

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MOOT**

LAWYERS FOR CHRIST, Chapter	:	
at Cervenka University School of Law	:	
Elsa Hernandez, and	:	Civil Action
Jack Allen,	:	No. Moot 1016-07
	:	
Plaintiffs	:	
	:	
v.	:	
	:	
JORD GAGE, in his official capacity	:	
as President, Cervenka University	:	
School of Law	:	
	:	
Defendant	:	

October 15, 2007

MEMORANDUM AND ORDER

JAMIL, District Judge

Plaintiffs, the Cervenka University School of Law chapter of the Lawyers for Christ (“LFC”), along with the Chapter’s President, Elsa Hernandez and Vice President Jack Allen commenced this action challenging the revocation of LFC’s status as a recognized student group. LFC argues this action violates LFC’s First Amendment right of expressive association and that the non-discrimination policy constitutes a violation of the Establishment Clause. Accordingly, they seek injunctive relief restoring LFC’s status as a recognized student group. Defendant, the public Cervenka University School of Law (“law school”), contends the law school’s non-discrimination policy, which forbids all student groups from discriminating on the basis of religion or sexual orientation, is valid. Defendant filed a timely motion for summary judgment, which is the instant matter before the Court.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and has resolved all issues as to standing and ripeness. For reasons set forth below, Defendant's motion for summary judgment is **GRANTED**.

I. Factual Background

Lawyers for Christ is a nationwide organization consisting of Christian lawyers, judges, law professors and law students, with chapters in many cities and on many law school campuses across the country. The organization's stated purposes include "nurturing Christian fellowship and society; promoting justice and religious liberty; disciplining, encouraging, and aiding Christian law students; and encouraging the provision of law services to the indigent."

Every member of the national LFC must sign a faith pledge, which affirms the individual's subscription to the Western Orthodox Christian faith. This faith pledge requires that members hold certain beliefs consistent with the Western Orthodox faith, including the prohibition and condemnation of sexual activity outside the marital bond, including homosexual conduct. Therefore, a person who engages in homosexual activity or does not adhere to the view that homosexuality is sinful is barred from participating in LFC as a member or officer. Such an individual is allowed, however, to attend LFC meetings and events. LFC also points out that any person who has engaged in homosexual conduct in the past but has since repented, anyone with homosexual inclinations who does not act on them, or anyone that has converted to the Western Orthodox Christian Faith may become a member or an officer. In order for any chapter to affiliate with the national LFC organization, it must adopt the national by-laws, including the faith pledge requirement.

The Cervenka University School of Law is located in Lambert, Cervenka. The law school maintains approximately sixty registered student organizations, ranging from a newly

established Cervenka Dining Club to a long-lasting Constitutional Law Society. The law school also hosts local chapters of numerous national organizations, including the National Lawyer's Guild, Republican and Democrat Clubs, and LFC. There are also a number of recognized student groups which are religious or spiritual in nature, including the Muslim Student Association, the Unitarian Universalist Union, the Jewish Student Association, and the Cervenka Association of Atheists.

Status as a registered student organization allows the organization to reserve and use campus spaces, request and receive funding from the law school, advertise on campus property, and utilize certain school-sponsored communication channels, such as an official email address, phone line, letterhead, and office space. There is a requirement that recognized student groups have a minimum of five members.

At its founding, the law school established a non-discrimination policy (hereinafter "policy"), which states:

The Cervenka University School of Law is committed to a policy of non-discrimination. All groups, including administration, faculty, student governments, student organizations, and University-owned facilities and programs are governed by this non-discrimination policy...

The University shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation. This Policy covers admission, access, and treatment in Cervenka-sponsored programs and activities.

The law school thus requires all registered student organizations to allow any student to participate, become a member, or seek leadership positions.

In approximately 1983, the law school registered an organization by the name of Orthodox Christian Law Students Association ("OCLSA"). This group, while similar to the LFC, was not affiliated with any national organization and did not require students to sign a faith pledge in order to become a member or officer. OCLSA remained a registered student

organization until the 2004-2005 academic year, at which time they had eight official members. At this point attendance at OSLCA events averaged ten people per event.

Elsa Hernandez and Jack Allen were elected as President and Vice President of OCLSA for the 2005-2006 school year. In September of 2005, the two decided to affiliate the student organization with the national LFC, in order to gain access to the increased resources of the national organization. On January 28, 2006, OCLSA officially adopted the LFC national by-laws, including the required faith pledge for group members, and re-registered with the law school as the Cervenka University School of Law Chapter of Lawyers for Christ. The new by-laws contained a non-discrimination policy but did not comply with the law school's policy, instead stating: "The Lawyers for Christ will not discriminate on the basis of race, color, national origin, ancestry, disability, age, or sex."

In February of 2006, upon learning of the organization's new by-laws, the law school revoked LFC's status as a registered student organization and informed the student group that the faith pledge requirement constituted a violation of the non-discrimination policy. Since LFC's official recognition was revoked, the student group has been ineligible to receive school funding, is no longer listed in the directory of student groups at the law school, and is ineligible for office space or law school-operated communications. However, the law school has continued to allow LFC to reserve rooms, hold events, and advertise on school property without recognized status. The law school does not allow any other non-recognized organizations to reserve rooms, hold events, or advertise on school property. The Cervenka chapter of LFC has had 5 official registered members since official recognition was revoked. There is no evidence as to why membership has decreased. Since February, 2006, LFC has had six events, where the attendance ranged from 6 to 10 people.

The revocation of LFC's official recognition sparked a wave of controversy throughout the law school. Two of the other registered religious or spiritual organizations, the Unitarian Universalist Union and the Cervenka Association of Atheists officially amended their by-laws to include a statement welcoming students of all sexual orientations. The Unitarian Universalist Union went on to fund a school-wide outreach campaign focused on the phrase "We welcome *all* Unitarians - no matter who you love!"

Plaintiffs subsequently brought this action, challenging the law school's application of the policy as unconstitutional because (1) it places an unconstitutional burden on Plaintiffs' First Amendment right of expressive association and (2) it has the effect of preferring some religions over others and thus violates the Establishment Clause.

Standard of Review

Summary judgment is appropriate if the moving party is able to show "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The moving party is entitled to "judgment as a matter of law" if the nonmoving party has "failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). As such, the facts in question and all inferences made "must be viewed in the light most favorable" to the nonmoving party, LFC. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

II. Analysis

Defendants contend that the non-discrimination policy is a neutral regulation which, in attempting to achieve the important goal of eliminating discrimination, places no unreasonable burdens on Plaintiffs' First Amendment rights. As such, the law school has filed a motion for summary judgment on both of Plaintiffs' claims, contending that there is no genuine issue of

fact. Plaintiffs assert that the non-discrimination policy places an unconstitutional burden on their expressive association rights and that the policy constitutes a violation of the Establishment Clause in that it prefers certain religions over others. We examine each issue in turn.

A. Expressive Association

The Supreme Court has recognized a right to expressive association as implicit in the First Amendment guarantee of free speech. The goals of such expressive conduct may be “political, social, economic, educational, religious, [or] cultural.” *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). A failure to protect one’s right to associate with like-minded people would effectively trample traditional free speech rights. State actors may not impede the right to expressive association by “impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group” or by attempting to “interfere with the internal organization or affairs of the group.” *Id.* at 622-23.

LFC argues that its right to expressive association has been violated. Surely, LFC has been denied official recognition by Cervenka and the benefits that flow from that recognition. However, we find that LFC has failed to show these limitations reach the threshold that would implicate First Amendment expressive association rights. LFC argues that this is a case of forced inclusion, as evidenced by reliance on cases such as *Boy Scouts of Am. v. Dale*. 530 U.S. 640, 648 (2000). But this reliance is incorrect. LFC is not forced to include certain members as official officers, as was the case in *Dale*. *Id.* Rather, the law school is here offering LFC a conditioned choice. That LFC chose not to meet the requirements for official recognition by the school does not immediately transform the choice into a compulsory act. Conditioning official recognition or participation on a reasonable state regulation is “neither direct nor immediate, since [the] conditioned exclusion does not rise to the level of compulsion.” *Boy Scouts of Am. v.*

Wyman, 335 F.3d 80, 88 (2d Cir. 2003). Here, Cervenka is not forcing LFC to admit any particular members. If LFC wishes to continue to meet as a group, excluding anyone they deem “unsavory,” they may do so, just as they did in the period leading up to this litigation. Therefore, we find a “forced inclusion” analysis to be inapplicable here.

1. LFC’s claims fail under the *Healy* analysis

The most instructive case that guides our expressive association analysis is *Healy v. James*, 408 U.S. 169 (1972). In *Healy*, a student group was denied recognition when the President of a public university found the organization to be “antithetical to the school’s policies.” *Id.* at 174. The Supreme Court held that students’ expressive association rights are unconstitutionally infringed when a student group is denied recognition without sufficient justification. However, the Court acknowledged that it is a public university’s right to impose restrictions on a student group for “the organization’s activities, rather than its philosophy.” *Id.* at 188. In so doing, the Court made a significant distinction between the restriction of a student group’s rights based on the organization’s activity, rather than its philosophy, finding the latter to be less worthy of protection. *Id.* at 188. Additionally, *Healy* held that public schools may require “a group seeking official recognition [to] affirm in advance its willingness to adhere to reasonable campus law,” because “such a requirement does not impose an impermissible condition on the students’ associational rights.” *Id.* at 193.

Cervenka has not denied LFC recognition in response to LFC’s particular philosophies or beliefs, but rather because of LFC’s refusal to comply with the law school’s non-discrimination policy. As such, we must evaluate whether that policy unconstitutionally infringes LFC’s expressive association rights and whether that policy is within the state’s constitutional power. We apply the test adopted by the Supreme Court in *U.S. v. O’Brien*, 391 U.S. 367 (1968) and

applied in *Healy*: government regulation of conduct is valid, even if that regulation results in an incidental restriction on speech, if: (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial government interest; (3) that government interest is unrelated to the suppression of expression; and (4) the regulation is narrowly tailored to effect no more of an impact on expression than essential. Cervenka's non-discrimination policy passes this test. The four prongs are considered in turn.

States have a substantial and compelling interest in prohibiting discrimination in all forms at issue. *See Gay Rights Coal. of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) ("the eradication of sexual orientation discrimination is a compelling governmental interest"); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) (states have a "compelling" interest in ending "religious discrimination"). This interest in ending discrimination is particularly strong in the university environment. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003) (noting the particularly destructive role discrimination plays in a setting as important to the social and intellectual development of citizens as a university). Additionally, state action in pursuit of this noble goal has been found to be "unrelated to the suppression of expression." *Roberts*, 468 U.S. at 624. Thus, Cervenka's policy is within the law school's constitutional authority, furthers an important governmental interest, and is unrelated to the suppression of expression. As such, the first three prongs of the test are fulfilled.

Addressing the last prong, "an incidental burden on speech is no greater than is essential, and therefore permissible . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld v. Forum for Academic and Institutional Rights Inc.*, 547 U.S. 47, 67 (2006) (citations omitted). Cervenka's

policy meets this reasonable standard. The non-discrimination policy only targets active discrimination, the eradication of which would clearly be hampered without such a policy. So long as student organizations agree not to discriminate, they may espouse any philosophies or beliefs they wish. This Court can imagine no alternative policy Cervenka could adopt that would address this important government interest in a more direct way. Therefore, the fourth prong is also satisfied.

2. LFC's claims fail under the *Dale* analysis

LFC relies heavily on *Dale*, claiming that the non-discrimination policy amounts to forced inclusion. We reject this argument. However, even if we assume, *arguendo*, that LFC's reliance on *Dale* is justified, we still find no evidence that Cervenka's denial of recognition to LFC is unconstitutional. Under *Dale*, LFC must show it is an organization engaged in an expressive activity which would be negatively impacted as a result of the challenged regulation. 530 U.S. at 655. However, this right to expressive association, like all constitutional rights, is not absolute. It is subservient to compelling, narrowly tailored state interests which are unrelated to the suppression of ideas. *Dale*, 530 U.S. at 541. As Cervenka does not dispute that LFC is engaged in expressive association, we focus our examination on the effect of the law school's policy and its underlying purpose.

In *Dale*, the Supreme Court held that "the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. Under this analysis, LFC's claim must fail. Cervenka has not required LFC to include any particular member - rather it has merely set a condition on the recognition of LFC and its subsequent participation in the law school forum.

In determining a group's ability to advocate a specific message, this Court need not blindly defer to the organization's self-characterization. *Id.* at 653. See *Rumsfeld*, 547 U.S. at 69 (“[A] speaker cannot erect a shield against laws . . . simply by asserting that mere association would impair its message.”). The Supreme Court in *Dale* held that the Boy Scouts were not required to admit Dale, an out and honest gay man and a LGBT rights activist, to participate in scout functions as a scout master. The Court found the Boy Scouts had a general mission to instill the value of being “morally straight” in young people. *Dale*, 530 U.S. at 649-50. This mission included a sincerely held belief that “homosexual conduct is not morally straight.” *Id.* at 651. The Court found that allowing Dale to hold a leadership position in the Boy Scouts would “force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.” *Id.* at 653.

Significantly, LFC cannot show how the inclusion of gay, lesbian, bisexual or non-Orthodox students would impair its mission. Unlike the Boy Scouts in *Dale*, LFC has not identified general education of moral values to be one of its stated missions. Therefore, the inclusion of all members of the Cervenka community would not significantly impact their ability to carry out the LFC mission.

III. Establishment Clause

The Establishment Clause of the First Amendment to the United States Constitution prohibits any law “respecting an establishment of religion.” U.S. CONST. amend. I. The Establishment Clause requires neutrality by the United States Government, prohibiting laws that benefit a particular religion *as well as those* which discourage particular religions. *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994).

In order to analyze government action under the Establishment Clause, the Supreme

Court articulated a test in *Lemon v. Kurtzman*. 403 U.S. 602 (1971). To be constitutional, a government action must survive all three prongs of the test. *Vernon*, 27 F.3d at 1396-97. First, the action must have a secular purpose. Second, it must not advance or inhibit a particular religion as its primary effect. Finally, the government action shall not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13.

The government action in the instant case, the law school's non-discrimination policy as applied to LFC, which led to the group's derecognition, survives all three prongs of the *Lemon* test and is therefore constitutional.

1. The Policy Has a Secular Purpose

The first prong of the test asks whether the "government's actual purpose is to endorse or disapprove of religion." *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993). Government action will only fail this purpose prong if the endorsement or disapproval of a religion was intentional. Furthermore, courts "must be reluctant to attribute unconstitutional motives to government actors in the face of a secular purpose." *Am. Family Ass'n Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002).

In this case, Cervenka has a plausible secular purpose for the policy - protecting against discrimination within and by its institution. The law school contends that this secular purpose was in fact the intent of the policy. Thus, the policy survives the first prong of the test.

2. The Primary Effect of the Policy is Secular

Next, the *Lemon* test asks "whether the government action has the principal or primary effect of advancing or inhibiting religion." 403 U.S. at 612. Where the first prong inquires as to intent, this prong is based on actual effect. *Am. Family Ass'n*, 277 F.3d at 1122. This prong is evaluated under an objective, reasonable person standard. *Id.*

LFC argues that the policy's principal effect is to favor religious groups that condone homosexual conduct, such as the Unitarian Universalist Union and the Cervenka Association of Atheists. Plaintiffs further argue that this primary effect "punishes" religious organizations that refuse to condone such activity by not recognizing the organizations and disallowing the use of law school facilities. However, these assertions are unsupported by the facts surrounding the policy. Counter to LFC's claims, the non-discrimination requirement is a blanket policy that applies to all groups, religious or not. The fact that a policy "merely happens to coincide or harmonize with the tenants of some or all religions" does not render such action unconstitutional. *McGowan v. State of Maryland*, 366 U.S. 420, 442 (1961); *see also Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). The non-discrimination policy at issue here is a standard policy that applies to all organizations. The primary effect of the policy is to "punish" *any* group that refuses to comply with it, secular or religious. A reasonable person viewing such a blanket policy would not perceive it to either condone or disapprove of any particular religion. Therefore, the policy survives the second prong.

3. The Policy Does Not Promote Excessive Entanglement

Finally, the third prong asks whether the government action produces "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. A more concrete articulation of this test is whether government involvement is enduring, "calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 675 (1970). But, if the involvement is only temporary, then the government action does not create "either the reality or the appearance of on-going government interference in church affairs" and the conduct is permissible. *Vernon*, 27 F.3d at 1399.

LFC argues that the policy fosters excessive entanglement, in that any time a student is

denied membership or loses an election, they could challenge the organization under the policy. This would, according to LFC, create undue government entanglement, requiring the law school to examine the operations and beliefs of the religious organization in order to determine whether discrimination actually occurred. This argument fails for two reasons. First, while LFC raises an interesting point with its hypothetical discrimination case, those are not the facts before this Court. Second, even if LFC's hypothetical situation was at issue in this case, the argument would still fail because the Supreme Court has held that uniform application of nondiscrimination policies "avoids the necessity for a potentially entangling inquiry." *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (citations omitted). Because the policy does not foster excessive entanglement, but rather discourages it, the policy survives the third prong.

Accordingly, because the law school's non-discrimination policy survives all three prongs of the *Lemon* test, we find that it complies with the Establishment Clause and is therefore constitutional.

IV. Conclusion

In summary, Defendants are entitled to judgment as a matter of law and have met the burden necessary to sustain a successful motion for summary judgment. As such, that motion is **GRANTED**.

IN THE UNITED STATES COURT OF APPEALS

FOR THE MOOT CIRCUIT

LAWYERS FOR CHRIST, Chapter	:	
at Cervenka University School of Law	:	
Elsa Hernandez, and	:	
Jack Allen,	:	
	:	
Appellants,	:	
	:	No. Moot APP-1016-07
v.	:	
	:	
JORD GAGE, in his official capacity	:	
of President of Cervenka University	:	
School of Law	:	
	:	
Appellee.	:	

July 24, 2008

MEMORANDUM AND ORDER

Before Judge Tai, Judge Ormes
Judge Yazzi, Circuit Judges.

YAZZI, Chief Judge.

INTRODUCTION

This case comes on appeal from the United States District Court for the Eastern District of Moot. Appellant, the University of Cervenka School of Law Chapter of Lawyers for Christ (“LFC”) filed an action challenging the law school’s decision to revoke the group’s status as a recognized student group. Appellee, the University of Cervenka School of Law, a public law school, terminated the group’s official recognition when the group failed to comply with the law

school's official non-discrimination policy which forbids discrimination on the basis of sexual orientation and religion. LFC claims this non-discrimination policy unconstitutionally burdens the group's expressive association and constitutes a violation of the Establishment Clause of the First Amendment by inhibiting the group's particular religion.

Defendant filed a motion for summary judgment which was granted by the District Court. LFC has appealed, seeking reversal of that ruling and remand for a trial on the merits.

ANALYSIS

I. Expressive Association

The right to expressive association is so critical that without it, the more traditional First Amendment freedoms of speech - such as assembly and petition - would be effectively void. State action, like that of publicly funded state universities, may not "impose penalties or withhold benefits from individuals because of their membership in a disfavored group," nor may they "interfere with the internal organization or affairs of the group." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The Supreme Court has further held that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.* Any regulation that constricts a group's right to expressive association is subject to strict scrutiny by this Court, and must be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* Applying this strict standard, we find that the district court clearly erred in granting Defendant's summary judgment motion.

In deciding this case, we look to the Supreme Court's reasoning in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). In *Dale*, an openly homosexual scoutmaster was not allowed to

continue participation with the Boy Scouts. Dale attempted to challenge this decision, citing a New Jersey law prohibiting discrimination in public accommodations on the basis of sexual orientation. The Boy Scouts argued that application of the law would effectively force the organization to dilute its message of promoting a lifestyle that is “morally straight.” The Supreme Court agreed, finding that forcing the Boy Scouts to include an openly homosexual scoutmaster would significantly and irreparably burden the group’s expressive association rights and that “[t]he state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion.” *Id.* at 659.

Dale set out a three prong test, which we apply in the instant case. First, is the LFC student organization engaged in expressive association? If so, would forcing LFC to include homosexuals in its membership have a significant impact on LFC’s ability to express its message? Lastly, is LFC’s right to expressive association outweighed by the law school’s interest in eliminating possible discrimination against homosexuals? The law school readily admits that LFC is indeed engaged in expressive association and thus, we consider the last two issues in turn. *Id.* at 648.

A. Would the Non-Discrimination Policy Have a Significant Impact on LFC’s Message?

LFC wishes to express disapproval, as a group, for homosexual activity. Clearly, therefore, to force LFC to include openly homosexual members would significantly and negatively affect LFC’s ability to express this message. The law school’s decision to link official recognition to acquiescence to the policy is nothing more than an attempt to induce LFC to change its membership standards. At this point, only official members are required to sign the faith pledge. Anyone may attend LFC’s meetings or events without signing the pledge and its included statement of distaste for homosexuality.

LFC is compelled, by the faith of its members, to convey a message that sexual conduct outside of traditional marriage, including homosexual conduct, is immoral. It would be extremely difficult, if not impossible, for LFC to effectively convey that message if it was also required to accept members who openly and unrepentantly engage in that very conduct. Forcing LFC to accept homosexuals and the lifestyle's supporters would cause the group's identity to dissolve.

Further, while the group may still operate on the fringes of the law school, without official recognition, the refusal to acknowledge LFC is sufficient to implicate constitutional questions. On this point, the district court was correct to rest its analysis on *Healy v. James*, although that analysis was thoroughly incorrect. 408 U.S. 169 (1972). In *Healy*, a politically minded student group, Students for a Democratic Society ("SDS"), was refused official recognition and its resultant privileges after the university decided the group's philosophy was in conflict with the general tenets of the university. *Id.* at 171. The appellate court found that the university had not implicated any of SDS's constitutional rights because the university had merely failed to recognize the group, not forced the group to alter itself. The Supreme Court rejected this argument, as we reject it here, holding that the mere refusal to grant official recognition was sufficient to unconstitutionally burden the group's associational rights. As such, we find that LFC has sufficiently shown that there is an issue of material fact regarding whether the law school's requirements violate the second prong of the test set out in *Dale*.

B. Is LFC's Expressive Association Interest Outweighed By A Significant Government Interest?

To justify the non-discrimination policy and its resultant suppression of LFC's expressive association rights, the law school must show that its policy is the least restrictive option, serving a compelling governmental interest that is unrelated to the suppression of ideas. This Court

acknowledges that the state does have an interest in combating discrimination. However, we are bound by the precedent of the Supreme Court which instructs us that anti-discrimination regulations may not be used to rein in expression as an attempt to stifle or alter certain opinions. *Dale*, 530 U.S. at 659-61.

The Supreme Court addressed this situation in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Hurley*, a gay-rights organization applied to march in the annual St. Patrick's Day parade. *Id.* at 560. When the permit was denied, they sought to challenge the decision, relying on a Massachusetts public accommodations law. The Supreme Court rejected this reliance, recognizing that the application of the law to expressive activity necessarily alters the message of the speech. And, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579. Here, the only interest the law school has in forcing LFC to change its membership policies is this same type of unconstitutional modification of expression.

This decidedly shaky government interest must be balanced against LFC's compellingly strong interest in First Amendment expression. It is not necessary that a particular viewpoint be popular in the eyes of the state actor or this Court in order to receive protection. Indeed, "public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Dale*, 530 U.S. at 661. As such, we find it to be highly likely that, upon trial on the merits, LFC would prevail on this third prong of the *Dale* test. We therefore find that the district court was in error when it granted Defendant's motion for

summary judgment on the issue of expressive association.

II. Establishment Clause

The district court also erred in granting summary judgment on the Establishment Clause issue. The lower court was correct to apply the test established by *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *McCreary County, Kentucky v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 854 (2005). A state policy must satisfy three elements in order to be constitutional. First, the regulation must have a secular purpose. Second, the principal effect of the regulation must not promote or inhibit a particular religion. Third, the regulation must not encourage excessive government entanglement with the practice of religion. However, the lower court's application of that test was fatally flawed. A government action must survive each of three prongs in order to comport with the Establishment Clause. *Lemon*, 403 U.S. at 612-13. The policy, while passing the first prong, fails the remaining two and is therefore in violation of the First Amendment.

A. Does the Policy Have a Secular Purpose?

The first prong of the test asks whether the non-discrimination policy is intended to endorse or condemn a particular religion. *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993). The law school's stated purpose for the policy is to protect against discrimination within the learning institution. When such a plausible secular purpose is present, courts must hesitate to assume a discriminatory intent. *Am. Family Ass'n Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002). The lower court was therefore correct in finding that the policy survives the first prong of the *Lemon* test.

B. What is the Principal Effect of the Policy?

The second prong of the test inquires into the actual effect of the government action. If

the policy's principal or primary effect is to promote or inhibit religion, the policy cannot pass this prong of the test. *Lemon*, 403 U.S. at 612. The law school argues that the policy is viewpoint neutral, a "blanket policy" that affects all groups equally. We disagree.

While the policy applies to all student groups at the law school, its actual effect is to restrict certain groups and not others. The Supreme Court has declared that "no State can pass laws which . . . prefer one religion over another." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). LFC argues that the law school's policy prefers certain religions over others because those that condone homosexual activity have access student group status, school facilities, and funds, while religions that do not condone homosexual activity are denied access to those same benefits. We agree. A discriminatory restriction cannot become constitutional simply because it is phrased in expansive language suggesting that all groups are equally affected by it. For example, if a University passed a regulation prohibiting all sports teams from playing football, this regulation would technically be a "blanket policy." But clearly the actual effect of such a regulation would be overwhelmingly felt by the football team, rather than the basketball or baseball teams. Similarly, the law school's policy has the effect of targeting one religious group, LFC, while condoning others. For this reason, the policy violates the second prong of the *Lemon* test.

C. Does the Policy Promote Entanglement Between the law school and Religious Practice?

The policy also violates the final prong of the *Lemon* test, which asks whether a government action produces an excessive government entanglement with religion. The District Court insisted on confining its analysis to the narrow, specific facts presented by LFC. However, to require that each separate set of facts be independently examined by the courts would, in itself, violate this entanglement prong. This point-by-point litigation the District Court would require

creates the kind of “official and continuing surveillance” that is prohibited. *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 675 (1970).

We reject the law school’s argument that the policy’s universal application avoids entanglement, rather than creating it. First, as discussed earlier, the policy’s effect is not that of a blanket policy. Second, we agree with LFC’s contention that, under such non-discrimination policies, any student can claim that they were discriminated against if they are denied membership or officer status. The Government, either the courts or the law school, would then have to inquire into the operations of the religious organization in order to determine whether discrimination actually occurred. We agree that repeated examinations of such claims would cause “an impermissible degree of entanglement” with religious organizations. *Id.* at 675. Therefore, the policy violates the third prong of the *Lemon* test.

In order to comply with the Establishment Clause of the First Amendment, a state’s action must survive all three prongs of the *Lemon* test. Because the Policy has violated two of those prongs, the law school has violated the Establishment Clause and the District Court erred in granting Cervenka Law School’s motion for summary judgment.

CONCLUSION

In conclusion, LFC has amply shown that issues of fact are present which warrant remand for a trial on the merits. The district court’s order granting Defendant’s motion for summary judgment is therefore **REVERSED**.

IN THE SUPREME COURT OF THE UNITED STATES

JORD GAGE,
in his official capacity of
President of Cervenka University School of Law,
Petitioner

v.

LAWYERS FOR CHRIST,
Chapter at Cervenka University School of Law,
Elsa Hernandez, and
Jack Allen,
Respondents

October 26, 2008

ORDER GRANTING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Moot Circuit is granted, in order that this Court may consider the following questions:

- 1) Does Cervenka University School of Law's non-discrimination policy violate Lawyers for Christ's right to expressive association?
- 2) Does Cervenka University School of Law's non-discrimination policy violate the establishment clause of the First Amendment to the United States Constitution?