

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNIVERSITY OF WISCONSIN-MADISON ROMAN  
CATHOLIC FOUNDATION, INC., TIMOTHY J.  
KRUSE, ELIZABETH A. PLANTON and  
JOHN B. KOCZELA,

Plaintiffs,

v.

MEMORANDUM AND ORDER

06-C-649-S

DAVID G. WALSH, MARK J. BRADLEY,  
JEFFREY BARTELL, ELIZABETH BURMASTER,  
EILEEN CONNOLLY-KEESLER, JUDITH V. CRAIN,  
MARY QUINNETTE CUENE, DANA DAVIS, THOMAS  
LOFTUS, MILTON MCPIKE, CHARLES PRUITT,  
GERARD A. RANDALL, JR., PEGGY ROSENZWEIG,  
JESUS SALAS, CHRISTOPHER SEMENAS, MICHAEL  
J. SPECTOR, KEVIN P. REILLY, JOHN D. WILEY,  
LORI M. BERQUAM, ELTON J. CRIM, JR. and  
YVONNE FANGMEYER,

Defendants.

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Plaintiffs' motion for preliminary injunction came on to be heard in the above entitled matter on March 8, 2007, the plaintiffs having appeared by Alliance Defense Fund by David A. French and by Alliance Defense Fund Law Center by Travis Barham; defendants by J.B. Van Hollen, Attorney General, by Bruce A. Olsen, Assistant Attorney General. The Hon. John C. Shabaz, District Judge, presided.

After reviewing the submissions of the parties and after hearing the parties' arguments the Court found the following facts were relevant to its determination on plaintiffs' motion:

1. University of Wisconsin-Madison Roman Catholic Foundation, Inc. (hereinafter the Foundation) is a non-profit Wisconsin

corporation. Its major purposes are: (1) to promote the religious, charitable, and educational interests of: (a) Roman Catholic students, faculty and staff at the University of Wisconsin-Madison, (b) other Roman Catholics who demonstrate a commitment to Catholic Ministry at the University of Wisconsin-Madison by supporting and becoming members of the Foundation; and ( c ) other individuals who demonstrate a commitment to Catholic ministry at the University of Wisconsin-Madison by supporting and becoming members of the foundation; and (2) to support and manage the temporal affairs of St. Paul University Catholic Parish of Madison, Wisconsin. Temporal affairs meaning lay, material, and secular affairs. Individual plaintiffs are UW-Madison students and members of the Foundation. The Foundation has twelve directors on its Board of Directors three of which are students. Additionally, all members of the Foundation, including students, have voting rights when selecting the Board of Directors.

2. UW-System Policy F20 provides that "Only student organizations which meet the institutional qualifications for official recognition and are so recognized...may receive [Segregated University Fees] SUF support." At UW-Madison, to be eligible to receive Registered Student Organization (RSO) status a group must: (1) "Be controlled and directed by UW-Madison students;" and (2) abide by UW-Madison's nondiscrimination policies.

3. The Foundation had received funding through allocable segregated fees notwithstanding Policy F20 and the fact that it is not an RSO. However, defendant Wiley indicated that future budgets may not fund non-RSO's.

4. In an effort to retain funding the Foundation applied for RSO status for the 2006-2007 academic year. The Foundation's application for RSO status was denied. Reasons for the denial were: (1) the Foundation failed to meet the criterion of being controlled and directed by UW-Madison students; and (2) the Foundation was not in compliance with the University's nondiscrimination requirement because, according to defendants, student membership in the Foundation is limited to Roman Catholics.

#### MEMORANDUM

To succeed on their motion for a preliminary injunction plaintiffs needed to establish that they were likely to succeed on the merits. Plaintiffs likelihood of success consisted of two related issues and one related sub-issue. First, plaintiffs needed to demonstrate that either: (1) UW-Madison's "Be controlled and directed by UW-Madison students" requirement is unconstitutionally vague; or (2) the Foundation complies with the requirement. Second, plaintiffs needed to establish that UW-Madison's nondiscrimination policy violates the First Amendment when applied to religious student organizations. While plaintiffs met their burden on the second issue, they failed to do so on the first.

Plaintiffs argued the “control and direction” requirement is void for vagueness because the meaning and application of the requirement is not apparent. However, the Court determined that this requirement is not vague. Rather, its plain meaning is clear. To control means to exercise authoritative or dominating influence over; check; hold-in restraint; restraint; verify; check and restrain. Additionally, the Court determined that the Foundation failed to satisfy this “control and direction” requirement. Three of the twelve Directors on the Foundation’s Board of Directors are UW-Madison students. Other Directors include: (1) the Bishop of the Diocese of Madison or his appointed Episcopal deputy, (2) the Vicar General of the Diocese; and (3) the Pastor of St. Paul University Catholic Parish. Because of the structure of the Foundation’s Board of Directors, plaintiffs failed to establish that UW-Madison students are the ones exercising decision-making authority over the Foundation. Accordingly, plaintiffs failed to succeed on this aspect of their claim.

However, based on Christian Legal Society v. Walker, 453 F.3d 853 (7<sup>th</sup> Cir. 2006) plaintiffs succeeded in demonstrating that UW-Madison’s nondiscrimination policy is unconstitutional as applied to the Foundation. In CLS, the Seventh Circuit determined that the likelihood of success on an expressive association claim turns on three questions: (1) Is the group an expressive association? (2) Would the forced inclusion of certain members and leaders significantly affect the group’s ability to spread its message? and

(3) Does the group's interest in expressive association outweigh the University's interest in ending discrimination? Id. at 862 (citation omitted). The Foundation is an expressive organization. Additionally, the forced inclusion of non-Catholic members would significantly affect the Foundation's ability to promote the religious, charitable, and educational interests of Roman Catholic students, faculty and staff at the University of Wisconsin-Madison. Finally, the Foundation's interest in expressive organization substantially outweighs the University's interest in ending discrimination. As such, plaintiffs succeeded on this aspect of their claim.

Accordingly,

ORDER

IT IS ORDERED that plaintiffs' motion for a preliminary injunction is GRANTED as it concerns enforcement of the University of Wisconsin-Madison's nondiscrimination policy. Defendants are enjoined from enforcing University of Wisconsin-Madison's non-discrimination policy as it is written against the Foundation. In all other respects, plaintiffs' motion for a preliminary injunction is DENIED.

Entered this 8th day of March, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ  
District Judge