IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

THE STUDENT COALITION FOR GAY RIGHTS, et al.,	)	
Plaintiffs,	)	
V.	)	CIVIL ACTION NO. 79-3430
AUSTIN PEAY STATE UNIVERSITY, et al.,	)	
Defendants.	)	

BRIEF IN SUPPORT OF APPLICATION FOR A PRELIMINARY INJUNCTION

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This action is brought by the Student Coalition for Gay Rights (the "Coalition"), an unincorporated association of students at Austin Peay State University, and certain of its officers and members, Edwin Guzman, Samuel T. Helton, and William H. Dannenmaier.

The defendants are Austin Peay State University ("APSU"), the State Board of Regents (the "Board"), Roy S. Nicks (the chief executive officer of the system of schools administered by the Board), Robert O. Riggs (President of APSU), Charles Boehms (Vice-President for Student Affairs at APSU), Lamar Alexander (in his official capacity as Chairman of the Board), and three members of the Student Life Committee of the Board, Claude Bond, David White, and J.C. Eoff. Defendants have refused to recognize the Coalition as a student organization on the APSU campus, which plaintiffs contend violates their First Amendment rights to freedom of assembly, association, and speech and their Fourteenth Amendment right to equal protection of the laws.

Plaintiffs seek a preliminary injunction preventing defendants from denying to the Coalition recognition and all the accompanying perquisites of recognition, including access to and use of APSU facilities on the same basis as other student organizations which have been recognized.

CHRONOLOGY

In the fall of 1978, certain APSU students, including plaintiffs Guzman, Helton, and Dannenmaier, organized the Coalition and filed an application with the Student Government Association (hereinafter "SGA") for recognition of it as a student organization. As shown more fully below, recognition carries with it certain rights (including use of APSU facilities) that are not given to non-recognized student organizations.

The SGA approved the Coalition's application for recognition by a vote of 25-1. On or about December 1, 1978, the application was submitted to Vice President for Student Affairs Charles N. Boehms for approval, as required by APSU regulations. Defendants admit that the Coalition had complied with all procedural and technical requirements of the University (Boehms, I:86)* and the Board of Regents (Boehms, II:26) for recognition of student organizations. He declined to recognize the organization solely for the substantive reasons set out in his letter of January 31, 1979 to Student Government President David Mason (Attachment 2 to Exhibit 17) and in his testimony. These reasons were as follows:

> a. Recognition would give credibility to homosexual behavior and tend to expand violations of state law prohibiting homosexual behavior.
>
> b. Recognition may lead to increased personal and psychological stress for persons who may be troubled about their sexual identity.
>
> c. Recognition would not be consistent with the educational goals of the University.
>
> d. Concern for how the community outside the University might react if the Coalition were recognized.

(Exhibit 17, Attachment 2; Boehms, I:66, 86-88).

On February 6, 1979, Mr. Richard Lewis, President of the Coalition, appealed Dr. Boehms' decision to President Robert O. Riggs. On February 8, 1979, President Riggs refused to extend recognition to the Coalition. His reasons are stated in his letters of that date to Mr. Richard Lewis (Exhibit 17, Attachment 5) and to Mr. David Mason (Exhibit 17, Attachment 4). The following statement from the letter to Mr. Lewis summarizes his reasoning:

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*The record of the hearing that is part of the record before the Court is contained in four numbered volumes. The testimony will be referred to by volume number and page number. Thus "I:86" above is a citation to page 86 of Volume 1. Exhibits will be referred to by exhibit number.

> It is my judgment that the Student Coalition for Gay Rights implicitly endorses homosexuality. Sexual activity with another of the same sex is unlawful in the State of Tennessee; moreover, such activity is contrary to the Judeo-Christian ethic which undergirds our community, our State, and our nation.
>
> There are ample opportunities for students and faculty in the classroom and through independent inquiry to examine freely the social and psychological structures and nuances of our society. . . .
>
> The Student Coalition for Gay Rights has no place at Austin Peay State University. The purposes of this group are contrary to the mission of this institution.

The Coalition appealed Riggs' decision to Chancellor Roy S. Nicks. A hearing officer was appointed and a fact-finding hearing ("Hearing") was held on May 9-10, 1979. Chancellor Nicks was not present. Both the Coalition and APSU were represented by counsel. APSU called Dr. Harvey Reese, a non-board-certified psychiatrist in private practice; Dr. Garland Blair, head of the APSU Psychology Department; and defendant Boehms, Vice-President of Student Affairs. The Coalition called Mr. Richard Lewis, an APSU student and the Coalition's President; Mr. Glen Carter, a faculty member in the APSU Sociology Department and the group's faculty adviser; Dr. Thomas Pinckney, a member of the APSU Political Science Department; Dr. Embry McKee, Associate Professor of Psychiatry at Vanderbilt University Medical School and Director of the Vanderbilt Adult Psychiatric Outpatient Clinic; Dr. Howard B. Roback, Associate Professor of Psychology at Vanderbilt University; William Riley, Director of Student Life at the University of Missouri - Columbia (by affidavit, Exhibit 5); and Dr. Judd Marmor, Professor of Psychiatry at the University of Southern California School of Medicine (by stipulated testimony, Substitute Exhibit 6). The record of that Hearing and a subsequent deposition of David Mason, SGA President at the time the coalition applied for recognition, have been submitted to the Court by consent of the parties (Stipulation).

On July 16, 1979, Chancellor Nicks notified the Coalition that he refused to recognize it (IV:7/16/79 Nicks' letter). Chancellor Nicks made certain conclusions,

purportedly based on the record of the Hearing, which are primarily elaborations on the rationales of Boehms and Riggs set out above (IV:7/16/79 Nicks' letter). These conclusions are set out in some detail below, as they become material to plaintiff's argument.

The Coalition appealed Nicks' decision to the Student Life Committee of the Board, which the Board had previously given the responsibility of disposing of any appeal that might result from an adverse decision by the Chancellor. On August 13, 1979, by a vote of 3-2 (defendants Bond, Eoff, and White constituting the majority) the Committee sent the issue back to Chancellor Nicks for reconsideration, with the proviso that the Committee approved Chancellor Nicks' final decision, whatever it might be (Exhibit 18).

On August 23, 1979, Chancellor Nicks reaffirmed his previous action not to recognize the Coalition (IV:8/23/79 Nicks' letter).

For the reasons set out below, plaintiff Coalition contends it is entitled to a preliminary injunction preventing plaintiffs from denying it recognition.

ARGUMENT

I.

THE PURPOSE AND ACTIVITIES OF THE COALITION ARE LAWFUL; ORGANIZATIONAL ACTIVITES DO NOT INCLUDE SEXUAL CONDUCT

That both the purposes and activities of the Coalition are, in every respect, lawful is not disputed in the record.

A. The Coalition's Purpose

The purpose of the Coalition is to educate the community about homosexuals

and homosexual lifestyles and to engage in political activity to outlaw discrimination against homosexuals and repeal statutes criminalizing private homosexual behavior between consenting adults.

Article II of the Coalition's Constitution contains the following statement of purpose:

> This organization shall work to promote human rights and to encourage a better understanding of alternate lifestyles.

(Exhibit 17, Attachment 1). The parties agree that the phrase "alternate lifestyles" refers to the various lifestyles of homosexual persons.

Article IX of the Constitution sets out the group's "Political Philosophy":

> We support the constitution and government of the United States, the State of Tennessee, and the rules and regulations of Austin Peay State University. However, we encourage the introduction of litigation within our existing systems that will bring about and maintain equal rights and responsibilities for all Americans.

(Exhibit 17, Attachment 1, p. 2).

The general wording of these constitutional statements is consistent with the common practice of student organizations at APSU, which is to restrict the statements of purpose contained in their constitutions to broadly-worded general descriptions (Carter, II:4-6). A more detailed statement of organizational purpose, however, was unanimously adopted by the general membership of the Coalition on April 11, 1979, as an internal document designed for the guidance of the membership, and as an elaboration on the broad statement of purpose contained in Article II of the Constitution (Lewis, I: 115-117).

That statement is as follows:

> The Student Coalition for Gay Rights is open to all students of Austin Peay State University, whether gay or non-gay, who share its goals. The Coalition's purposes are as follows:
>
> 1. To encourage communication between gay and non-gay members of the University community.

2. To educate the University and the surrounding community on the meaning of being gay and to dispel the false stereotypes of gay people that now exist.

3. To organize effective political action in support of legislation protecting the civil rights of gay people, including equal opportunity to jobs and housing.

4. To engender a rational debate concerning sodomy laws and other statutes that proscribe private sexual conduct between consenting adults without ethical, social or political justification, and to urge their repeal.

As an educational and political action organization, the Coalition does not advocate or promote violation of state statutes. Our goal is not to promote homosexuality or any other kind of sexual behavior but to promote understanding and equality for all people without regard to their sexual orientation. We seek to effect our goals through compliance with the Constitution of the United States and the State of Tennessee, Tennessee statutory law and the rules and regulations of the University.

(Exhibit 8.)

The Coalition's president and faculty advisor both testified that this statement accurately describes the specific purposes of the organization (Lewis, I:115-118; Lewis, I:133-136; Carter, I:149-150). Although worded differently than earlier detailed expressions of organizational purpose (which were preliminary drafts or informal statements contained in press releases), the April 11 statement is fully consistent in substance with the previous expressions. (Compare Exhibit 8 with Exhibit 3, an earlier draft version of a statement of purpose). The record clearly reflects that the April 11 statement represents no change in the group's purposes as perceived by participants at the time it was founded (Lewis, I:116-117; Carter, I:149-150).*

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*Nicks alleges that the constitutional statement of purpose is "vague and would not serve to limit any of the activities of the organization, and would preclude any evaluation by APSU as to whether the SCGR is legally fulfilling its mission" (IV: 7/16/79 Nicks' letter). This objection was never made by Boehms or Riggs and fails to reflect that at both the May 9-10, 1979 hearing and the August 13, 1979 meeting of the Board's Student Life Committee, the Coalition offered to accept recognition by the University conditioned on the Coalition retaining the April 11, 1979 Statement of Purpose and on the Coalition's activities remaining consistent with the statement (Counsel for Coalition, I:135; Exhibit 18).

At the hearing, defendant Boehms conceded that the group's organizers are truthful when they say it is not their purpose to advocate homosexual behavior, and that their goal is merely to promote a better understanding of homosexuals and homosexual lifestyles. (Boehms, I:95, 99).

B. The Coalition's Activities

The record reflects that meetings of the Coalition have been conducted in a businesslike manner, comparable to that of other student organizations. (Carter, I:146). The faculty advisor testified that if any differences do exist, the Coalition meetings are conducted "a little more professionally" than other student groups with which he is familiar. Id.

There is no contention in the record that any of the Coalition's past or proposed activities involve sexual conduct. No evidence was adduced that the organization has urged any person to engage in homosexual conduct (Blair, I:49-50; Porteus, I:77; Boehms, I:77, 103).

The past and proposed future activities of the organization are educational and political. The Coalition seeks to evaluate the positions of candidates for public office on the question of discrimination against homosexuals and to make endorsements (Lewis, I:118). It distributes materials setting forth modern scientific research about homosexuals and arguing for tolerance of them. These materials contain the arguments of prominent Americans and American institutions supporting civil rights legislation for homosexuals, and opposing job discrimination against gay people (Lewis, I:118-123). Examples of these materials are incorporated in the record as Exhibits 9-13.

The Coalition is thus virtually identical to the successful plaintiff organizations that were before the First Circuit in Gay Students Organization of the University of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974), the Fourth Circuit in Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976), and the Eight Circuit

Virginia Commonwealth Univ.

in Gay Lib v. Univ. of Missouri, 558 F.2d 848 (8th Cir. 1977). In Gay Alliance, the Court observed:

> At the outset, we state what this case is not. There is neither claim nor evidence that GAS as such engages in unlawful activities. So far as this record establishes [it] is, at most, a "pro-homosexual" political organization advocating a liberalization of legal restrictions against the practice of homosexuality and one seeking, by the educational and informational process, to generate understanding and acceptance of individuals whose sexual orientation is wholly or partly homosexual.

544 F.2d at 164, quoted with approval in Gay Lib v. University of Missouri, 558 F.2d at 856.

That same case is before this Court. For the reasons set forth below the Court should follow those precedents.

II.

DEFENDANTS' DENIAL OF RECOGNITION CONSTRICTS PLAINTIFFS' CONSTITUTIONALLY PROTECTED ACTIVITIES

It is now beyond dispute that "state colleges and Universities are not enclaves immune from the sweep of the First Amendment." Healy v. James, 408 U.S. 169, 180, 33 L. Ed. 2d 266, 925. Lt. 2338 (1972). See Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969). Indeed, the Supreme Court has recognized that the "vigilant protection" of First Amendment freedoms "is nowhere more vital that in the community of American Schools." Shelton v. Tucker, 364 U.S. 479, 487, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960). Accordingly, defendants' actions must conform to the mandate of the First Amendment.

The right of a group to organize to further a political objective — i.e., freedom of political association — is one of the rights protected by the First Amendment. See Cousins v. Wigoda, 419 U.S. 477, 487, 42 L. Ed. 2d 595, 95 S. Ct. 541, (1975); Williams v. Rhodes, 393 U.S. 23, 30, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968). That right is protected not only against "heavy-handed frontal attack but also from being stifled by more

subtle government interference." Bates v. City of Little Rock, 361 U.S. 516, 523, 80 S. Ct. 412, 4 L. Ed. 2d 480, 485 (1960).

In Healy v. James, 408 U.S. 169, 181, 92 S. Ct. 2338, 33 L.Ed. 2 266 (1972), the Court held that where denial of recognition of a student organization carries with it a significant constriction of access to University facilities and means of communication, non-recognition burdens or abridges the right of association. In the instant case, the record reflects that denial of recognition deprives the Coalition of the right to schedule the use of University facilities, distribute notices through the campus mail, post notices of meetings and activities on University bulletin boards reserved for student groups, apply for student activity funds from the SGA, enter a float in the annual homecoming parade (which is sometimes used by student organizations to convey political messages), obtain a listing in the student handbook and yearbook, lease a campus post office box, and participate in "Organizations' Day", (a time set aside for groups to solicit new members). (Boehms, II:26-27; Exhibit 14; Mason depos., 11-12).

Therefore, rights protected by the First Amendment are adversely affected by the conduct of which plaintiffs complain. This is true despite Nicks' argument in the record that "the members of the SCGR have, on an individual basis, in effect received or had the opportunity to receive all of the major benefits of recognition" (IV: 7/16/79 Nicks' letter). It is well-established that rights may not be denied to organizations on the theory that no harm is done to the members' rights because as individuals they can assemble, speak, or distribute material on campus or because the group can meet as a formal organization off campus. This argument was specifically rejected in Healy, supra, 408 U.S. at 182-183.

Implicit in Healy is the holding that a university that establishes a system for granting official recognition thereby creates a public forum, a mechanism for the exchange of viewpoints among groups and members of the university community. It is

clear that through its process of recognition the University and the Board have established a policy of allowing — indeed encouraging and nurturing — the organization of a variety of groups to further their associational goals. Thus, there is no issue here of whether defendants could deny recognition to all student organizations who wish to associate for political purposes. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974). It is the defendants' selective exclusion of plaintiffs' organization from participating in the public forum established at APSU that poses the constitutional issue.

In Healy, the Court held that once a student organization files an application in conformity with the formal requirements of the University (as in the instant case), the burden of justifying denial of recognition is on the University. That burden, the Court emphasized, is a "heavy" one. Id. at 184. The following analysis of defendants' justifications for non-recognition demonstrates that they have not met that burden.

III.

DEFENDANTS' RATIONALES FOR DENYING RECOGNITION ARE INSUFFICIENT AS A MATTER OF LAW TO JUSTIFY THAT DENIAL.

A. Defendants' Disapproval Of The Content Of Plaintiffs' Social And Political Views Cannot Justify The Denial Of Recognition

The most fundamental principle of first amendment law is that government cannot supress associational activity because of disagreement with the content of the message the association seeks to convey. Thus, in Police Department v. Mosley, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972), the United States Supreme Court said, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

Chancellor Nicks justified his July 16, 1979 denial of recognition, in part, by stating, "recognition of the SCGR would constitute both actual and implicit approval of the purposes of the organization. . ." (IV: 7/16/79 Nicks' letter). Likewise, Vice-President Boehms justified his earlier denial, in part, by claiming that "official recognition would cast or bestow official condoning of the goals and purposes, and functions of the organization by the University." (Boehms, I:66; I:88-89). The inevitable corollary of this argument is that recognition is being withheld because defendants disapprove of the organization's views. Indeed, two of the University's witnesses at the Hearing testified that community disapproval of the group was a consideration in denying recognition and Boehms emphasized in his letter of denial that, "we must recognize that as an instrument of society [the University] cannot operate independently of the social system that founded and supports it." (Boehms, I:87-88; Blair, I:55; Attachment 2 to Exhibit 17). Also, President Rigg's letter explicitly noted that rejection of recognition was based in large part on his personal view that homosexual activity "is contrary to the Judeo-Christian ethic" and that the organization was "contrary to the mission" of APSU (Attachment 4 to Exhibit 17).

The Court in Healy specifically rejected the notion that recognition could be denied by campus officials because an organization's philosophies are "counter to the official policy of the College." 408 U. S. at 187.

Defendants' arguments articulate the unconstitutional motive of their suppression of the Coalition.

B. Defendants' Allegation That Recognition Will Cause An Increase In Homosexual Conduct Cannot Justify The Denial Of Recognition, Under The Applicable Case Law.

Although Defendants do not contend that the Coalition advocates or attempts to incite the imminent violation of law, they do claim that recognition of gay rights

groups will have a practical effect of increasing homosexual conduct. This specific rationale, and the various arguments underlying it, have already been rejected by the First Circuit in Gay Students, supra, the Fourth Circuit in Gay Alliance, supra, and the Eighth Circuit in Gay Lib, supra, Indeed, Chancellor Nicks' justifications for denying recognition (IV: 7/16/79 and 8/23/79 Nicks' letter) read like a checklist of arguments against recognition of homosexual civil rights organizations taken from these reported cases.* However, all of these arguments have been uniformly rejected by the appellate courts.

They have been rejected for three reasons — (1) the basis of the claim is too conjectural to meet the government's burden of proof under the first amendment; (2) even if they are accepted as being true, denial of recognition is overkill because it does not merely prevent illegal conduct, but also restricts associational activities that are not illegal; and (3) even if they are accepted as being true, they do not reflect a specific intent by the organization to incite the illegal conduct by individuals, which is a prerequisite to suppression of the organization's activities.

Thus these Courts have already held that even if defendants' contention about increased homosexual conduct is true, it does not provide a constitutional ground for their conduct. Since for that reason the contention is largely immaterial to the establishment of plaintiffs' claim for relief, plaintiffs will not debate at length the merits of that contention. Suffice it to say that a brief examination of the arguments of defendants underlying the contention show the wisdom of the courts' previous holdings that they are not supported by "the quantum and quality of proof necessary to justify the abridgement of First Amendment Rights." Gay Lib v. Univ. of Missouri, 558 F.2d at 853.

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*This is perhaps because they were written for Chancellor Nicks by the General Counsel of the Board. Compare Proposal Findings of Fact on behalf of APSU in Volume 4 with Nicks' 7/16/79 letter in Volume 4; they are vitually identical.

(1). The arguments underlying defendants allegation are too conjectural to satisfy their burden of proof.

Defendants' claims that recognition of the Coalition will result in an increase in homosexual conduct is based on ~~four~~ several major arguments:

1. Recognition will be viewed as University approval of the policies and objectives of the organization, thus encouraging students with sexual identity problems to experiment with homosexuality. (IV: Nicks' 7/16/79 letter, p. 8).

2. Recognition will result in homosexuals counseling other students who are homosexuals or who are suffering from gender identity problems (IV: Nicks 7/16/79 letter, p. 9) and such counseling will be toward a homosexual lifestyle.

3. Since a "significant" number of homosexuals are promiscuous and since the drive for homosexual behavior is "compulsive" in "some" males, as a result of the "frequent meetings of openly admitted homosexuals" and other associational activities of the group "there will be an immediate increase in the homosexual behavior of those students who are homosexuals." (IV:Nicks' 8/23/79 letter, p. 1).

These arguments purport to be based on the record of the May 9-10, 1979 Hearing. (IV:Nicks' 7/16/79 letter,p. 1). The unqualified, categorical manner in which Chancellor Nicks states these arguments masks their highly conjectural basis in the record, which is revealed when the arguments are traced back to their source.

The record shows without dispute that there is no empirical or historical basis in the scientific literature for the contention that recognition of a "gay rights" group will increase homosexual behavior (McKee, II:59). This was also the finding of the Eighth Circuit in Gay Lib, supra, at 854.

Nor has such been the experience of colleges that have recognized such groups. The Director of Student Life at the University of Missouri - Columbia testified (Exhibit 5) that he has found no indication that formal recognition of two "gay rights" groups on that campus has resulted in increased or expanded homosexual conduct among students, although that University's administrators had made dire predictions to

that effect previous to a Court order requiring recognition. See Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977).

Even the psychiatrist called by the University, Dr. Harvey Reese, testified that it would be "impossible" to prove that there will be more homosexual conduct on the campus as an immediate effect of such an organization's recognition (I:13-14; 16). The psychiatrist and psychologist called by the Coalition, both of whom have done extensive work on issues of human sexuality in general and homosexuality in particular, testified that neither the University's position on recognition nor the functioning of the Coalition in accordance with its purposes will increase the amount of homosexual conduct (McKee, II:12, 51, 52; Roback, II:81).

Faced with this overwhelming preponderance of the scientific and empirical evidence, defendants are forced to rely in this record on "speculation" (Boehms, I: 105); "assumption" (Boehms, I:92); "impressions" (Reese, I:9); and their personal beliefs about "general human nature" (Boehms, I:92-93; Reese, I:23) to support their conclusions.

Thus defendants' bases for their arguments are no better (and are, if judged by their own descriptive labels, worse) than the conclusory "inferences" and "beliefs" of psychiatric witnesses rejected in Gay Lib, 558 F.2d at 854. In fact, the arguments of the instant defendants do not even have the quality of support that defendants had in Gay Lib, since here many of the conclusions are not expressly those of the state's single psychiatric witness but are those of the college administrators themselves, who have not been shown to have expertise on the subject. In short, defendants' fears are nothing more than the sort of "undifferentiated fear or apprehension" which the Supreme Court has held "is not enough to overcome the right to freedom of expression." Tinker V. Des Moines Independent School District, 393 U.S. at 508 (fear of disturbances from the wearing of armbands); Healy v. James 408 U.S. at 191 (fear of disruption from SDS Chapter).

Defendants' assertion that students will perceive recognition as constituting University condonation of homosexuality is actually contradicted by the record, and Dr. Boehms has admitted that the suggestion that this alleged student perception will cause homosexual experimentation is based on his "speculation" (I:104-105). The record reflects that APSU students in fact distinguish between approval or disapproval of homosexuality on the one hand and the rights of homosexual persons to freedom of assembly, association and expression on the other. Although they generally disapprove of homosexuality, the 25-1 vote of the Student Government Association in favor of recognition and the testimony of the faculty members and the SGA president about student attitudes indicate that most of the students support recognition of the Coalition (Pinckney, II:6-9; Carter, I:147-148; Lewis, I:141; Exhibit 17, attachment 3; Mason deposition, pp. 17-19). Thus, the University's students generally do not appear to regard recognition of the Coalition as constituting "approval of homosexuality."

Defendants' assertion that recognition will result in homosexuals counseling other homosexuals and students with gender identity problems does not withstand rational analysis as a factual justification for non-recognition. Dr. Boehms admitted that regardless of whether the Coalition is recognized, it will continue to exist and that regardless of whether the Coalition is recognized, individual homosexuals will be available on campus for such counseling as students may seek from them (Boehms, I:94-96). Furthermore, in point of fact the record shows that it is the Coalition's policy and practice to refer any students who come to it indicating emotional or psychological problems to persons with professional expertise in counseling (Lewis, I:127, 132, 134). The Coalition refers persons to the University psychologist or to a psychologist in private practice in Clarksville who was formerly employed by the Tennessee Department of Mental Health. Any "peer counseling" that is a part of the Coalition's activities is of a non-psychological nature. Id. There is no evidence that the Coalition is engaged in any "improper" counseling (however the University may

define that term). Dr. Reese conceded that his view that individual gay persons engaged in counseling will encourage students to engage in homosexuality (which he said is based on his beliefs about human nature) applies only to some, and not to all, homosexuals (Reese, I:23, 40).

Thus, defendants are attempting to deny recognition to the Coalition, whose activities have not been shown to involve sexual solicitation or advocacy of present violations of law, on the basis of a vague notion that some unnamed and unknown individual homosexuals may encourage violations of the law. (As will be shown below, this approach is unconstitutional because it is hopelessly overbroad, affecting as it does the innocent as well as the "guilty" and because it is aimed at restraining the lawful First Amendment activities of the organization, rather than punishing the unlawful individual conduct).

The same practical defect — the overbreadth of the remedy of nonrecognition — exists with respect to defendants' next assertion, that "some" "promiscuous" or "compulsive" homosexuals (who, defendants admit, are not typical of all homosexuals) will be able to locate sexual partners at "frequent meetings of openly-admitted homosexuals." (IV:Nicks' 8/23/79 letter, p. 1). This, it is argued, will result in an "increase" in homosexual behavior. It is difficult, logically, to see how this will result in an increase in homosexual behavior since by definition compulsive or promiscuous individuals are those who are already engaging in frequent sexual conduct and who will continue doing so regardless of whether the Coalition exists. (Defendants can hardly deny that numerous ways already exist for such persons to find sexual partners, chief of which are gay bars.) Since it is the "frequent meetings of openly—admitted homosexuals" that defendant's fear, their assertion that increased homosexual conduct will result from recognition is also inconsistent with their claim that the "activities [of the Coalition] can be pursued through campus discussions [and] meetings . . . regardless of recognition." (IV:Nicks' 8/23/79 letter, p. 2).

Clearly, such arguments are based on fears that notwithstanding the fact that the organizational purpose of the Coalition is not to advocate or promote homosexual behavior, some individual homosexuals (who may or may not be members of the Coalition) might have that purpose or may solicit or encourage students to practice homosexuality. (Every witness expressing this view admitted that it was not based on any specific knowledge of, or discussion with, the Coalition or with the actual members of the Coalition, but on the witnesses' beliefs about general human nature, Reese, I:38-39; Boehms, I:92-93.)

The argument that recognition may be denied to the Coalition because some individual homosexuals may act improperly is contradicted by the University's own policy of differentiating between individual and organizational misconduct. The University administration acknowledged at the Hearing that no student organization can absolutely control the conduct of all its members (Boehms, I:99), and that as a consequence, the University's policy is to hold individuals individually responsible for their conduct. It disciplines individual students who violate the law or University policy and disciplines the organizations to which such students may belong only if the individuals, in engaging in the violative conduct, were acting under the auspices of or in connection with that organization. Id. As previously noted, there is no evidence in this record, or even any contention, that any activity conducted under the auspices of, or in connection with, the Coalition has involved homosexual conduct, or other violation of the law. Thus under its own policy the University has not justified its punitive action against the Coalition.

Defendants burden of proof can hardly be met by their assertion that solicitation of sexual partners by individual homosexuals will be materially impeded by refusal to grant recognition to an organization whose organizational purposes and activities do not include sexual conduct or the solicitation of sexual conduct. Furthermore, homosexuals who are members of the Coalition (as well as those who are not) will

continue to be University students despite non-recognition, and will continue to carry out whatever their patterns of private, individual behavior may be (Boehms, I:100: Reese, I:39).

Clearly, Defendants conjectural basis for denying recognition is not enough to meet its heavy burden of proof. As the Eighth Circuit observed in rejecting the identical arguments put forth by these defendants:

> Even accepting the opinions of defendants' experts at face value, we find it insufficient to justify a governmental prior restraint on the right of a group of students to associate for the purposes avowed in their statement and revised statement of purposes. While it is difficult to articulate generalized standards as to the quantum and quality of proof necessary to justify the abridgement of First Amendment rights, the many Supreme Court cases dealing with prior restraints and other First Amendment issues make clear that the restriction of First Amendment rights in the present context may be justified only by a far greater showing of a likelihood of imminent lawless action than that presented here.

Gay Lib, supra. 558 F.2d at 854-55.

(2). The allegation, even if assumed to be true, cannot justify the denial of recognition because the remedy of non-recognition is overbroad and because no specific intent to incite violations of the law has been shown.

(a). Overbreadth. Once a governmental entity creates a public form, its ability to restrict access to it is very narrowly circumscribed. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552-58, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (Chattanooga rock musical "Hair" case). As the Court held in Police Department v. Mosley, 408 U.S. 92, 98-99, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972), government's "justifications for selective exclusion from a public forum must be carefully scrutinized." While reasonable regulations of time, place and manner are acceptable, Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972); and content — based regulation is clearly unacceptable, id., government can only restrict access to a public forum if the regulation is (1) narrowly tailored (2) to promote a compelling state interest. That is, even where the State is attempting to

further a compelling interest, it must use the least drastic means available to it, so as not unnecessarily to restrict First Amendment activities. Id. at 116-17; Mosley, 408 U.S. at 99. The rationale for this rule is that denying access to a public forum is a form of prior restraint, and the "presumption against prior restraints is heavier - and the degree of protection broader - than against limits on expression imposed by criminal penalties." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59, 95 S. Ct. 239, 43 L. Ed. 2d 448 (1975). The special rule against prior restraints is warranted because "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." Id. at 559. Thus, Judge Webster, in dismissing arguments identical to those of defendants here, observed in Gay Lib.

> I am . . . certain that the University posesses the power and the right to deal with individuals and organizations . . . that violate . . . the laws of the state. There will be time for that if [the university's] dire predictions should somehow prove to be correct. The nature of our government demands that we abide that time."

558 F.2d at 857 (concurring opinion), (emphasis supplied).

The critical defect, therefore, in defendants' rationale for denying recognition - the prevention of illegal homosexual activity - is its hopeless overbreadth. Even where government purports to promote a substantial interest, it cannot unduly suppress expressive activities if there are more direct ways of achieving the goal. For example, although it is certainly proper to ban littering in the public streets, the Supreme Court has held that it is improper to pursue that goal by banning the distribution of political literature in the streets on the theory that this would increase the likelihood that an illegal act would occur. In language directly applicable, by analogy, to the instant case, the Court held:

> Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the Constitutional protection of freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street

littering. There are obvious methods of preventing littering. Amongst these is punishment of those who actually throw papers on the street.

Schneider v. State, 308 U.S. 147, 162, 60 S. Ct. 146, 84 L. Ed. 155 (1939). If APSU is genuinely concerned with feared illegal behavior then it can enforce sanctions on the sexual acts of homosexuals directly, thereby not unduly burdening the rights of political association, which is not illegal. That would allow the protected activity to flourish and would be more precisely aimed at the evil defendants allegedly seek to prevent.

Defendants' approach toward preventing homosexual conduct -- namely, denial of recognition -- is a blunderbuss and therefore insufficiently tailored to meet the "least drastic means" element of the strict scrutiny standard. It is overbroad in other ways as well. The administrative record indicates that the defendants acknowledge homosexual conduct occurs, and will continue to occur despite nonrecognition. The incremental benefit to the University's interests is therefore speculative, since no particularized evidence exists about the degree of increased homosexual conduct that would accompany recognition. It is questionable in any event whether total suppression of an organization could be justified because of the fear of increased illegal conduct, see City of Madison v. Wisconsin Employment Relations Commission, 429 U.S. 167, 173-74, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976), but if a record showed the insufficiency of alternatives, it would present a much stronger case for defendants. If defendants are genuinely concerned exclusively with illegal conduct, there are much narrower, more precise means available to aim directly at illegal activity, while permitting expressive activity.*

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*Indeed, the overbreadth of the university's approach - suppressing political association to curtail increased homosexual activity - is further evidence that the aim is suppression of the expressive activity itself because of the content of the ideology. (See part III A, above). As the Supreme Court has noted in Street v. New York, 394 U.S. 576, 592, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969):

> If a statute is not narrowly enough drawn to create a close nexus between its means and its legitimate ends, the Court may disregard such ends as [being the real] justifications of the challenged law.

Thus, the interest of the University in preventing illegal conduct is not clearly advanced, and certainly the record does not support the burden the University has under Healy to justify the prior restraint by showing it is essential to achieve its goal and narrowly tailored to that end. Id. Rather, the denial of recognition is a broadside aimed at the core First Amendment political association itself.

(b). No Specific Intent to Incite. As already shown, since the denial of recognition is a form of prior restraint, Healy v. James, 408 U.S. at 184, the burden of justifying the governmental action is a "heavy" one. Id. It cannot be satisfied unless the suppressed activity is "directed to inciting or producing imminent lawless action" and [is also] likely to produce such action. Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430, (1969) (emphasis added). Accord, Gay Alliance of Students v. Matthews, 554 F.2d 162, 166 (4th Cir. 1976).

As shown in Section III B(1) above, defendants have not met their burden of proof in showing imminent lawless activity resulting from plaintiffs' conduct. Likewise, the University cannot carry its burden of showing incitement. There is no evidence that a purpose or an intended activity of plaintiff organization is the incitement of imminent illegal activity. Indeed, while advocacy of illegal conduct, without incitement, cannot be suppressed, Healy v. James, 408 U.S. at 188, there is no evidence in this case that the organization even advocates illegal conduct. Its purpose is to educate and to create a more tolerant social, political and legal climate for homosexual lifestyles and values. Incitement is not part of its mission, and there is no significant evidence to the contrary.

Under defendants' rationale, the potential for perniciousness is apparent. Any associational activity or organization that could reasonably attract a disproportionate number of homosexuals could be denied recognition because, on defendants' theory, the mere association provides the opportunity for contact, which in turn leads to illegal action. The chain of relationships is strained, to say the least, and upholding that line

of reasoning in the face of the infringement on fundamental First Amendment values can only lead to substantial erosion of basic associational values. Similar notions have been repeatedly rejected by the Courts:

> The Court has consistently disapproved governmental action denying rights and privileges solely because of a citizen's association with an unpopular organization, [citing cases]. In these cases, it has been established that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights. United States v. Robel, supra, at 265, 19 L Ed 2d at 515. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.

Healy v. James, 408 U.S. at 186 (emphasis added).

In the particularized context of "gay rights" groups, the Eighth Circuit has noted:

> It is difficult to singularly ascribe evil connotations to the group simply because they are homosexuals. See Gay Alliance of Students v. Matthews, supra; Gay Students Org. of Univ. of New Hampshire v. Bonner, supra. An interesting fact is that not all members of the group are homosexuals. Furthermore, this approach blurs the constitutional line between mere advocacy and advocacy directed to inciting or producing imminent lawless action. Finally, such an approach smacks of penalizing persons for their status rather than their conduct, which is constitutionally impermissible. See Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

Thus, the First Amendment requires the rejection of defendants' argument that even if plaintiffs are not engaging in illegal conduct, their activities, if recognized, may have an undesirable effect on students who are exposed to plaintiffs' views. That argument was raised and rejected explicitly by the Fourth Circuit in Gay Alliance of Students v. Matthews, 544 F.2d 162 165 (4th Cir. 1976), where Judge Winter for a unanimous court held

> [t] o the extent that registration would serve to encourage membership . . ., the result would accord with the purposes of the first amendment . . . If it is the right of an individual to associate with others in furtherance of their mutual beliefs, that right is furthered if those who may wish to join . . are encouraged by the fact of registration to take that step.

Defendants' argument denies the Coalition recognition because of fear of the "effects produced by awareness of the information [their] actions impart." L. Tribe American Constitutional Law 850 (1978).

As one constitutional authority has observed:

> [I] f the constitutional guarantee is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness.

Id. The Supreme Court has held that the First Amendment requires government to permit expressive activity, even if there is a risk of misuse of the information, because that risk is outweighed by the harm of suppressing that activity. See Virginia State Board of Parmacy v. Virginia Citizens Council, Inc., 425 U.S. 748, 770, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). In this case, defendants have chosen to suppress the expressive activity because of their fear that plaintiffs will be effective in changing public attitudes and the laws concerning homosexuality. This is a choice that under the First Amendment they are not entitled to make. Gay Lib v. University of Missouri, 558 F.2d 848, 854-57 (8th Cir. 1977); Gay Alliance of Students v. Matthews, 544 F.2d 162, 165-66 (4th Cir. 976). As Justice Powell stated in Healy "[T] he mere disagreement with the group's philosophy affords no reason to deny it recognition" 408 U.S. at 184.

IV.

DEFENDANTS' SYSTEM FOR THE GRANTING AND DENIAL OF OFFICIAL RECOGNITION VIOLATES THE FIRST AMENDMENT BECAUSE OF THE ABSENCE OF STANDARDS AND OTHER PROCEDURAL SAFEGUARDS NECESSARY TO REDUCE THE DANGER OF COVERT CENSORSHIP OF CONSTITUTIONALLY PROTECTED ASSOCIATIONAL ACTIVITY.

It has already been established that the process of official recognition is a form of prior restraint of access to a public forum. It is well settled that a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural

safeguards designed to obviate the dangers of a censorship system." Freedman v. Maryland, 380 U.S. 51, 58, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). The denial of recognition herein occurred without adequate procedural safeguards, especially the lack of precise standards. See Niemotko v. Maryland, 340 U.S. 268, 271-273, 71 S. Ct. 328, 95 L. Ed. 265 (1951). A system that constitutes an overbroad delegation of authority to an administrative official is unconstitutional because it gives administrators "the power to discriminate--to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly." L. Tribe, American Constitutional Law, 733 (1978); see generally Monaghan, First Amendment "Due Process," 83 Harv. L. Rev., 518 (1970).

The denial of recognition by APSU is functionally "indistinguishable in its censoring effect," Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) from a long line of cases that have held invalid licensing systems that vest excessive degrees of discretion in administrative officials. Thus, in Cantwell v. Connecticut, 310 U.S. 296, 305, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) the Supreme Court held invalid an act that prohibited solicitation for "any alleged religious, charitable or philanthropic cause unless that cause was approved by a governmental official." The Court's objection to the law was that the governmental official did not ministerially approve requests "as a matter of course," but rather, was required to appraise facts, exercise judgment and form an opinion.

Similarly, in Kunz v. New York, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280 (1951), a speaker was arrested for speaking in a public area without a permit, which the police commissioner had refused to issue. The ordinance specified no criteria for denial of a permit, and the Court objected to the discretion the police commissioner had in denying permit applications. Id. at 293. Chief Justice Vinson, for the Court, noted that "licensing systems which vest in an administrative official discretion to grant or

withhold a permit upon broad criteria unrelated to proper regulation of public places" has been consistently condemned. Id. at 294.

In Staub v. City of Baxley, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d. 302 (1958), the Court held invalid an ordinance that made it an offense to solicit for members of a union without a permit, which the city could deny because of its "effects upon the general welfare of citizens of the City of Baxley." Id. at 314 n. 1 (Section IV). The Court found the ordinance allowed prior restraint without "definitive standards or other controlling guides," thereby permitting essentially "uncontrolled discretion" by city officials. Id. at 322. Access to public forums, however, cannot be conditioned on the "uncontrolled will of an official." Id.

In Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969), a civil rights marcher was convicted of participating in a parade without a permit in violation of a city ordinance. The ordinance allowed the city to deny a permit in the interest of the "public welfare, peace, safety, health, decency, good order, morals, or convenience." Id. at 149. For the Court, Justice Stewart noted that "[t]here can be no doubt" that the ordinance conferred "virtually unbridled and absolute power" on the city to bar any parade or demonstration on the city's streets because "in deciding whether or not to withhold a permit, the [governmental officials] were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience." Id. at 150. The Court held that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." Id. at 150-151. Thus, despite the city's legitimate interest in regulating the use of its streets, it cannot "empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the

activity in question on the 'welfare,' 'decency,' or 'morals' of the community." Id. at 153.

These prior restraint licensing decisions make it clear that the administrative discretion that has been granted to APSU officials is much too broad to pass constitutional muster. The language of the law is Staub is especially poignant, since it allowed an official to deny a permit because of the "effect upon the general welfare of citizens of the city" of solicitation activities. That is precisely the rationale offered by defendants for denying recognition to plaintiff organization. Essentially, the administrators in the board of regents system have reserved to themselves the authority to refuse to recognize any group that, in their opinion, is incompatible with the school's values. Clearly, that type of standardless discretion violates the constitutional principles established in Southeast Promotions ("Hair"), Shuttlesworth, Staub, Niemoko, Kunz, and Cantwell. If the system is to be valid, it must limit the authority of the administration in advance and not permit such opportunity for "covert censorship." L. Tribe, American Constitutional Law 773 (1978).

Consequently, regardless of the intent of the decision, and regardless of the propriety of the rationale for denial of recognition actually employed (allegedly the prevention of illegal conduct), the procedural shortcoming renders the denial invalid. Provided that plaintiff organization meets the formal requirements for recognition, as it does, the University cannot carry its Healy burden of justification by reference to the alleged substantive criteria used in this case because of the procedural defect of standardless delegation and the accompanying risk of covert, undetectable censorship. Unless and until the University develops more definitive, less generalized, criteria to guide administrative decision making it is obliged to recognize plaintiff organization, since it has complied with all the formal requirements for recognition.

V.

DEFENDANTS' DENIAL OF RECOGNITION TO PLAINTIFF ORGANIZATION IS AN IMPERMISSIBLE CLASSIFICATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE SINCE IT IS NOT NECESSARY TO PROMOTE A COMPELLING STATE INTEREST.

State action that unevenly classifies must conform to the Fourteenth Amendment guarantee of equal protection. In order to determine whether equal protection is violated, the Supreme Court has developed two standards. Under the traditional test, legislation that makes a distinction between groups is valid if the state can show that the classification is rationally related to a legitimate state interest. That is the test typically applied to social welfare and taxation classifications. See Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).

Where, however, a state classification infringes a fundamental interest, Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d. 274 (1972) (voting), or employs a "suspect" criterion, Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (race), the state can only justify the classification if it is necessary to promote a compelling state interest.

The right of political association is a fundamental right, and a classification that adversely affects that right is subject to strict scrutiny under the equal protection clause. Williams v. Rhodes 393, U.S. 23, 89 S. Ct. S. 21 L. Ed. 2d. 24 (1968); Police Department v. Mosley, 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d. 212 (1972). Thus, a classification that infringes on associational rights can be justified only if necessary to promote a compelling state interest.

In this case, the defendants have withheld recognition of a gay rights group solely because of the content of the message to be conveyed. There has not been a general ban on groups whose activities might lead to illegal conduct. Fraternities and sororities are not banned, even though it is widely acknowledged that liquor is often

served to under-aged juveniles. Social activities are not banned even though they may well promote the use of illegal drugs such as marijuana. Moreover, even if the defendants' concern with violations of the crime against nature statute were credited, the denial of recognition of the plaintiff organization is underinclusive because, surely, using defendants' reasoning, heterosexual groups on campus, by encouraging male-female interaction, are undoubtedly encouraging, to some extent, heterosexual crimes against nature such as fellatio and cunnilingus.

Besides the underinclusiveness of the classification, there is also gross over-inclusiveness. Many members of plaintiff organization are not homosexuals, such as plaintiff Dannenmaier. In addition, many homosexuals are passive in their homosexual orientation, manifesting homosexual desire but not necessarily acting on it. See Wilson & Shannon, Homosexual Organizations and the Right of Association, 30 Hastings L.J. 1029 1031-33 (1979). These individuals are deprived of their right to act politically to change the law so that, as law-abiding citizens, they can legally become functional homosexuals.

The blanket ban on official recognition is therefore both overinclusive and underinclusive and, as such, fails to pass strict constitutional scrutiny. The Fourth Circuit held the ban on recognition of a gay rights group to be a violation of equal protection, and this court should follow that precedent. See Gay Alliance of Students v. Matthews, 554 F.2d 162, 167 (4th Cir. 1976).

VI

THE DISTRICT COURT SHOULD GRANT A PRELIMINARY INJUNCTION RESTRAINING DEFENDANTS FROM DENYING RECOGNITION TO PLAINTIFFS PENDING THE OUTCOME OF THIS LITIGATION BECAUSE PLAINTIFFS WILL OTHERWISE SUFFER IRREPARABLE INJURY

BY THE LOSS OF FREEDOMS GUARANTEED TO THEM BY THE FIRST AMENDMENT

The granting of a preliminary injunction is within the sound discretion of the Trial Court. Virginia Railway Co. v. System Federation, R.E.D., 300 U.S. 515 (1937). There is a four-part standard employed by the Sixth Circuit to determine whether it is proper to grant a preliminary injunction:

(1) Whether the plaintiffs have shown a substantial likelihood of success on the merits;

(2) Whether the plaintiffs have shown irreparable injury;

(3) Whether the issuance of a preliminary injunction would cause substantial harm to others;

(4) Whether the public interest would be served by issuing a preliminary injunction.

Mason County Medical Ass'n v. Knebel, 563 F.2d 256 (6th Cir. 1977).

In the previous discussion, plaintiffs have already made the requisite showing of a substantial probability of success on the merits. Because of the nature of the First Amendment rights at stake here, the foregoing discussion of those rights also satisfies the second part of the test, that of showing irreparable injury.

A. The Loss Of First Amendment Freedoms For Even Minimal Periods Of Time Constitutes Irreparable Injury.

Although in most instances a showing of irreparable harm is a difficult burden of proof, that is not the case when First Amendment rights are threatened. Deprivation of First Amendment rights is irreparable injury per se, where, as here, a prior restraint is involved. New York Times, Co. v. United States, 403 U.S. 713, 29 L. Ed.2d 822, 91 S. Ct. 2140 (1971); Carroll v. Princess Anne, 393 U.S. 175, 182, 21 L. Ed.2d 325, 89 S. Ct. 347 (1968). In Elrod v. Burns, 427 U.S. 347 (1976), a case involving challenges by non-civil-service employees to patronage dismissals, the Supreme Court affirmed the Seventh Circuit holding that because of the involvement of First Amendment

associational rights, injunctive relief was clearly appropriate even though many of the plaintiffs were only threatened with discharge. The Court said:

> It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. (emphasis added)

347 U.S. at 373.

Since Elrod was decided, numerous lower federal courts have cited its reasoning with approval and granted preliminary injunctions based on it. In International Society for Krishna Consciousness v. Hays, 438 F.Supp. 1077 (S.D. Fla. 1977), the District Court cited Elrod in saying "it is well established that the denial of First Amendment freedoms even for a day inflicts irreparable injury . . ." 438 F.S. at 1081. See also Swearson v. Meyers, 455 F.Supp. 88 (D.C. Kansas 1978). The Court of Appeals for the Fourth Circuit went so far as to say that "[v]iolations of First Amendment rights constitute per se irreparable injury. Elrod v. Burns . . ." Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978).

As has already been demonstrated, plaintiffs' First Amendment associational rights are burdened by the denial of official recognition. Under the Elrod rule, such denial itself thus constitutes irreparable injury sufficient to meet the second part of the Sixth Circuit's four-part standard.

B. In The Absence Of Immediate Injunctive Relief To Plaintiffs, Their Associational Rights Will Be Irreparably Harmed By The Loss Of Opportunities Essential To Their Existence As A Campus Organization, And Which Are Presented Solely At The Start Of The Academic Year.

In the academic world it is essential to the functioning of a student organization that it exist officially at the outset of the school year. Without official recognition, student organizations are unable effectively to appeal to new students or to otherwise build their membership. The beginning of the year is when students decide how much time they have to invest in non-academic pursuits and choose the ones with which they

want to affiliate. (See Mason deposition, p. 12). In fact, at APSU every fall quarter there is an "Organization Day", in which only recognized organizations can participate. The student groups put up tables and booths and try to recruit members. (Mason deposition, p. 11). Unrecognized groups completely lose this opportunity presented early in the year to seek new members. If a student organization cannot make its appeal to students at the beginning of the school year, it will be placed at a major disadvantage.

These facts of academic life were attested to in a sworn deposition by David Mason, the immediate past president of the Student Government Association at Austin Peay State University. Mr. Mason, in describing how campus organizations interrelate, stated that the Coalition would be at a competitive disadvantage in building its organization should it be unable to seek new members at the onset of the school year. (Mason deposition, p. 12). He testified that the opportunities presented at the beginning of the year are unique and will be forever lost if not capitalized on when presented.

Should recognition be postponed pending the outcome of this litigation, the Coalition will suffer further harm in that it will lose the opportunity to include a float in the annual Homecoming Parade at the University, an opportunity only open to recognized campus organizations. (Mason deposition, p. 9.) The Homecoming Parade, while serving predominently as a source of entertainment and recreation, has also been used by student groups in the past to convey various political messages. (Mason deposition, p. 10.) The denial of access to this forum for political speech represents a clear infringement on protected First Amendment activities.

C. Plaintiffs Also Satisfy The Third And Fourth Requisites Of The Preliminary Injunction Standard In That Issuance Will Not Cause Any Harm To Defendants and Will In Fact Serve The Public Interest

The final two requirements of the Sixth Circuit standard for the issuance of preliminary injunctions are easily sastisfied here. The issuance of an injunction mandating recognition pending the outcome of this litigation can hardly "cause substantial harm to others," for recognition can be later withdrawn at any time. The University thus suffers no harm sinc, as held in Healy, the mere filing of an application for recognition imposes a burden of justification on the University. Since the issue being litigated is whether the University has met its burden, the University suffers no harm until such time that it has satisfied that burden.

The public interest is served by the issuance of this preliminary injunction because by such action the Court is safeguarding the all-important freedoms guaranteed by the First Amendment. The public interest is best served by vigilant protection of First Amendment rights, particularly in the situation, such as the one presented here, where the balance of the equities falls heavily in favor of issuance of the injunction.

CONCLUSION

For the foregoing reasons, the Court should grant plaintiffs' application for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to R. Stephen Doughty, attorney for all defendants in their official capacities, 450 James Robertson Parkway, Nashville, Tennessee, 37219, this 4th day of September 1979.

Gary E. Crawford