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U.S. SUPREME COURT LIMITS FREEDOM OF ASSOCIATION

Freedom of association, as applied to student organizations, took a significant step back as a result of the U.S. Supreme Court's decision in *Christian Legal Society vs. Martinez*.[1] The case may or may not have far-ranging implications, but it does show that the current Supreme Court is less supportive of student First Amendment rights.

The Christian Legal Society at Hastings

The Christian Legal Society (CLS) is an association of Christian lawyers and law students. In 2004, students at Hastings Law School, part of the University of California system, formed a campus chapter of CLS. The chapter adopted bylaws that required all members to sign a "Statement of Faith" and excluded from membership anyone who did not adhere to certain religious and social principles. Those principles included the belief that sex should only occur within marriage between a man and a woman. These exclusions ran contrary to Hastings' Nondiscrimination Policy, which prohibits discrimination based on religion or sexual orientation.

CLS applied for status as a registered student organization (RSO) at Hastings. The application was denied unless CLS agreed to revise its bylaws to end any exclusions based on religious belief or sexual orientation. CLS refused and instead filed suit against Hastings in U.S. District Court alleging a violation of CLS's rights to free speech, expressive association, and free exercise of religion. CLS alleged that it was the only student organization to ever be denied RSO status, that Hastings continued to allow other RSOs to discriminate, and that CLS was being singled out because of its religious views, in particular its views on homosexuality. The District Court granted summary judgment in favor of Hastings. That ruling was affirmed by the Ninth Circuit Court of Appeals, and CLS sought review by the U.S. Supreme Court.

The ruling against CLS seemed to create a split of authority in the Federal courts, because the Seventh Circuit had supported the CLS position in a very similar case arising at Southern Illinois Law School, *Christian Legal Society v. Walker*.[2] However, in *Martinez* the parties had entered into what became a crucial factual stipulation:

> "The parties stipulate that Hastings imposes an open membership rule on all student groups – all groups must accept all comers as voting members even if those individuals disagree with the mission of the group."

This so-called "accept all comers" rule, rather than the actual Nondiscrimination Policy that Hastings had applied to CLS, ended up forming the basis of the Supreme Court's decision.

The Supreme Court's Decision

The U.S. Supreme Court, in a 5-4 decision authored by Justice Ginsberg, affirmed the decision of the Ninth Circuit and held that Hastings' "accept all comers" policy does not violate the First Amendment rights of CLS students.

The majority opinion noted that two lines of precedent applied to the case. First, there is a line of cases analyzing the right of free speech depending on what type of public forum is involved. In a traditional public forum, like a park or street corner, any limits on speech must satisfy strict scrutiny and must serve a compelling government interest. But in a "limited" public forum, like a university campus, limits on speech are subject to a lower standard of review – the limits must merely be reasonable and viewpoint neutral.

Second, there is a line of cases analyzing freedom of association, meaning the right to resist governmental compulsion to admit unwanted members. The Court acknowledged that freedom of association "plainly presupposes a freedom not to associate," citing *Roberts v. United States Jaycees*.[3] The Court also noted that forcing a group to accept unwelcome members "directly and immediately affects associational rights," citing *Boy Scouts of America v. Dale*.[4] *Dale*, in particular, seemed to support the students' case because there the Court had upheld the right of the Boy Scouts to exclude homosexual members based on its group values.

Bringing those lines of cases together in the university context, the majority opinion held that because a university campus is a "limited" public forum, all student First Amendment rights, including freedom of association, will be analyzed under the lower standard of review applicable to such forums – meaning that limits on speech will be upheld if the limit is reasonable and viewpoint neutral.

As for reasonableness, the Court reviewed Hastings' asserted reasons for requiring full inclusion of all students in all groups, and found them a logical extension of Hastings' educational mission. The majority also held that

CLS was merely under "indirect" pressure to modify its membership policies, rather than the direct compulsion faced by the groups in *Roberts* and *Dale*. The Court also found that CLS, even if denied RSO status, had "substantial alternative channels" to communicate internally and with other Hastings students.

As for viewpoint neutrality, here is where the stipulation became critical: the parties had agreed that Hastings used an "accept all comers" rule. The Court noted:

> "It is … hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers." (Emphasis in original.)

CLS argued that Hastings did not actually have an "accept all comers" rule, claimed it was merely a pretext, and urged the Court to review the Nondiscrimination Policy as written. But the Court bound CLS to its stipulation and refused to consider evidence offered by CLS about Hastings having singled it out based on its members' religious beliefs.

Justice Alito authored a blistering dissent, arguing that the majority was making too much of the parties' stipulation to avoid confronting the constitutionality of the actual policy enforced by Hastings. The dissent also argued that the evidence showed that Hastings' policy was merely a pretext for religious discrimination against CLS.

Some Observations on Martinez

The *Healy* Burden. In *Healy v. James*[5] the Supreme Court held that student groups are entitled to the benefits of university recognition unless the group disrupts campus order. A university must shoulder a "heavy burden" to justify denying those benefits. In regard to whether students have lesser rights, the *Healy* Court held:

> "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."

The *Martinez* majority did not reject *Healy*, but found it inapplicable because in their view *Healy* involved direct viewpoint discrimination – the SDS had been banned from campus for its beliefs. But by choosing to analyze all student First Amendment claims within the "public forum" framework and thereby applying a lower standard of review, the *Martinez* Court seemed to reverse the *Healy* burden and place it back on the students. It is unclear if that will be the effect, but apparently the *Martinez* majority believes that students have a lesser degree of First Amendment protections while on campus.

In another break with *Healy*, the *Martinez* majority believed that CLS could simply function as an unrecognized group. The Court noted that CLS could still potentially use campus meeting rooms and public bulletin boards; while other communication channels would be blocked, "the advent of electronic media and social-networking sites reduces the importance of those channels." The same basic argument was made by the university in *Healy*, but there the Court rejected it:

> [T]he group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. … Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."

Perhaps the Court is right that the Internet has made "campus recognition" less important than it once was. But this is another example of the Court's majority backing away from precedent.

Practical Effect.

The *CLS v. Martinez* decision can be viewed as a narrow one; it affirmed only "accept all comers" policies, which are believed to exist on very few public campuses, and then only if the policy is in fact enforced across the board without singling out any particular group or viewpoint. Will other public universities enact "accept all comers" policies and thereby attempt to deny recognition to single-sex organizations? Only time will tell, but such policies would likely encounter opposition from many campus constituencies that would like to maintain exclusionary membership. And as Jus-

EDITOR'S NOTE

Tim Burke, who recently directed a webinar on *CLS v. Martinez* for the Center for Excellence and Higher Education Law and Policy at Stetson University College of Law, offers these comments:

Among other reasons the majority used to justify its position in the Christian Legal Society case that lack of recognition did little harm to CLS was their statement that "private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official affiliation." While it is true that fraternities and sororities can exist "off campus" without recognition by a public university, and there is very little the public university can do to prevent that, it is a rare public campus where fraternities and sororities exist without some kind of university sanction or recognition.

The CLS litigation remains pending with the parties wrestling in the Ninth Circuit U.S. Court of Appeals over the issue of whether or not CLS can proceed on its claim that Hastings purported selective enforcement of its "all comers" policy was merely a pretext for the denial of CLS's recognition.

tice Kennedy warned in his separate concurrence, evidence that a university failed to enforce such a policy even-handedly, or used the policy to stifle unpopular speech, would present a much different case where the students would regain the advantage.

CLS v. Martinez may have little or no practical impact on fraternities and sororities. But the case is a milestone because it appears to have swung the pendulum away from the First Amendment rights of students and toward the power of the university.

• James C. Harvey

— Mr. Harvey is an attorney in Orange County, California and a member of Phi Delta Theta. He also serves on the NIC Legal Advocacy Committee.

[1] 130 S. Ct. 2971 (June 28, 2010).
[2] 453 F.3d 853 (7th Cir. 2006).
[3] 468 U.S. 609, 623 (1984).
[4] 530 U.S. 640, 659 (2000).
[5] 408 U.S. 169 (1972).

AUTOMATIC REVOCATION OF TAX-EXEMPT STATUS FOR FAILURE TO FILE IRS FORM 990

The Pension Protection Act of 2006 requires the Internal Revenue Service ("IRS") to revoke the tax-exempt status of organizations that fail for three consecutive years to file required Forms 990. These revocations will occur automatically by operation of law beginning as early as May 15, 2010.

This article provides background on the Form 990 filing requirements and due dates, penalties for failure to timely file, and strategies for non-filing organizations to protect their tax-exempt status.

Which Form 990 is my Organization Required to File?

For tax year 2009, a tax-exempt organization must file (a) Form 990-N if its gross receipts normally are less than $25,000, (b) Form 990-EZ or Form 990 if its gross receipts are more than $25,000 and less than $500,000 and if its total assets are less than $1.25 million, and (c) Form 990 if its gross receipts are greater than $500,000 or its total assets are more than $1.25 million.

For tax year 2010 and later years, a tax-exempt organization will be required to file (a) Form 990-N if its gross receipts are normally less than $50,000, (b) Form 990-EZ or Form 990 if its gross receipts are between $50,000 and $200,000 and if its total assets are less than $500,000, and (c) Form 990 if its gross receipts are more than $200,000 or if its total assets are more than $500,000.

For the remainder of this memorandum, the Forms 990-N, 990-EZ and 990 will be referred to collectively as the "Form 990."

When is my Form 990 Due?

Forms 990 must be filed by the 15th day of the fifth month after the end of your organization's fiscal year. For example, if your organization's fiscal year ends on December 31, the Form 990 is due by May 15th of the following year. IRS Form 8868 may be used to request an automatic three-month extension of time to file and also to apply for an additional three-month extension if needed. The additional three-month extension, however, is not automatic. Note also that the filing deadline for the Form 990-N may not be extended.

What are the Penalties for Filing Forms 990 Late?

If an organization fails to file a required Form 990 by the due date (including any extensions), it must pay a penalty of $20 per day for each day the return is late. The penalty generally may not exceed the lesser of $10,000 or 5% of the organization's gross receipts. For an organization that has gross receipts of over $1 million for the year, the penalty is $100 per day up to a maximum of $50,000. Organization managers who do not comply with a written demand that information be provided may also be subject to a penalty of $10 per day, subject to a $5,000 maximum.

Penalties for late filing may be abated if the organization establishes to the satisfaction of the IRS that such failure was due to reasonable cause. The request for abatement can be made as an attachment to the Form 990.

What Happens if my Organization Fails to File Forms 990 for Three Years?

If an organization required fails to file the required Form 990 for three consecutive years, the organization's tax-exempt status is revoked automatically by operation of law. The revocation is effective from the last day the organization could have timely filed the third required Form 990.

The three-year period for automatic revocations for failure to file Forms 990 began when the Pension Protection Act was adopted in 2006. Thus, an organization that does not file a required Form 990 for 2007, 2008 and 2009 will have its tax-exempt status revoked on the applicable filing deadline in 2010.

An organization whose tax-exempt status is revoked for failing to file Forms 990 may apply to obtain reinstatement of that status, by filing Form 1023 or 1024, as applicable, and paying the requisite user fee. If, upon application for reinstatement of tax-exempt status, an organization can show to the

satisfaction of the IRS reasonable cause for the failure to file the Forms 990, the organization's tax-exempt status may, in the discretion of the IRS, be reinstated retroactively to the date of revocation.

How will this Impact Donors?

Contributors to Section 501(c)(3) organizations may rely on determination letters until the IRS publishes the list of revoked organizations on its website and in Publication 78. The IRS has stated informally that the initial list of revoked organizations will not be available until early 2011. As always, donors should check Publication 78 to confirm the exempt status before making gifts to tax-exempt organizations.

What are the Possible Next Steps?

Non-filing organizations should file a Form 990 for the 2009 fiscal year in a timely manner, requesting extension (s) if necessary, to prevent the revocation of the organization's exempt status. The organization should, of course, make all appropriate filings in future years.

Previously non-filing organizations should be aware that filing a Form 990 could cause the IRS to request tax returns for prior years. Filing such additional returns could be difficult if the organization does not have adequate records as to income and expenses for earlier years. The organization also could owe taxes, interest, and penalties. Furthermore, because the statute of limitations does not run when a taxpayer fails to file a return, returns could be due for many prior years.

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Editor's Note

Ms. Bailey, Mr. Callan and Mr. Christopher will all be speakers at the 2010 Fraternal Law Conference.

ELEVENTH CIRCUIT: NO DUTY TO PROTECT MEMBERS FROM CRIMINAL ACTS OF THIRD PARTIES

Richard Wilder attended a party at the Theta Chapter of Sigma Nu in Tuscaloosa, Alabama. Toward the end of the evening, two individuals who were not members of the Chapter, nor invited to attend the party, entered the house and were noticed by some of the brothers when they tried to help themselves to beer. They were asked to leave. Matters quickly became ugly. One of the uninvited guests drew a butterfly knife and used it to ward off a group of the party attendees who wanted them gone.

The intruders did leave the house, but epitaphs and racial slurs were flying back and forth. Once out on the front yard of the house, one of the intruders launched a beer bottle back toward the crowd. According to the court,[1] "the fraternity members returned in kind. Violence erupted, and within moments, Gibson [one of the intruders] stabbed Wilder in the head with his butterfly knife," seriously injuring him.

Wilder sued Gibson and the National Fraternity, the Chapter and the House Corporation. Wilder asserted negligence, *respondeat superior,* negligent supervision, and wantonness claims. The trial court granted the defendants' motion for summary judgment.

On August 3, 2010, the 11th Circuit of the United States Court of Appeals unanimously upheld the trial court's decision. The court recognized that the general rule in Alabama was the absence of some special relationship or circumstances "a person has no duty to protect another from criminal acts of a third person." In essence, what the court said was that since no one at the fraternity party had any legal duty to protect Wilder from criminal acts of Gibson, the third party, no one could have been negligent in failing to do so. Without negligent conduct, there would be no vicarious liability imposed on the organizations since no members were negligent. The Court concluded, "Rarely does a premises owner have a legal duty to protect others from the criminal acts of a third party." In circumstances like this, only when the party knows or should know that a particular type of crime is probable does it have a duty to protect its guests. The facts in this case fail to create the kind of foreseeability necessary to impose on the fraternity and its members a duty to protect their guests. In the absence of a legal duty, there can be no negligence, negligent training, vicarious liability, or wantonness

While Sigma Nu and its members had no liability in this case, it should not be viewed as a recommendation to engage in self-help when unwanted intruders enter a fraternity party, especially when someone pulls out a knife. Certainly, at that point, 911 should be called. Chapter leaders should attempt to move their members and guests away from any potential treat of harm and attempt to maintain calm. But at least in Alabama, even if that fails, the social hosts may have no responsibility for injuries resulting from the criminal acts of unwanted intruders.

• Timothy M. Burke

[1] *Wilder v. Sigma Nu Fraternity, Inc., et al.*, Case No. 10-10996 (U.S. Court of Appeals, 11th Circuit, August 3, 2010).

IRS DENIES EXEMPTION TO LOCAL FOUNDATION

Ever since 1956, Greek organizations have understood that a tax-exempt IRC § 501(c)(3) educational fraternity foundation could award scholarships to members of its related fraternity without jeopardizing its tax-exempt status as an educational foundation. That long-standing understanding is grounded in a 1956 Revenue Ruling from the IRS which determined that simply because a fraternity foundation awarded scholarships only to members of a specific fraternity, that foundation would not be precluded from tax exemption under IRC § 501(c)(3). *Rev. Rul. 56-403.* The IRS shook that understanding in a recent Private Letter Ruling denying exemption to a local fraternity foundation formed to award scholarships to members of the local chapter of that fraternity. *PLR 201017067.* However, upon critical examination, this recent IRS ruling does not change the legal framework within which foundations comfortably grant scholarships. Rather, the ruling enunciated in the recent PLR demonstrates the care foundations must take in designing scholarship programs. The facts underlying both the 1956 Revenue Ruling and the 2010 PLR are instructive to proper construction of a fraternity scholarship program.

The 1956 Revenue Ruling.

The foundation at issue in 1956 was organized to "foster intellectual excellence through scholarships and other means, to further cultural growth through publishing literary papers, to cultivate useful citizenship and amicable relationships between individuals, student groups and others, to promote and encourage religious, moral, civic and social responsibility, and to carry out such purposes through contributions to tax-exempt organizations in those fields...". In other words, awarding scholarships to members of a particular fraternity was only ***one*** of its exempt purposes.

Moreover, in the 1956 case, scholarships were open to seniors in all chapters of the fraternity; the potential benefited class was relatively large and unknown. Any senior in the fraternity could have earned the scholarship. Finally, the scholarships at issue were truly *earned* and were awarded based on scholarship, character and service to the institution.

On these facts, the IRS found the foundation to be a tax-exempt organization under IRC § 501(c)(3). Specifically, the IRS found that even though the foundation's scholarships were limited to fraternity members, the foundation was nevertheless an exempt educational foundation because (i) the foundation's scholarships did not specifically designate persons eligible for scholarships and (ii) the purposes of the foundation were not so personal, private or selfish in nature that they lack the elements of public usefulness and benefit which are required of organizations qualifying for exemption under § 501 (c)(3). In short, the Revenue Ruling established two critical criteria:

1) The foundation was formed with a mission beyond granting scholarships; and

2) While the potential benefited class was known generally, the actual scholarship recipients were unknown at the time of the award.

The 2010 PLR.

The facts as described in the recent PLR were markedly different from the 1956 case. In the 2010 case, the foundation at issue was formed specifically to provide tuition and room and board scholarships to members of a local fraternity chapter. Unlike the foundation in the 1956 case, the foundation at issue here had no other educational purpose.

Unlike the foundation in the 1956 case, the foundation under review in 2010 granted scholarships without regard to any criteria. Although potential recipients were ranked based on need and academic performance, that ranking had little to do with actually earning a scholarship. The foundation simply began at the top of the list and granted scholarships as far down the list as its resources allowed. Under this system, a scholarship award had nothing to do with the student's relative achievement; rather, the scholarship award turned solely upon foundation fundraising success in a given year. In fact, the IRS found that it was conceivable, perhaps likely, that in some years, *every* member would receive a scholarship.

Complicating the case, the foundation did not appear to be completely altruistic in its "educational" grants. In the 2010 case, all of the trustees of the foundation were members of both the fraternity and the local house corporation. The foundation planned to solicit funds from members of the house corporation, which, due to its ownership of the chapter house, had a vested interest in scholarships for room and board expenses.

Based upon these circumstances, the IRS determined the foundation was not exempt. The principal reason for the IRS determination was that the class of beneficiaries was too restricted to confer the public benefit required by Code Section 501(c)(3). In other words, the foundation's benefits were overly directed toward a narrowly designated group, the single chapter at issue. Compounding this problem, the foundation acknowledged that typically about ½ of the members of that chapter would receive a scholarship, which acknowledgment led to other problems.

For instance, because nearly ½ of members would receive scholarships in a normal year, the IRS found an unacceptably high level of pre-selection of scholarship recipients. In short, donors would know, in advance, that their donations would assist only certain applicants from a small pre-identified pool.

Finally, the fact that some or all of the room and board portion of the scholarships would be paid to or for the benefit of the house corporation resulted in a significant private benefit to the house corporation.

Lessons learned.

What to do:

a) Ensure your educational foundation is multi-faceted and not formed solely to grant scholarships to a single chapter; all foundations can have other equally important educational missions;

b) Establish a finite and specific number of scholarships that must be *earned* through some sort of demonstrable achievement; and

c) Ensure that potential recipients remain anonymous to awarding committee.

What not to do:

a) Limit the foundation's educational mission to granting scholarships to single chapter;

b) Tie number or amount of scholarship grants to fundraising successes;

c) Establish scholarship programs that allow grant money to be used for non-educational purposes, particularly if the non-educational and non-charitable entity receiving the grant funds is a related house corporation.

- Sean Callan and John Christopher
  Dinsmore & Shohl

FRATERNAL LAW CONFERENCE
NOVEMBER 5-6, 2010

Please return this form to Bonnie Hill, Fraternal Law, 225 West Court Street, Cincinnati, Ohio. The full day session will begin at 9:00 on Friday and the half-day session on Saturday ends at Noon.

Who should attend?
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A block of rooms has been reserved at the Westin Hotel. Hotel reservations may be made by calling the Westin Hotel toll free at (800) 937-8461. Ask for the Fraternal Law Conference rates when making your reservation. For further information contact Bonnie Hill at (513) 721-5525.

Name: _____ **Title:** _____

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May we have your permission to publish this information in our handout materials? Your signature on the line below indicates your approval.

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The Goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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