S. at 183).

the allocation of public resources.¹⁰⁸ In addition, the Supreme Court has repeatedly held that Congress may attach conditions to the receipt of federal funds, even when those conditions intrude upon the exercise of certain fundamental rights.¹⁰⁹ Although a state may not withhold a benefit to compel individuals to forgo First Amendment rights, a state may, within broad limits, appropriate public funds to establish a program and then define the limits of that program.¹¹⁰

SIU created a program of recognized student organizations, and established criteria, including meeting the EEO Policy, for becoming a recognized student organization.¹¹¹ Because CLS refused to admit homosexuals as members, SIU informed CLS that it had violated the EEO Policy, and CLS was therefore no longer allowed to participate in the program of recognized student organizations.¹¹² The majority asked what purpose was served by “forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed.”¹¹³ However, nowhere in the record before the Seventh Circuit was there any indication that SIU

¹⁰⁸ *Cf. Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that, despite a woman’s fundamental right to choose to terminate a pregnancy, Connecticut is under no obligation to use public funds to subsidize abortions for indigent women).

¹⁰⁹ *See United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194 (2003) (plurality) (mandated use of Internet filters on library computers where Internet access was procured with federal assistance did not violate library patrons’ First Amendment rights); *Rust v. Sullivan*, 500 U.S. 173 (1991) (prevention of family-planning funds from being used by programs mentioning abortion did not violate either free speech rights of doctors or patients’ rights to choose to terminate pregnancy); *Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984) (forbidding a college receiving federal funding from discriminating on the basis of gender did not violate that college’s First Amendment rights); *see also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1306-07 (2006) (although the Court held that Congress could directly compel law schools to accept military recruiters, it noted that the law schools were “free to decline the federal funds”).

¹¹⁰ *Am. Library Ass’n*, 539 U.S. at 210-11.

¹¹¹ Brief of Defendants-Appellees at 4, *Christian Legal Soc’y*, 453 F.3d 853 (No. 05-3239).

¹¹² *Christian Legal Soc’y*, 453 F.3d at 858.

¹¹³ *Id.* at 863.

created the EEO Policy to force student groups like CLS to include members with which those groups did not wish to associate. Like virtually all law schools across the country,¹¹⁴ SIU had a preexisting antidiscrimination policy, generally applied, that precluded discrimination on the basis of “race, color, religion, sex, national origin, age, disability, . . . sexual orientation, or marital status,”¹¹⁵ and required that all recognized student groups comply with that policy.¹¹⁶ SIU found that CLS was in violation of this policy and revoked its recognized status.

Because SIU did not force CLS to admit anyone, the majority’s reliance on *Dale* and *Hurley* is misplaced. Rather, as in *Rumsfeld v. Forum for Academic and Institutional Rights*, CLS “has attempted to stretch [the] . . . First Amendment doctrine[]” of expressive association “well beyond the sort of activities” protected by that doctrine,¹¹⁷ and the majority should not have extended First Amendment protection to CLS. Because *Dale* significantly weakened a state’s ability to enforce antidiscrimination laws against certain groups, courts should be wary of extending the holding of *Dale*.¹¹⁸ By shielding CLS from the enforcement of SIU’s EEO Policy despite the fact that CLS wished to avail itself of the benefits attendant to official recognition by SIU, the majority of the panel did just that. This overextension of *Dale* could potentially lead to the invalidation of any antidiscrimination policy protecting homosexuals, and it calls into question the validity of antidiscrimination policies generally.

¹¹⁴ *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 280 (D.N.J. 2003), *rev’d*, 390 F.3d 219 (3d Cir. 2004), *rev’d and remanded*, 126 S. Ct. 1297 (2006).

¹¹⁵ *Christian Legal Soc’y*, 453 F.3d at 858.

¹¹⁶ Brief of Defendants-Appellees, *supra* note 111, at 4.

¹¹⁷ 126 S. Ct. at 1313.

¹¹⁸ *Cf. Jed Rubenfeld, The First Amendment’s Purpose*, 53 Stan. L. Rev. 767, 810 n.96 (2001) (taken to its logical conclusion, the holding in *Dale* could allow a Christian homeowners’ association, wishing to exclude African-Americans, Jews, homosexuals, or anyone else on the basis of religious belief, to demand that any law challenging their discrimination be subjected to strict scrutiny).

2. Although SIU withdrew from CLS the benefits conferred to officially recognized student groups, SIU did not prevent CLS from associating on or around the SIU campus.

The majority argued that the facts before it were similar to the facts in *Healy* in “all material respects.”¹¹⁹ However, the facts in *Healy* are readily distinguishable, as Judge Wood noted in her dissent.¹²⁰ Not only did the president of the college in *Healy* refuse to confer recognized status to the student group (“SDS”) in that case, he denied SDS the ability to meet on campus and took the “extraordinary step of refusing to let students meet (*i.e.* sit together) in the campus coffee shop!”¹²¹ SIU did nothing so drastic to CLS. CLS was still able to meet on campus, and, as recognized by the district court, its abilities to “assemble, evangelize, and proselytize [were] not impaired.”¹²² Although CLS’s access to physical bulletin-board space at SIU was restricted when it was derecognized, CLS was still free to distribute flyers on campus.¹²³ In addition, as recognized by the dissent, the importance of physical bulletin-board space on modern campuses has diminished markedly in the years since *Healy* was decided: “[m]ost universities and colleges, and most college-aged students, communicate through email, websites, and hosts like MySpace®.”¹²⁴ All of these avenues remained available to CLS, so CLS had substantial means to get its message out to the SIU community,¹²⁵ unlike the students in *Healy*.

Not only are the facts in *Healy* materially distinguishable from this case, the majority overlooked an important holding in *Healy*. The *Healy* Court held that SDS’s associational rights were violated when the college refused, *without justification*, to grant it official

¹¹⁹ *Christian Legal Soc’y*, 453 F.3d at 864.

¹²⁰ *Id.* at 874 (Wood, J. dissenting).

¹²¹ *Id.* (citing *Healy v. James*, 408 U.S. 169, 181 (1972)).

¹²² *Christian Legal Soc’y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, No. 05-4070-GPM, 2005 WL 1606448, at *2 (S.D. Ill. Jul. 5, 2005).

¹²³ Brief of Defendants-Appellees, *supra* note 111, at 11.

¹²⁴ *Christian Legal Soc’y*, 453 F.3d at 874 (Wood, J. dissenting).

¹²⁵ *Id.*

recognition.¹²⁶ The Court further held that “the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees.”¹²⁷ This is directly analogous to the case before the Seventh Circuit: CLS sought “the benefits of participation” as a recognized student group at SIU, but also wished to violate SIU’s EEO Policy. Under the correct interpretation of *Healy*, SIU had every right to derecognize CLS. The majority recognized SIU’s “interest in maintaining order and enforcing reasonable campus rules,” but stated that SIU could not apply the EEO Policy to CLS because it was aimed at CLS’s “advocacy or philosophy.”¹²⁸ Although CLS alleged that SIU had singled it out for enforcement of the EEO Policy,¹²⁹ the record before the Seventh Circuit was undeveloped. As noted in the dissent, SIU had not yet submitted any evidence to counter CLS’s assertion that the EEO Policy had been applied to it unfairly.¹³⁰ Yet, the majority nevertheless held that SIU had no purpose in enforcing its antidiscrimination policy other than “neutralizing particular beliefs” of CLS.¹³¹ As addressed in greater detail below, SIU’s purpose in enforcing its EEO Policy was not to disadvantage CLS, but to further the compelling goal of eliminating discrimination within student organizations.

3. SIU has a compelling interest in eliminating invidious discrimination within its educational community.

The final element of the Supreme Court’s expressive association test is the balancing of interests.¹³² Even if a group shows that a regulation has significantly impaired its ability to associate, the regulation may still be valid if it “serve[s] compelling state interests,

¹²⁶ 408 U.S. at 181.

¹²⁷ *Id.* at 193-94.

¹²⁸ *Christian Legal Soc’y*, 453 F.3d at 864.

¹²⁹ Verified Complaint, *supra* note 102, at ¶ 4.11.

¹³⁰ *Christian Legal Soc’y*, 453 F.3d at 869 (Wood, J. dissenting).

¹³¹ *Id.* at 863.

¹³² *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658-59 (2000).

unrelated to the suppression of ideas,” and is narrowly-tailored to meet those interests.¹³³ Not only did SIU not significantly impair CLS’s ability to associate, the majority misapplied the balancing test by declining to recognize SIU’s compelling interest in eliminating discrimination in the educational opportunities provided to students. In *Roberts*, the Supreme Court held that Minnesota’s antidiscrimination law “clearly further[ed] compelling state interests” by ensuring equal access to women,¹³⁴ and that a state’s interest in ensuring equal access to all of its citizens was unrelated to the suppression of ideas.¹³⁵

Most law schools have, since at least 1990, advanced antidiscrimination policies identifying sexual orientation as a protected class.¹³⁶ These policies arose, at least in part, as a response to the discrimination to which gay people in America have been subjected.¹³⁷ In addition, the Supreme Court has long held elimination of discrimination in education to be a compelling interest.¹³⁸ More recently, the Supreme Court has recognized that diversity among a law school’s student body is a compelling interest that withstands strict scrutiny.¹³⁹ The Court further held that when a university’s “proper institutional mission” is at issue, “‘good faith’ on the part of [the] university is ‘presumed’ absent ‘a showing to the contrary.’”¹⁴⁰

¹³³ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

¹³⁴ *Id.* at 626.

¹³⁵ *Id.* at 624.

¹³⁶ *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 280 (D.N.J. 2003), *rev’d*, 390 F.3d 219 (3d Cir. 2004), *rev’d and remanded*, 126 S. Ct. 1297 (2006).

¹³⁷ *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (Colorado constitutional amendment denied to homosexual individuals the sort of protections against exclusion from ordinary life in society that heterosexual individuals take for granted).

¹³⁸ *Cf. Norwood v. Harrison*, 413 U.S. 455, 469 (1973) (“discriminatory treatment exerts a pervasive influence on the entire educational process”).

¹³⁹ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

¹⁴⁰ *Id.* at 329 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978)).

So long as SIU applied the EEO Policy in furtherance of its “institutional mission,” it is therefore presumed to have acted in good faith. The Supreme Court has noted that a university can further its educational mission by promoting participation in student groups and other extracurricular activities.¹⁴¹ SIU’s determination that its educational mission would be furthered by eliminating discrimination in access to student groups was thus entitled to substantial deference from the Seventh Circuit. Rather than granting SIU this deference however, the majority casually referred to the state’s general interest in eliminating discriminatory conduct, and then insisted, despite the limited record before it, that SIU had enforced the EEO Policy not to promote equality of opportunities, but rather to suppress CLS’s ability to express its beliefs.¹⁴² Precisely because the record was so limited, Judge Wood had no reason to believe that SIU would behave in such a capricious manner: “I am unwilling to indulge in the presumption that a body that is legally part of the State of Illinois is violating the federal and state constitutions.”¹⁴³

B. The Seventh Circuit should not have reversed the district court, because the record was too incomplete to rule on CLS’s public-forum exclusion claim.

Even though the record on appeal was admittedly thin, Judge Sykes nonetheless held that SIU had violated CLS’s right to participate in the public forum of officially recognized student organizations.¹⁴⁴ Judge Wood noted in her dissent that SIU had not yet presented any evidence because of the case’s early procedural posture.¹⁴⁵ It is therefore unsurprising that, in the majority’s words, “every part of [the record] . . . point[ed] to success for CLS.”¹⁴⁶ The majority noted that

¹⁴¹ See *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 222-23 (2000).

¹⁴² *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 863 (2006).

¹⁴³ *Id.* at 874-75.

¹⁴⁴ *Id.* at 867.

¹⁴⁵ *Id.* at 869 (Wood, J. dissenting).

¹⁴⁶ *Id.* at 867.

SIU had created a some sort of public forum by choosing to grant official recognition to certain student groups,¹⁴⁷ but acknowledged that the record was insufficiently developed to determine the exact type of public forum present, and therefore the proper level of scrutiny under which to analyze CLS's alleged expulsion from the forum.¹⁴⁸ The majority argued that, regardless of the level of scrutiny it applied, SIU had enforced the EEO Policy against CLS in a viewpoint discriminatory way.¹⁴⁹ CLS alleged in its complaint that SIU had singled it out for derecognition,¹⁵⁰ and provided the constitutions of a few other student groups which it claimed discriminated in their membership yet remained officially recognized.¹⁵¹ However, the district court noted that "at this stage in the case, the Court need not, and indeed cannot, decide whether the [EEO] Policy has been neutrally applied."¹⁵² If the record was too incomplete for the district court to determine whether SIU had singled out CLS for enforcement of the EEO Policy, the majority was unwise to grant a preliminary injunction on the basis of that record.

CONCLUSION

In its expressive association jurisprudence, the Supreme Court has struck a balance between protecting the important First Amendment rights promoted by group association and protecting the rights of individuals to freely access publicly available goods and services. The Seventh Circuit's holding in *Christian Legal Society v. Walker* tipped this delicate balance too far in favor of groups wishing to exclude, because Christian Legal Society's associational rights were not significantly impaired in the same fashion as groups in prior expressive association cases. The Supreme Court's present First

¹⁴⁷ *Id.* at 865.

¹⁴⁸ *Id.* at 866.

¹⁴⁹ *Id.*

¹⁵⁰ Verified Complaint, *supra* note 102, at ¶ 4.11.

¹⁵¹ *Christian Legal Soc'y*, 453 F.3d at 870 (Wood, J. dissenting).

¹⁵² *Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, No. 05-4070-GPM, 2005 WL 1606448, at *2 n.2 (S.D. Ill. Jul. 5, 2005).

Amendment jurisprudence allows colleges and universities, as part of their educational mission, to prevent discrimination within student organizations, so long as any antidiscrimination policy is enforced in a viewpoint-neutral manner. Because there was insufficient evidence before the Seventh Circuit that Southern Illinois University had discriminated in the application of its antidiscrimination policy to revoke Christian Legal Society's status as an officially recognized student organization, the Seventh Circuit should not have reversed the district court's decision.