CONSTITUTIONAL LAW — FIRST AMENDMENT — SEVENTH CIRCUIT HOLDS THAT PUBLIC UNIVERSITY CANNOT REFUSE TO RECOGNIZE STUDENT GROUP BASED ON GROUP'S VIOLATION OF SCHOOL NONDISCRIMINATION POLICY. — *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006).

Universities have struggled in recent years to accommodate the conflicting goals of facilitating free association among students and eradicating discrimination on campus.[1] In an effort to provide equal access to campus resources for all students, many universities have established nondiscrimination policies.[2] Courts have repeatedly grappled with the intersection of these nondiscrimination policies and student organizations' desires to shape the composition of their memberships.[3] Recently, in *Christian Legal Society v. Walker*,[4] the Seventh Circuit faced this conflict directly: when a public university withdrew recognition from a Christian student organization that excluded homosexuals from full membership in possible violation of the university's nondiscrimination policy, the organization filed suit, arguing that the university unconstitutionally infringed upon the organization's rights of expressive association and free speech. On appeal from the preliminary injunction decision, the court determined that Christian Legal Society was likely to prevail on its expressive association and free speech claims.[5] Although the court had the commendable aim of preventing the exclusion of religious student groups from cam-

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[1] The task is especially difficult for public universities. Some scholars argue that government *does not* have a "constitutionally legitimate interest in eradicating discriminatory attitudes, beliefs, expressions, or associations." David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV 83, 101 (2001) (emphasis omitted). Other scholars emphasize that government *should not* have an interest in eradicating discrimination because "forcing greater inclusion would actually diminish genuine diversity" by failing to "preserve enclaves of orthodoxy." Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 25 (2000). The Supreme Court has not yet weighed in on "whether the stronger legal interest is that of a university's students to be free from discrimination, or that of the members of an official student organization to exercise their freedoms under the First Amendment." Dona G. Hamilton & Eric D. Bentley, *Enforcing a University's Non-Discrimination Provision for a Student Organization's Selection of Its Members and Officers*, 34 J.L. & EDUC. 615, 625 (2005).

[2] *See, e.g.*, Univ. of Va., Nondiscrimination Policy (Nov. 14, 2002), *available at* http://www.virginia.edu/nondiscrimination.html ("[T]he University does not discriminate in any of its programs, procedures, or practices on the basis of age, color, disability, national or ethnic origin, political affiliation, race, religion, sex (including pregnancy), sexual orientation, or veteran status.").

[3] Arizona State University, the University of North Carolina at Chapel Hill, the University of California's Hastings College of Law, the University of Minnesota, Texas Tech University, Shippensburg University (Shippensburg, Pennsylvania), and Washburn University (Topeka, Kansas) have all faced lawsuits brought by Christian student organizations over the universities' nondiscrimination policies. *See* Kathleen Murphy, *Can Religious Groups Exclude Non-Believers?*, CHI. TRIB., Nov. 18, 2005, § 2, at 12.

[4] 453 F.3d 853 (7th Cir. 2006).

[5] *Id.* at 864, 867.

pus life, it dramatically overstated the effects of derecognition in an effort to find a constitutional violation and thereby avoided considering to what extent public universities may condition the receipt of state funds on adherence to a nondiscrimination policy.

Southern Illinois University's School of Law (SIU), a public law school, invites student organizations to apply for official recognition.[6] Recognition provides several benefits to student groups: access to the law school e-mail list and campus bulletin boards, inclusion in the law school's list of official student organizations, permission to reserve campus space for meetings and storage, and funding from the law school budget.[7] Christian Legal Society (CLS), one chapter of which is an SIU student group, is an association of Christian lawyers and law students who agree to abide by the moral principles espoused in the organization's statement of faith.[8] Although any student may attend CLS's meetings, full voting membership in the organization is subject to the student's adherence to CLS's moral principles, which include a prohibition against engaging in or approving of homosexual activity.[9] After receiving a complaint that active homosexuals could not become voting members of CLS, SIU revoked CLS's student organization status on the ground that CLS violated SIU's Affirmative Action/Equal Employment Opportunity (AA/EEO) policy to "provide equal employment and education opportunities for all qualified persons without regard to . . . sexual orientation" and the SIU Board of Trustees' policy that required all recognized student organizations to "adhere[] to all appropriate federal or state laws concerning nondiscrimination and equal opportunity."[10]

CLS filed suit against SIU claiming violation of its First Amendment rights of expressive association and free speech and moved for a preliminary injunction to restore its student organization status pending a decision on the merits.[11] The District Court for the Southern District of Illinois denied the preliminary injunction on the ground that CLS did not meet two of the requirements for a preliminary injunction. First, CLS did not demonstrate that it was reasonably likely to succeed on the merits — "at best it is a close question."[12] Second, CLS did not show that it would suffer irreparable harm if the injunc-

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[6] *Id.* at 857.

[7] *Id.*

[8] *Id.* at 857–58. CLS's beliefs include acceptance of "Jesus Christ as my Savior" and "[t]he Bible as the inspired Word of God." Christian Legal Soc'y v. Walker, No. Civ. 05-4070-GPM, 2005 WL 1606448, at *1 (S.D. Ill. July 5, 2005).

[9] *Walker*, 453 F.3d at 858.

[10] *Id.* (internal quotation marks omitted).

[11] *Id.* CLS also advanced equal protection and due process claims, which CLS did not pursue on appeal. *Id.* at 860 n.1.

[12] *Walker*, 2005 WL 1606448, at *3.

tion were denied — "the organization exists, will continue to exist, and will meet and carry-on its business."[13] The court found that SIU's nondiscrimination policy was facially neutral, that application of the policy did not force CLS to include unwanted members, and that revocation of student organization status did not violate CLS's right to expressive association because derecognition did not force the group to "alter its message or expression."[14] The court characterized the consequence of derecognition as a minor logistical inconvenience, noting that the important "right[s] to meet, assemble, evangelize, and proselytize" remained untouched.[15] CLS appealed the preliminary injunction decision.[16]

The Seventh Circuit reversed the judgment and remanded. Judge Sykes,[17] writing for the majority, found that CLS met the two preliminary injunction requirements identified by the district court: CLS was likely to succeed on the merits, and CLS would suffer irreparable harm outweighing any harm suffered by SIU if the preliminary injunction were denied.[18] The court indicated that CLS was likely to succeed on the merits even without resort to the group's First Amendment arguments because derecognition was likely not justified under either of the school's two rationales. CLS did not violate the Board of Trustees' policy that required student organizations to adhere to federal and state nondiscrimination laws; indeed, SIU could not identify a law that CLS had violated.[19] CLS probably also did not violate SIU's AA/EEO policy because CLS did not exclude homosexuals on the basis of sexual orientation, as opposed to sexual conduct,[20] nor did CLS "employ" anyone or constitute an "education opportunity."[21]

Notwithstanding CLS's likelihood of success on this threshold issue, the court went on to state that even if SIU's policies did justify derecognition, CLS was likely to succeed in demonstrating that the application of those policies violated CLS's rights to expressive association and free speech.[22] The court found that SIU's application of its nondiscrimination policy infringed on CLS's right of expressive association because it forced CLS to allow homosexuals as voting mem-

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[13] *Id.*

[14] *Id.* at *2.

[15] *Id.*

[16] *Walker*, 453 F.3d at 859.

[17] Judge Kanne joined Judge Sykes's opinion.

[18] *Walker*, 453 F.3d at 859, 867.

[19] *Id.* at 860.

[20] *Id.*

[21] *Id.* at 860–61 (internal quotation marks omitted).

[22] The expressive association and free speech findings are technically dicta since the court held against SIU on the threshold question of whether CLS violated SIU's nondiscrimination policy. *See id.* at 861.

bers and because the inclusion of homosexuals would burden CLS's ability to express its disapproval of homosexuality.[23] Revoking student organization status was an indirect means of inhibiting expressive association,[24] and SIU's action was unjustified because its only purpose was to "neutraliz[e] particular beliefs contained in [CLS's] creed."[25] SIU also violated CLS's free speech rights by ejecting it from a speech forum in which it had a right to remain.[26] The court declined to determine whether the student organization forum was an open forum, a designated public forum, or a nonpublic forum, citing insufficiency of the record.[27] The court found, however, that even under the least rigorous standard of the three — that for nonpublic forums — CLS's right to free speech had likely been violated.[28] SIU applied its AA/EEO policy unevenly, in that it had not derecognized student groups such as the Muslim Students' Association and the Young Women's Coalition, despite the fact that they discriminated on bases prohibited by SIU's nondiscrimination policy.[29] To determine whether CLS would suffer irreparable harm if the preliminary injunction were denied, the court balanced CLS's likely success on the merits against the harm of requiring SIU to recognize a group that may violate its nondiscrimination policy. The court found that the probable violation of CLS's First Amendment rights outweighed any potential harm to SIU.[30]

Writing in dissent, Judge Wood stated that there was not enough evidence in the preliminary record to decide how CLS's policy had been applied in the past or whether SIU discriminated against the Christian group by failing to target other organizations that violated the nondiscrimination policy.[31] Judge Wood observed that the "existence of a close question" suggested that deference should be given to the district court's decision.[32] Further, Judge Wood emphasized that there is a "line between rules that compel conduct and rules that merely withhold benefits."[33] Analogizing to discrimination against Arabs or African Americans, she argued that an organization in violation of the nondiscrimination policy must "sustain itself without any state

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[23] *Id.* at 863.
[24] *Id.* at 864.
[25] *Id.* at 863.
[26] *Id.* at 865–66.
[27] *Id.* at 866.
[28] *Id.*
[29] *Id.* The Muslim Students' Association excluded non-Muslims, and the Young Women's Coalition excluded men. *Id.*
[30] *Id.* at 867.
[31] *Id.* at 869–70 (Wood, J., dissenting).
[32] *Id.* at 871.
[33] *Id.* at 873.

support — even if it could root such a membership policy in a religious text."[34] She determined that SIU had a greater likelihood of success because the university had an interest in promoting a diverse environment, and the AA/EEO policy gave it the ability to do so.[35]

The *Walker* court, preoccupied with protecting CLS's ability to choose its members, approached the group's core expressive association claim with the result already in mind. The court failed to consider whether derecognition might represent a constitutional means of conditioning student group funding on inclusion of the categories of students protected by SIU's nondiscrimination policy. Instead, the court merely asked whether SIU had a compelling interest in overriding CLS's expressive association through the forced inclusion of homosexuals. In other words, the court presupposed that derecognition is a tool of forced inclusion. However, derecognition did not interfere with CLS's membership or message as a private group. The primary issue therefore is not the forced inclusion of undesired members in a private group, but the ability of the law school to condition the grant of campus resources on adherence to a nondiscrimination policy.[36] Ultimately, the court was correct to issue a preliminary injunction based on technical flaws unique to these facts — the possibly inapplicable nondiscrimination policy[37] and the possibly inconsistent application of the policy[38] — but its reasoning on the merits of the expressive association claim was flawed.

The court began its expressive association analysis incorrectly by characterizing SIU's derecognition of CLS as forced inclusion when the evidence does not support such an interpretation. The majority framed the question as whether "the forced inclusion of active homosexuals significantly affect[ed] CLS's ability to express its disapproval of homosexual activity" and concluded in no uncertain terms: "To ask this question is very nearly to answer it."[39] The court then proceeded

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[34] *Id.* at 875.

[35] *Id.* at 872–73.

[36] This comment, like the *Walker* opinion, "accept[s] at face value SIU's conclusion that CLS's membership policies violated the university's antidiscrimination policy" for the purposes of analyzing the expressive association claim. *Id.* at 861 (majority opinion).

[37] *See id.* at 860–61.

[38] *See id.* at 866.

[39] *Id.* at 862. The court abruptly concluded that the inclusion of homosexuals would hamper CLS's ability to convey its intended message. However, it is unclear how homosexual members would impair CLS's mission "to maintain a vibrant Christian Law Fellowship on the School's campus which enables its members, individually and as a group, to love the Lord with their whole beings." Christian Legal Soc'y v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *22 (N.D. Cal. May 19, 2006) (internal quotation mark omitted); *cf.* Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374, 393 (E.D.N.Y. 2006) (finding that the inclusion of women would not hamper a fraternity's ability to fulfill its mission of conducting com-

to argue against SIU's derecognition of CLS by reciting the facts of the leading forced inclusion cases, *Boy Scouts of America v. Dale*[40] and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[41] However, these precedents considered individuals who sought to join private groups that did not receive public funding; thus, they are inapplicable to *Walker* because SIU did not force CLS to accept homosexual members into its private organization. It conditioned funding only on compliance with its nondiscrimination policy.

After its premature conclusion that derecognition implies forced inclusion, the court backpedaled to acknowledge the question that should have led the inquiry: did the action of derecognition alone unconstitutionally interfere with CLS's expressive association?[42] SIU claimed that the practical effect of derecognition on CLS was so trivial that it did not rise to the level of unconstitutional forced inclusion. However, instead of addressing SIU's assertion, the *Walker* court deflected the question through misapplication of *Healy v. James*.[43] In *Healy*, a university refused to recognize a socialist student organization affiliated with a national umbrella group that advocated violence.[44] The *Walker* court characterized *Healy* as holding that a university "impermissibly infringe[s]" on a student group's associational rights if it "refuse[s] to confer student organization status and its attendant benefits" on the group.[45] However, the *Healy* Court's holding focused on the *effects* of nonrecognition, not on the mere *fact* of nonrecognition.[46] The university's conduct in *Healy* rose to the level of a constitutional violation only because, in addition to nonrecognition, the university effectively excluded the group from campus.[47]

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munity service, hosting campus events, and promoting Jewish culture). However, a court may be more reluctant to second guess the purpose of a religious group than that of a social organization.

[40] 530 U.S. 640 (2000) (holding, on First Amendment expressive association grounds, that the New Jersey public accommodations law could not require the private Boy Scouts organization to accept an openly gay scoutmaster as a member in contravention of the group's opposition to homosexuality). Use of the *Dale* precedent is a common tactic when framing derecognition of a student group as forced inclusion. *See, e.g.*, Mark Andrew Snider, Note, *Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies*, 61 WASH. & LEE L. REV. 841, 870 (2004) ("*Dale* obligates a court to respect a group's determination that forced inclusion would impair its ability to engage in free speech.").

[41] 515 U.S. 557 (1995) (holding, on First Amendment grounds, that the Massachusetts public accommodations law could not require a private parade organization to accept a gay group as a distinct parade unit because the private organization could choose with whom to associate).

[42] *Walker*, 453 F.3d at 864.

[43] 408 U.S. 169 (1972).

[44] *Id.* at 172–74.

[45] *Walker*, 453 F.3d at 864.

[46] The Court listed as a consequence of derecognition "denial of access to the customary media for communicating with the administration, faculty members, and other students," including campus bulletin boards and publications. *Healy*, 408 U.S. at 181–82.

[47] *See id.* at 181.

In an attempt to solidify a weak parallel, the court deemed *Walker* "legally indistinguishable" from *Healy* and overstated the facts in *Walker*'s admittedly "spartan" record: "Both [student organizations] were frozen out of channels of communication offered by their universities; both were denied university money and access to private university facilities for meetings."[48] This comparison is riddled with inaccuracies. CLS was hardly "frozen" because, in a wired world, lack of access to campus bulletin boards is not anywhere near as paralyzing as it was in the Vietnam War era.[49] Whereas the social group in *Healy* was denied access to campus facilities and even chased out of the campus coffee shop,[50] SIU allowed CLS to use campus facilities.[51] The cumulative punitive nature of derecognition in *Walker* was far less severe than that in *Healy*.

The lack of meaningful consequences stemming from derecognition suggests that *Walker* should be viewed as a conditioned inclusion case in which SIU may place reasonable restrictions on the groups it includes in its student organization program.[52] SIU did not force CLS to include any unwanted members but simply conditioned the use of its funding and name on adherence to a nondiscrimination policy.[53] Viewed from this perspective, the court erred in focusing exclusively on *Dale* and declining to consider as persuasive authority the Second Circuit's more direct treatment of the issue in *Boy Scouts of America v. Wyman*.[54] In *Wyman*, Connecticut barred a Boy Scout troop from a state charitable campaign on the ground that permitting the troop to participate would violate Connecticut's Gay Rights Law,[55] and the

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[48] *Walker*, 453 F.3d at 864, 867.

[49] Indeed, Judge Wood noted that CLS could still use e-mail, the Internet, and MySpace to communicate and implied that these mechanisms are superior to bulletin boards both in efficacy and in that they are not controlled by the university. *See id.* at 874 (Wood, J., dissenting).

[50] *Healy*, 408 U.S. at 176.

[51] Judge Wood added the qualification that unrecognized student groups must pay a fee to rent the auditorium, but this did not affect CLS because it numbered fewer than a dozen students. *See Walker*, 453 F.3d at 874 (Wood, J., dissenting).

[52] *See* Erez Reuveni, Note, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. REV. 109, 140–41 (2006) (noting that government refusal to fund a group's expressive association does not create unconstitutional conditions, whereas "[t]hreats and penalties [that] entail purposeful, indirect government action that successfully changes behavior" do).

[53] Indeed, as part of constituting its own expressive environment, SIU has chosen to expend its resources on groups that are open to all students because of its organizational interest in not supporting intolerant campus activity. *Cf.* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S. Ct. 1297, 1311–12 (2006) (recognizing a university's interest in controlling its expressive environment but determining that a law school's expressive association is not violated by requiring the school to allow military recruiters on campus because these recruiters are external to the school's expressive association).

[54] 335 F.3d 80 (2d Cir. 2003).

[55] CONN. GEN. STAT. ANN. § 46a-81 (West 2004).

Second Circuit found *Dale* inapplicable.[56] The *Wyman* court held that "conditioned [inclusion] does not rise to the level of compulsion" because barring the Boy Scout troop from the state charitable campaign had only a minimal impact on the troop.[57] Conditioned inclusion does not violate the right to expressive association because it leaves the noncompliant organization free to express its chosen message, to constitute its own membership, and to pursue private funding sources.[58] Moreover, courts have found denial of a government benefit constitutional if the grounds for denial are viewpoint neutral and reasonable.[59] Given that, SIU's denial of recognition due to CLS's failure to meet certain conditions would be constitutionally permissible. As Judge Wood noted, "SIU has left CLS entirely free to adopt whatever policies it wants; it has simply declined to give certain additional assistance (financial and in-kind) to organizations that violate its nondiscrimination policy."[60]

In rejecting SIU's decision to derecognize CLS for its possible violation of SIU's nondiscrimination policy, even when that sanction did not alter CLS's expression or ability to choose its own members, the *Walker* court missed an important opportunity to support a public university's decision to expend resources only on those student organizations that are open to all students.

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[56] *Wyman*, 335 F.3d at 86, 91.

[57] *Id.* at 91. The funding at issue was to come from voluntary contributions made by state employees to charities of their choosing. The state aggregated the funds through automatic payroll deductions. *Id.* at 84. The Boy Scouts could still engage in private fundraising, soliciting the same state workers outside of the state program.

[58] *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right . . . .").

[59] *Wyman*, 335 F.3d at 92; *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."); Healy v. James, 408 U.S. 169, 193–94 (1972) ("[T]he 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."); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1940–41 (2006) (noting that just as a university could require student groups to be entirely student-run, it could require student groups to be equally accessible to all community members).

[60] *Walker*, 453 F.3d at 873–74 (Wood, J., dissenting).