No. 05-3239

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

v.

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

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

AMICUS BRIEF OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PLAINTIFF-APPELLANT AND SUPPORTING REVERSAL OF THE DISTRICT COURT'S DENIAL OF PLAINTIFF-APPELLANT'S MOTION FOR PRELIMINARY INJUNCTION

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DISCLOSURE STATEMENT

Appellate Court No: 05-4070-GPM

Short Caption: *Christian Legal Society Chapter at Southern Illinois University School of Law v. Walker, et al.*

1. The full name of every party that the attorney represents in the case:

   The Foundation for Individual Rights in Education ("FIRE")

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Richard M. Esenberg, 8900 North Arbon Drive, Milwaukee, WI, is counsel for FIRE in this case. He is not a member of any law firm.

3. If the party or amicus is a corporation:

   i) Identify all its parent corporations, if any; and

   N/A FIRE is a not-for-profit tax-exempt corporation organized under the laws of the State of Massachusetts and has no parent corporation.

   ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

   N/A FIRE has not issued shares of stock.

Attorney's Signature: _____ Date: 9-13-05

Attorney's Printed Name: Richard M. Esenberg

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d): Yes X No ____

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Foundation for Individual Rights in Education ("FIRE") submits this brief as *amicus curiae* in support of Plaintiff/Appellant's appeal from July 5, 2005, Order of the United States District Court for the Southern District of Illinois denying Plaintiff/Appellant's Motion for a Preliminary Injunction. FIRE joins the Appellant in asserting that the District Court erred in concluding that Appellant was not likely to succeed on the underlying merits of its First Amendment claims against Defendants/Appellees.

FIRE is a secular, nonpartisan civil liberties organization with a mission to defend and sustain individual rights at America's increasingly repressive and partisan colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience -- the essential qualities of individual liberty and dignity. FIRE's core mission is to protect the unprotected and to educate concerned Americans about the threats to these rights on our campuses as well as the means to preserve them.

FIRE has advocated for the fundamental religious liberties of campus religious organizations in multiple states and on multiple campuses. FIRE has an interest in preserving the American higher education community as a "marketplace of ideas" and embraces the Supreme Court of the United States' description of the importance of free speech and inquiry in higher education:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. ***To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation***.... Teachers and students must always remain free to inquire, to study and to evaluate, to

> gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (emphasis added). Depriving religious organizations of equal rights of speech and association on public university campuses simply because those organizations choose to govern themselves according to faith-based principles is fundamentally incompatible with the marketplace of ideas and relegates religious students to an unconstitutional second-class status. FIRE seeks to restore true "legal equality" for public university students of all faiths or no faith at all.

SUMMARY

The fundamental question in this case is both simple and profoundly important: can religious organizations participate in the life of public universities without being forced to give up their distinctive religious character? For more than two decades, the Supreme Court of the United States has answered – in various contexts – an emphatic "yes." In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court held that religious organizations were entitled to "viewpoint neutral" access to university facilities. In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court held that religious organizations were entitled to viewpoint neutral access to student fee funds. These cases mirror the precedents applicable to high schools and elementary schools. *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (holding that religious student groups were entitled to equal access to high school facilities) and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (granting religious organizations equal access even to students at elementary schools). In every educational context, the answer is the same: religious groups are

constitutionally entitled to equal access to academic facilities and (in the university context) student fee funds.

In recent years, however, universities have created a new barrier to equal access: expansive nondiscrimination policies. Southern Illinois University (SIU), like hundreds of other universities across the country, has conditioned access to its facilities and to student fee funds on compliance with a nondiscrimination policy that – as applied to religious organizations – cripples their ability to function in a manner consistent with their faith principles. Specifically, Southern Illinois University has taken the position that religious student organizations may not be permitted to discriminate on the basis of *religion*. These organizations cannot use the very principles that are *the reason for their existence* when making decisions of leadership, membership, and (because a group's statements come from its leaders and members) its message. This policy is akin to prohibiting an environmental group from asking whether prospective members or leaders actually have an interest in the environment or prohibiting the College Democrats from ensuring that its voting members are not Republicans.

These nondiscrimination polices tend to have much greater impact on theologically conservative or orthodox Christian and Muslim organizations. In FIRE's experience, these organizations tend to be much more likely to choose leaders and members through the use of faith-based criteria (such as the Statement of Faith at issue in this case). Moreover, these organizations traditional views of sexual morality conflict with universities often committed to advocating for ever-greater sexual freedom for students and employees.

Acting in response to a wave of sanctions and expulsions, Christian student groups have been forced to file lawsuits at numerous schools, including the University of Minnesota, Rutgers University, the Ohio State University, Hastings College, Penn State University, the University of North Carolina at Chapel Hill and Arizona State University. At numerous other schools, Christian or Muslim student organizations have faced sanctions for refusing to comply with university-approved sexual or religious orthodoxies. While these disputes have typically been resolved without resort to litigation, controversies have roiled campuses across the country, including at Louisiana State University, Purdue University, Castleton State College in Vermont, the University of Arizona, and the University of Wisconsin at Madison. Despite the prevalence of the controversy, this Court is the first federal circuit court to address the precise issues raised by the Christian Legal Society's appeal.

It is important to make three observations about this dispute. First, there is a critical difference between status and belief. Christian Legal Society's lawsuit does not represent a blanket assault of the facial validity of nondiscrimination statutes or policies. The argument is much narrower: expressive organizations must be permitted to make *belief-based choices* when choosing their leaders and voting members. There is a difference between making a determination on the basis of an immutable characteristic and making a choice on the basis of changeable personal beliefs and rules of conduct. For example, Muslim Malaysians would not be suitable for voting membership in the Christian Legal Society not because of their Asian heritage but because Muslims tend to be poor ambassadors for the (constitutionally protected) idea that Jesus is Lord.

Second, any belief-based membership tests are meaningless unless a group may prescribe rules of conduct that are consistent with the group's beliefs. The Democratic Party may certainly reject a person who may sign agreement with Democratic principles but then actively campaigns for a Republican or Libertarian. An individual can declare love for the environment, but the Sierra Club may certainly take action if that individual lobbies for the repeal of the Clean Air Act. Similarly, with regards to religious beliefs, a group that believes sexual conduct should be reserved for a marriage between a man and a woman may ask not only that its members advocate such a belief but that they conduct themselves accordingly. Such conduct-based rules are standard in virtually every religious denomination in Christianity and in virtually every other religious tradition in the world.

Third, the university's prohibition against religious discrimination by religious organizations represents an *ideological choice* made by the university. It is not compelled by law. There is simply no applicable state or federal statute that prevents religious organizations from using religious criteria when selecting leaders. Nor is it even clear that the university's policy protects an identifiable class of individuals. Is it really the case that Americans are harmed by not being permitted to join and lead organizations whose message they despise? The facts of this case are instructive. An individual with no interest in membership or leadership in the CLS initiated a complaint against the group – not because he wanted to join but because he wanted to suppress the group's ability to operate on campus. As applied, therefore, the university's policy is far less about protecting identifiable individuals and far more about discouraging the

"dangerous ideas" (especially ideas about sexual morality) of evangelical Christian students.

Therefore, to be clear, a public university in the state of Illinois has made the ideological choice that its religious student organizations must forego the exercise of their most basic rights to free speech and association to enjoy the "privilege" of university "recognition." Further, because the university does not prohibit discrimination on the basis of ideology, it does not place similar belief-based restrictions on other student groups. The message to religious student groups is clear (and unconstitutional): you may organize on this campus, but only if you leave your faith outside the meeting room.

ARGUMENT

SIU's actions are unconstitutional for two primary reasons. First, because the university demands religious student organizations submit to a nondiscrimination policy that goes far beyond applicable law, SIU has violated its obligation to provide viewpoint neutral access to campus facilities and student-fee funds. Second, because SIU is requiring religious student organizations to surrender basic free speech and association rights as a precondition to equal access to campus, it has imposed unconstitutional conditions on the receipt of a state benefit. Both of these actions stand against decades of Supreme Court precedent establishing that, if there is any place where the First Amendment freedoms should flourish, it is in America's public universities.

By Drafting and Enforcing a Nondiscrimination Policy That Goes Far Beyond Legal Requirements, SIU Has Imposed Viewpoint-based Restrictions on Access to University Facilities and Student-fee Funds.

The university's entire argument hinges upon a basic assertion: that it is not actually interfering with the CLS's ability to organize and govern itself, but it is rather

merely saying that CLS cannot govern itself by faith-based principles and still enjoy the "benefits" of facilities access and student-fee funding. However, such a statement ignores both the unique character of the university environment and the applicable constitutional standards that govern student organization recognition and access. Regarding student activity fees, the Supreme Court has made it abundantly clear that when student organizations are funded by mandatory student activity fees, then the speech funded by those fees is not "government speech." *See Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000) ("If the challenged speech here [speech funded by the student activity fee] were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us."); *Rosenberger,* 515 U.S. at 851-852 (1995) ("The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.") (Justice O'Connor, concurring).

Since the student fee expenditures do not represent government speech, the government may not use those funds to "advocate" for or "defend" its own policies -- such as a formal policy of nondiscrimination. *Southworth*, 529 U.S. at 229-231. In other words, because student activity fees do not represent government monies, there is no legitimate state interest in restricting them only to those groups presenting a government-approved message or conducting themselves according to government-approved rules of conduct. Thus, the university is obligated to dispense the funds on a "viewpoint neutral" basis -- otherwise the fee program represents nothing more than unconstitutional forced

speech: "Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for insuring the integrity of the program's operation once the funds have been collected." *Id.* at 234. The "viewpoint neutrality requirement" exactly mirrors the viewpoint neutrality applicable to facilities access. *See Widmar, supra.*

To be clear, if SIU's policy is simply that student organizations must comply with otherwise applicable (and constitutionally appropriate) federal and state laws, then there is no viewpoint discrimination. In this case, however, the university's nondiscrimination policy (despite claiming to track federal law) is a policy of its own making – one that goes far beyond the requirements of applicable law to effectuate an ideologically charged university policy. Contrary to SIU's policy, federal nondiscrimination policies often contain explicit exceptions for religious organizations. For decades, religious colleges have received hundreds of millions of dollars in direct and indirect federal funds without being required to drop religious criteria for students, faculty, staff and administrators. In fact, Title IX (which prohibits discrimination on the basis of gender, not religion) specifically exempts religious colleges from its scope if the application of its provisions "would not be consistent with the religious tenets" of the college. *See* 20 U.S.C. § 1681(a)(3). Similarly, Title VII of the Civil Rights Act of 1964 has its own provisions exempting religious organizations from its requirements. *See* 42 U.S.C. § 2000e-1. To the extent that federal statutes have any bearing on this dispute, they merely demonstrate that the federal government respects the religious autonomy of religious organizations. As *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-648 (2000) makes clear, anti-discrimination laws that do not permit expressive organizations to limit membership or leadership to those who share the group's expressive purpose are constitutionally suspect.

The Second Circuit's decision in *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996) is instructive. In *Hsu*, a student at Roslyn High School sought to form an after-school Christian student organization, the Walk on Water Club (the "Club"). Hsu submitted the Club's constitution to administrators, as required by all after-school organizations seeking recognition. *Id.* at 848-850. The Club's constitution – like the CLS constitution at issue here – 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 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. The student filed suit, alleging violations of, among other things, the Equal Access Act and the First Amendment's Free Speech and Free Exercise clauses.

The Court reversed the school's decision to deny recognition to the Club. Relying on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), the Court noted the constitutional truism that "the message a group imparts sometimes depends upon its ability to exclude certain people." *Hsu*, 85 F.3d 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 (emphasis added). In support of this holding, the Court stated the obvious: "the decision to allow only Christians to be President, Vice-President, or Music Coordinator is calculated to make a

particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original).

For example, in *Speiser v. Randall*, 357 U.S. 513 (1958), the Supreme Court invalidated a requirement by the State of California that anyone seeking to take advantage of a specific tax exemption must first sign a declaration stating he did not advocate the forcible overthrow of the Government of the United States. There was no real argument that the prohibited speech was in any way realistically related to the property tax exemption. Instead, the denial of tax exemptions to those who would not sign the declaration was "frankly aimed at the suppression of dangerous ideas." *Id.* at 519.

A student organization structure, 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....'" *Southworth*, 529 U.S. at 223 (outlining the interests advanced by the University of Wisconsin's mandatory student activity fees). *Southworth* is only the latest case to clarify (both implicitly and explicitly) that the student organization structure is designed to foster the marketplace of ideas. As the Supreme Court held in *Healy v. James*, 408 U.S. 169 (1972) no university "mission" or "message" can trump the marketplace of ideas and serve as pretext for denying student group recognition, benefits, or facilities access. *See also Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967) (emphasizing that the "Nation's

future depends upon leaders trained through wide exposure to that robust exchange of ideas....")

Far from advancing a legitimate state interest – like enforcing applicable law – the SIU policy is more precisely aimed at "the suppression of dangerous ideas." As noted in above, the facts of this case demonstrate the suppression quite clearly. SIU cannot legitimately claim to be advancing the interests of protecting gays and lesbians against sexual orientation discrimination. The Christian Legal Society does not discriminate on the basis of sexual orientation. Any person of any sexual orientation (so long as "sexual orientation" refers to the character of one's sexual attractions) can join CLS so long as they agree with the Statement of Faith and agree to conduct themselves in accordance with traditional, biblically-based Christian sexual morality. Both gay and straight citizens across this country have embraced evangelical Christianity and conduct themselves according to its moral precepts.[1]

If the issue is not *orientation* but *belief* and *conduct*, then the true absurdity of SIU's policy becomes clear. At SIU, Republican groups can exclude Democrats, environmentalists can exclude industrialists, civil rights groups can exclude white

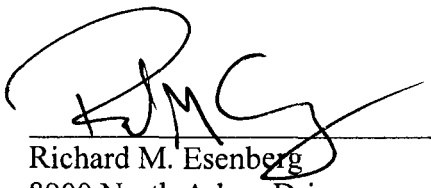
[1] Because the university is so clearly set apart as a "marketplace of ideas" and because CLS is not discriminating on the basis of sexual orientation but instead on the basis of religious of belief and conduct, this case is distinguishable from *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the state of Connecticut could bar the Boy Scouts of America from participation in a state workplace charitable campaign because of the Scouts policy of excluding homosexuals from membership and employment). Whereas in *Wyman*, state employees could still give to the Boy Scouts (just not through the state's automatic payroll deduction mechanism), in this case CLS's very existence as a viable student organization is threatened. Without the right of access to facilities, funding, and the proper means of communication to students, CLS (or any student group) will have difficulty existing. And this existence is threatened not to protect gay students from discrimination (because CLS does not discriminate on the basis of sexual orientation) but to ensure that religious student organizations cannot make religious decisions regarding leadership and voting membership.

supremacists, gay and lesbian groups can exclude those who argue against gay rights, but Christian groups cannot exclude those who do not believe in Christ. This structure results in a unique burden on religious organizations. Alone among expressive organizations on campus, they face the terrible choice between complying with the university's policy and risking the very purpose of their existence or defying that policy and facing all the disadvantages of second-class citizenship. There is no legitimate justification for singling out religious organizations in this manner.

CONCLUSION

There is no legitimate state interest in preventing Christian student groups from reserving leadership and voting membership for Christians. To the contrary, the state has a vital interest in protecting basic free speech and free association rights in its universities. In 1957, the Supreme Court declared, "The essentiality of freedom in the community of American universities is almost self-evident." *Sweezy*, 354 U.S. at 250. FIRE urges this court to preserve the marketplace of ideas and safeguard essential freedoms by giving religious organizations a place at the table. University ideology cannot trump the First Amendment.

Respectfully submitted,



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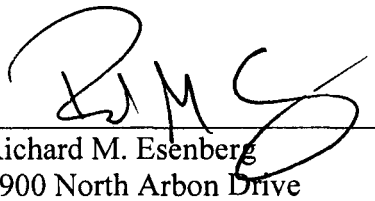
CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7). The body of the foregoing brief (exclusive of caption, table of contents, and table of authorities) is 3,397 words.



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CERTIFICATE OF SERVICE

The undersigned, Richard M. Esenberg, certifies that on the 13th day of September, 2005, 15 copies of the foregoing brief was sent via Federal Express, next day delivery, to the Clerk, U.S. Court of Appeals, Seventh Circuit, Room 2722, U. S. Courthouse, 219 S. Dearborn Street, Chicago, IL 60604. A copy of the foregoing brief was sent via Federal Express, next day delivery to counsel of record:

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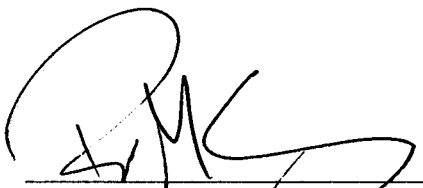

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