

No. 05-1701

IN THE
SUPREME COURT OF THE STATE OF GRACE

Grace State University,

Petitioner,

v.

Grace State Christian Fellowship,

Respondent.

On Writ of Certiorari to
The Court of Appeals of the State of Grace

BRIEF FOR RESPONDENT

Team 211

Questions Presented

- I. Whether Petitioner violated Respondent's members' First Amendment free association rights when Petitioner revoked the registered student organization status of Respondent for excluding a student on the basis of sexual orientation?

- II. Whether Petitioner's application of Grace State University Rule 2.3 prohibiting discrimination on the basis of sexual orientation to Respondent violates the Establishment Clause of the First Amendment of the United States Constitution?

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Constitutional Provisions or Statutes Involved

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Grace State University Rule 2.3:

Registered Student Organizations (RSOs) may not discriminate on the basis of race, color, creed, religion, national origin, disability, ancestry, age, sexual orientation, pregnancy, marital status, or parental status. University-affiliated groups may not discriminate on these prohibited grounds in selecting or initiating new members, in selecting officers, or in providing any aid, benefit, or service.

R. at 2.

Statement of the Case

This case arises from Grace State University's ("the university") decision to revoke the recognized student organization ("RSO") status of Grace State Christian Fellowship ("GSCF"). R. at 3. The university is a public school funded by the state of Grace. R. at 1. GSCF is one of many religious campus organizations. R. at 2. Prior to the revocation of its RSO status, GSCF enjoyed a university-hosted website, the use of university resources to print and distribute newsletters, an office space on campus, the use of university computers, access to publicity events, and university funding. R. at 1-2. GSCF requires its members to sign a "Statement of Belief," wherein members acknowledge that they are Christians who will refrain from alcohol and drug use and remain sexually pure. R. at 2.

The university purportedly draws its authority to revoke GSCF's RSO status from a discrimination policy that prohibits RSOs from providing preferential treatment on the basis of characteristics such as religious preference and sexual orientation. R. at 2-3. When GSCF removed Janet Miller, a homosexual, from a leadership position within GSCF and terminated her membership for noncompliance with its Statement of Belief, the university revoked GSCF's RSO status. R. at 3.

Only members of GSCF can hold executive positions and organize GSCF events. R. at 2. In her capacity as Social Events Coordinator, Ms. Miller was in charge of activities that GSCF intended to provide university students "alternative, wholesome entertainment." R. at 2-3. Although students could attend these social events without signing the Statement of Belief or becoming GSCF members, the activities served the primary purpose of providing social events free of alcohol, drugs, and licentious behavior. R. at 2. Ms. Miller's position as Social Events Coordinator obligated her to plan these social events and to attend all religious events. R. at 3, 5.

Ms. Miller is not a member of any gay advocacy groups and does not publicize her sexual orientation, but she openly dates members of the same sex. R. at 3.

GSCF brought the present action against Grace State University after exhausting its administrative remedies. *Id.* The North County District Court held that the university's decision to revoke GSCF's RSO status did not violate GSCF's First Amendment right to free association because GSCF could continue to exist despite the loss of significant university benefits. R. at 6. The District Court also held that the university's discrimination policy did not violate the Establishment Clause because the policy comported with the three-prong *Lemon* test. R. at 6-8.

The State of Grace Court of Appeals reversed the trial court on both issues. R. at 9. The Court of Appeals held that the university violated GSCF's First Amendment right to free association because the university's discrimination policy would force GSCF to advocate a position that GSCF does not endorse. R. at 10. The Court of Appeals also held that the university's discrimination policy violated the Establishment Clause because it does not treat religious views with neutrality. R. at 11. This Court granted the Petition for Writ of Certiorari to resolve these issues under *de novo* review.

Summary of the Argument

This Court should remedy the university's violation of GSCF's free association rights by affirming the correct holding of the State of Grace Court of Appeals and restoring GSCF's RSO status. The university's revocation of GSCF's RSO status was a violation of GSCF's freedom of association, according to the requirements set forth in *Boy Scouts of Am. v. Dale*. GSCF's claim meets the first *Dale* requirement because GSCF is an expressive association that takes positions on matters of public concern and sets normative goals for its members. GSCF's claim meets the second *Dale* requirement because the university imposed a direct burden upon GSCF by

attempting to force GSCF to retain Ms. Miller as a member and as an officer despite Ms. Miller's noncompliance with GSCF's Statement of Belief. GSCF's claim meets the final *Dale* requirement because the university's interference with GSCF's decisions about membership and leadership was unsupported by a compelling state interest, was directly related to the suppression of ideas, and was executed without consideration of alternatives less restrictive of GSCF's associational freedoms. The university's revocation of GSCF's RSO status therefore meets each of the *Dale* requirements and amounts to a violation of GSCF's associational rights. This Court should therefore affirm the correct holding of the Grace of Grace Court of Appeals and restore GSCF's RSO status.

While the violation of GSCF's associational rights alone entitles GSCF to judicial relief, GSCF's injury under the Establishment Clause should also compel this Court to affirm the State of Grace Court of Appeals and restore GSCF's RSO status. The Establishment Clause prohibits the university from applying its discrimination policy against GSCF. The *Lemon* test is the relevant measure of violations of the Establishment Clause, and the university's action defies each prong of this test. The university's discrimination policy fails the first prong because it does not further the stated secular purpose and because it has no secular purpose when applied to religious groups. The discrimination policy fails the second prong because it favors certain religions over others and because it favors nonreligion over religion. The discrimination policy fails the third prong because it requires substantial and enduring monitoring of religious groups and because it fosters greater government entanglement than a religious exemption would foster. Because the breach of a single *Lemon* prong violates the Establishment Clause, the university's defiance of all three *Lemon* prongs should compel this Court to affirm the holding of the State of Grace Court of Appeals and order the restoration of GSCF's RSO status.

Argument

I. THIS COURT SHOULD AFFIRM THE APPELLATE COURT'S CORRECT HOLDING THAT THE UNIVERSITY VIOLATED RESPONDENT'S FIRST AMENDMENT FREEDOM OF ASSOCIATION BY REVOKING RESPONDENT'S RSO STATUS.

When the university revoked GSCF's RSO status, it interfered with GSCF's freedom of association. Though not explicit in the First Amendment, freedom of association is implicit in the freedoms of assembly, petition, and speech. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (“[I]mplicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”); *Healy v. James*, 408 U.S. 169, 181 (1972). As a state actor, the university must abide by First Amendment limitations on government action. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 324-26 (2000) (Rehnquist, Ch. J., dissenting); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 689 n.10 (1998); *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981); R. at 2. The right to associate includes a right to not associate with undesired parties. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Freedom of association is a constitutional right meriting the highest degree of protection our courts can afford, and protecting this freedom is especially important at public universities like Grace State. *See, e.g., Healy v. James*, 408 U.S. at 185 (noting that “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools”).

The United States Supreme Court has established three requirements that a group must satisfy to establish an expressive association claim. First, the group must engage in expressive association. *Dale*, 530 U.S. at 648. Second, the group must suffer interference from government action that “significantly affect[s its] ability to advocate public or private viewpoints.” *Id.* at

650. Finally, the burden of interference with the group's associational rights may not be outweighed by a compelling government interest that justifies the regulation. *Id.* at 658-59.

GSCF's claim against the university satisfies each of the *Dale* factors. GSCF's claim meets the first *Dale* requirement because GSCF is an expressive association that takes positions on matters of public concern and requires its members to set and reach behavioral goals. GSCF's claim meets the second *Dale* requirement because the university's interference with GSCF's internal decision-making directly and substantially burdened GSCF's ability to freely associate. GSCF's claim meets the third *Dale* requirement because the university's interference was unsupported by a compelling state interest, was directly related to the suppression of ideas, was reflexively executed without consideration of alternatives less restrictive of GSCF's associational freedoms, and did not outweigh GSCF's interest in expressive association.

A. GSCF's claim meets the first *Dale* requirement because GSCF engages in expressive association.

GSCF engages in expressive association. Expressive association is present when a group asserts a stance on matters of public policy or seeks to achieve normative goals. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). GSCF takes positions on matters of great concern to public policy makers, and it requires its members to conform to the normative teachings of Christ, which emphasize the importance of service, ethics, good will, and peace. R. at 2. Moreover, GSCF's social events, with which Ms. Miller was intimately connected, are "intended to develop good morals." *Dale*, 530 U.S. at 650 (quoting *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring)). As an organization that engages in expressive association, GSCF satisfies the first of the *Dale* requirements for showing a violation of the right to free association.

The North County District Court erred in implying that GSCF is entitled to less constitutional protection because “the goal of [GSCF’s] social events is not necessarily to recruit new members to GSCF’s religion or to give members of the religion a place to congregate.” R. at 2. GSCF did not compromise the expressive nature of its association merely because it mixed socializing with expression. “[T]here is no requirement that an organization be primarily political (or even primarily expressive) in order to receive constitutional protection for expressive associational activity.” *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435, 444 (3d Cir. 2000). Indeed, “associations do not [even] have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment.” *Dale*, 530 U.S. at 655. Therefore, GSCF’s functions did not cease to be expressive merely because they served a variety of purposes. R. at 2. In fact, GSCF social events expressed principles central to the organization because they were kept free from alcohol, drugs, and promiscuity. *Id.* GSCF engaged in a variety of protected, expressive acts of association vital to its central message, including the social events planned and attended by Ms. Miller. R. at 2-3. These social meetings were just as expressive as GSCF’s other functions.

GSCF routinely engaged in some of its most important expressive association during the social events planned by Ms. Miller. Expressive association can occur in a wide variety of contexts. *Dale*, 530 U.S. at 649-50. It is sufficient that the activities are intended to “instill values.” *Id.* In fact, “[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.” *Roberts*, 468 U.S. at 636 (O’Connor, J., concurring). GSCF’s social activities were imbued with a sense of purpose signified by the absence of alcohol, drugs, and promiscuity. R. at 2. This feature of the social events

communicated values held by GSCF that would not be expressed at a university function sponsored by an organization that allowed such conduct. R. at 2, 10. By communicating the values held by GSCF, these social events were at least as expressive as outdoor survival training or patriotic community service. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring); R. at 2. Ms. Miller was therefore deeply involved with a vital aspect of GSCF's expressive association.

GSCF's social events stand in stark contrast to non-expressive social events such as the ones at issue in *Stanglin*. In *Stanglin*, the plaintiffs alleged an expressive associational right to socialize at a dance hall. *Stanglin*, 490 U.S. at 22. The United States Supreme Court held that because the dance hall patrons were neither asserting stances on questions of public policy nor performing any of the other expressive activities articulated in *Duarte*, the dance hall patrons could not support their expressive association claim. *Id.* at 25. In contrast, GSCF takes a position on numerous public policy matters. For example, GSCF requires its members to abstain from alcohol use, drug use, and sexual impurity. R. at 2. Each of these topics is an independent matter of public policy and broad social concern, and GSCF's publicly advertised position on these topics is sufficient to constitute expressive association. *See id.* In fact, GSCF takes bold and unequivocal positions that contrast with popular culture on these topics. *See, e.g.*, Terence P. Thornberry, *Multiple Patterns of Offending: Explaining Multiple Patterns of Offending Across the Life Course and Across Generations*, 602 *Annals Am. Acad. Pol. & Soc. Sci.* 156, 182 (2005) (discussing how "emerging adults are [at] the ages of peak involvement in a variety of risky behaviors such as unprotected sex with multiple partners; alcohol, drug use, and binge drinking; and risk-taking activities such as driving while intoxicated"). GSCF's tenets are expressive not only because they address matters of public policy, but also because they confront popular culture on such matters.

GSCF also performs many of the expressive activities recognized in *Duarte* that the dance hall patrons in *Stanglin* failed to establish. *Duarte* recognized that values like service, ethics, good will, and peace are expressive, and only denied the Rotary Club's efforts to exclude women because the exclusion of women was not essential to the fulfillment of these expressive goals. *Duarte*, 481 U.S. at 548. Like the Rotary Club in *Duarte*, GSCF espouses the "basic goals of humanitarian service, high ethical standards . . . , good will, and peace." *Id.* at 539; R. at 2. GSCF requires its members to live "according to Christ's teachings." R. at 2. Values like service, ethics, good will, and peace are central to the teachings of Jesus Christ, and are therefore at the heart of GSCF's Statement of Belief. *Id.* GSCF therefore espouses the same expressive goals recognized by the United States Supreme Court in *Duarte*.

GSCF engages in expressive association. It takes positions on matters of great concern to public policy makers, and it requires its members to conform with the teachings of Christ, holding themselves to high standards for service, ethics, good will, and peace. GSCF also expresses a particular view of good moral values. Because it engages in expressive association, GSCF satisfies the first *Dale* requirement for demonstrating a violation of the right to free association.

B. GSCF's claim meets the second *Dale* requirement because the university's revocation of GSCF's RSO status interfered with GSCF's ability to advocate its viewpoints.

When Grace State revoked GSCF's RSO status, it imposed an expression-stifling constraint on GSCF in violation of its First Amendment right to associate. The university's attempt to force GSCF to include Ms. Miller struck at the core of what GSCF stands for, imposing a direct burden on GSCF's freedom of association.

The university's interference with GSCF's right to exclude Ms. Miller directly burdened GSCF's free association rights. The United States Supreme Court has repeatedly emphasized

that the forced inclusion of a person within an organization is an assault upon the group's free association rights. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring). Government action of this type is such a substantial interference that it triggers exacting judicial review:

The most rigorous standard of review is triggered when the state action directly burdens expressive rights. *Roberts, Duarte, and Dale* all involved this kind of direct effect; in each of these cases, a state law mandated that the group accept members with whom the group did not want to associate. The Court recognized this as a direct burden on the associational expressive rights of the respective groups, because the state action directly affected the groups' associational abilities.

Pi Lambda Phi, 229 F.3d at 445-46. The university's revocation of GSCF's RSO status amounted to a direct burden on GSCF's right to associate and its attendant right to exclude, just as the regulations in *Roberts, Duarte, and Dale* were direct burdens. R. at 10. The university's discrimination policy left GSCF with two alternatives: include Ms. Miller or cease to exist as a viable student organization. R. at 2, 5, 10. This choice is really a state attempt at forced inclusion that imposes a direct burden on GSCF. *See Pi Lambda Phi*, 229 F.3d at 445-46. Either alternative would have produced an impermissible burden.

The university's discrimination policy significantly affected GSCF's ability to advocate its viewpoints. Forced inclusion of a party is an impediment to expressive association if the exclusion of that party is essential to the fulfillment of a group's goals. *Duarte*, 481 U.S. at 550. The exclusion of homosexuals is essential to the fulfillment of GSCF's expressive goals. *See R.* at 2, 4. The GSCF Statement of Belief requires members to "remain sexually pure, in thought and deed." R. at 2. GSCF considers the forced inclusion of Ms. Miller a government attempt to force GSCF "to associate with someone who violates the principles of its religion and forces the organization to advocate a position antithetical to its own." R. at 4. This Court may not

reevaluate GSCF's determination that homosexuality demonstrates "sexual impurity." *Dale*, 530 U.S. at 653 (requiring that courts "give deference to an association's assertions regarding the nature of its expression" and "give deference to an association's view of what would impair its expression"). Therefore the university's discrimination policy would have remained an impermissible burden even if GSCF had elected to retain Ms. Miller for the sake of maintaining RSO status.

The university's revocation of GSCF's RSO status does not cease to be a constitutional violation merely because GSCF can continue to exist in a diminished form. The loss of official campus recognition constitutes direct interference with the freedom of association. *Healy v. James*, 408 U.S. at 183. "[A] group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by [non-recognition]." *Id.* GSCF's ability to function as a campus organization is drastically reduced by the loss of RSO status. *R.* at 1-2, 10. In light of *Healy*, the university cannot distinguish its revocation of GSCF's RSO status from an attempt to force the inclusion of Ms. Miller within GSCF. *Cf. R.* at 6 (erroneously underrating the importance of RSO status). Rather, the university's action amounted to a "direct burden on [GSCF's] associational expressive rights." *Pi Lambda Phi*, 229 F.3d at 446. GSCF's claim satisfies the second *Dale* factor because the direct burden imposed by the university stifled GSCF's voice in the campus community.

C. GSCF's claim meets the third *Dale* requirement because the university does not have a compelling interest that justifies the burden placed on GSCF's freedom of association.

Grace State University has no compelling interest that outweighs the burden its discrimination policy places on GSCF. The university must demonstrate that its revocation of GSCF's RSO status and its continued refusal to reinstate GSCF as an RSO "serve[d] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means

significantly less restrictive of associational freedoms.” *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623). Additionally, the university’s compelling interest must justify the burden imposed on GSCF’s right to free expression. *Id.* at 658-59. The university has not shown a sufficiently compelling interest to justify the application of its discrimination policy against GSCF. Even if it could convince this Court that it revoked GSCF’s RSO status to further a compelling state interest, the university still has not made the required showing that its actions were “unrelated to the suppression of ideas.” *Id.* at 648. Likewise, the university has not shown that its interest in preventing discrimination cannot be achieved “through means significantly less restrictive of associational freedoms.” *Id.* Finally, no putative compelling interest on behalf of the university could justify the burden imposed on GSCF’s right to free expression.

1. The university’s revocation of GSCF’s RSO status was unsupported by a compelling state interest, was directly related to the suppression of ideas, and was executed without consideration of alternatives less restrictive of GSCF’s associational freedoms.

The university has no compelling interest in preventing GSCF from choosing its members or officers. To establish a compelling interest, a government actor must do more than assert that a class of persons is entitled to protection. *Id.* at 647-48; *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 579 (1995). Additionally, government action cannot interfere with speech simply to “promot[e] an approved message or discourag[e] a disfavored one, however enlightened either purpose may strike the government.” *Hurley*, 515 U.S. at 579. The university’s discrimination policy constitutes government interference for the sole sake of promoting an approved message at the cost of a disfavored one, which is precisely the type of interference forbidden by *Dale* and *Hurley*. *Dale*, 530 U.S. at 647-48; *Hurley*, 515 U.S. at 579; *R.* at 3-4. By regulating the “marketplace of ideas,” the university seeks to dictate which values are acceptable for expression. *R.* at 3. The ability to revoke RSO status is the

university's tool to silence organizations that advocate different values. R. at 1-2. The university does not have a compelling interest to rebuke GSCF merely because the university disagrees with GSCF regarding which values are important to campus expression. *See Dale*, 530 U.S. at 647-48; *Hurley*, 515 U.S. at 579. The university has no compelling interest to exercise its value judgment over that of campus organizations.

Even if this Court regards GSCF's lawful exclusion of Ms. Miller as discrimination, the university has no compelling state interest in preventing discrimination against Ms. Miller as a homosexual. Cases like *Roberts* and *Duarte*, in which the United States Supreme Court has recognized a compelling government interest in preventing discrimination, have involved a suspect class. *Dale*, 530 U.S. at 657. However, courts have routinely declined to find that homosexuals are a suspect class like women or racial minorities entitled to strict judicial scrutiny. *E.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (noting that "[h]omosexuality is not an immutable characteristic," but rather "is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes"); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (holding that homosexuality is "primarily behavioral" and therefore not immutable); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc) (noting that homosexuals are not a suspect or quasi-suspect class). Because homosexuals are not a suspect class, preventing discrimination against them is not a compelling state interest. Although Ms. Miller is a woman, she was not excluded from GSCF because of her membership in the suspect class of women. R. at 3. Rather, she was excluded because of her membership in the non-suspect class of homosexuals. *Id.* Ms. Miller's membership in this class does not give rise to a compelling government interest.

The university's actions were not unrelated to the suppression of ideas. Even if this Court finds that preventing discrimination against Ms. Miller was a compelling government interest, revocation of GSCF's RSO status must be "unrelated to the suppression of ideas." *Dale*, 530 U.S. at 648. In order to be unrelated to such suppression, a government action must not "materially interfere with the ideas that the organization sought to express." *Id.* at 657; *Hurley*, 515 U.S. at 579. The university's attempt to force GSCF to retain Ms. Miller as a member and an officer directly suppressed GSCF's idea that homosexuality is immoral behavior with which GSCF does not wish to be identified. R. at 4-5. The revocation of RSO status effectively suppressed every idea that GSCF sought to express, because the revocation extinguished GSCF's ability to participate in campus discourse. R. at 10. Therefore, the university not only failed to support its regulation of GSCF with a compelling interest, it also pursued its dubious regulation in a manner that suppressed GSCF's ideas.

The university did not pursue alternatives less restrictive of associational freedoms. To permit the university's restriction on associational freedoms, this Court must find that the university had no alternatives that would have imposed a lesser burden on associational freedoms. *Dale*, 530 U.S. at 648. Not only did the university suppress GSCF's ideas about morality, it sought to achieve its impermissible purpose of forcing Ms. Miller's inclusion within GSCF by the most restrictive means possible. Once the university became aware that Ms. Miller had been relieved of her duties as Social Events Coordinator, the university did not seek to discuss the matter with GSFC or even to impose reasonable sanctions on the organization. R. at 3. Instead, the university summarily stripped GSCF of RSO status. *Id.* If the university wanted to force GSCF to conform to the university's views, it could scarcely have employed a more Herculean chokehold than the revocation of RSO status. The loss of RSO status had the effect of

barring GSCF from the campus community. R. at 9-10. Without the benefits that accompany RSO status, GSCF no longer had a voice on campus. R. at 10. Because an organization's ability to communicate is integral to its expression, the loss of RSO status burdened GSCF's associational freedoms in the most direct way conceivable. The university's heavy-handed methods left unexplored many other regulatory alternatives that would have been "significantly less restrictive of associational freedoms" than immediate revocation of RSO status. *Dale*, 530 U.S. at 648.

2. The university's unsubstantiated interest in attempting to force Ms. Miller's continued inclusion within GSCF did not outweigh the burden that her continued inclusion would have imposed upon GSCF.

Even if this Court determines that the university has a compelling interest in regulating GSCF's ability to choose its own members and officers, such an interest cannot outweigh GSCF's right to expressive association. A government's interest in ensuring equal access of a traditionally disfavored class to places of public accommodation does not outweigh an expressive organization's desire to exclude members of that class. *Id.* at 659. Similarly, the government's interest in mandating the inclusion of a class of persons does not outweigh an organization's interest in expressing disapproval of that class. *Hurley*, 515 U.S. at 580-81. In *Dale* and *Hurley*, the United States Supreme Court held that regulations intended to guarantee the inclusion of homosexuals did not entail state interests compelling enough to outweigh a private organization's right to exclude homosexuals. *Dale*, 530 U.S. at 659; *Hurley*, 515 U.S. at 579-81. The First Amendment entitles GSCF to at least as much protection. R. at 10. In fact, the religious nature of its expression likely entitles GSCF to greater protection of its right to exclude members who do not share its expressive goals. *Id.* GSCF's interest in determining its membership outweighs any government interest to the contrary, "just as readily as a private club

could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Hurley*, 515 U.S. at 580-81. Therefore, the university's determination that homosexuals are entitled to inclusion does not outweigh GSCF's right to express a rival perspective.

GSCF cannot protect its right to associate without exercising its right to exclude. Freedom of association means nothing unless courts protect the right of organizations to exclude people whose beliefs or conduct do not match the expressive message the organizations seek to send by associating. *E.g.*, *Dale*, 530 U.S. at 648; *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (citing *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981)). GSCF has determined that homosexuality equates with sexual impurity, and this determination requires deference from this Court. *Dale*, 530 U.S. at 653; R. at 4. Therefore, the continued presence of Ms. Miller within GSCF would have eviscerated GSCF's requirement that its members remain sexually pure. R. at 4-5. Her continued presence as a high profile officer in charge of planning social activities would have announced to the entire campus community that GSCF's disapproval of homosexuality was meaningless. *Id.* In fact, GSCF would have appeared to advocate homosexuality, a position that GSCF wishes to avoid. R. at 5, 10. GSCF has shown that its right to exclude Ms. Miller is indispensable to its freedom of association. R. at 4-5, 10. The university's unsubstantiated interest in revoking GSCF's RSO status does not outweigh the egregious burden imposed upon GSCF's freedom of association.

GSCF's claim satisfies all of the *Dale* requirements, which entitles GSCF to judicial relief. GSCF's claim meets the first *Dale* requirement because GSCF is an expressive association that takes bold stances on matters of public concern and requires its members to set and reach behavioral goals. GSCF's claim meets the second *Dale* requirement because GSCF

suffered direct interference with its right to associate. GSCF's claim meets the final *Dale* requirement because the interference suffered by GSCF was not outweighed by the university's asserted interest in interfering. Therefore, this Court should affirm the appellate court and restore GSCF's RSO status.

II. THIS COURT SHOULD AFFIRM THE APPELLATE COURT'S CORRECT HOLDING THAT THE UNIVERSITY VIOLATED THE ESTABLISHMENT CLAUSE BY REVOKING RESPONDENT'S RSO STATUS.

The university violated the Establishment Clause when it revoked GSCF's RSO status. The United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Fourteenth Amendment applies this prohibition to the states by incorporation. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2729 n.3 (2005). The United States Supreme Court has interpreted the Establishment Clause broadly in order to effectuate its intended purpose. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). This Court should utilize the tripartite test announced by the United States Supreme Court in *Lemon v. Kurtzman* to determine whether the university violated the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Under *Lemon*, a government action is permissible only if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster excessive government entanglement with religion. *Id.* This Court may also invalidate the university's discrimination policy on grounds other than a failure to pass the *Lemon* test. See *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). Nevertheless, this Court should regard *Lemon* as signifying "[t]he general nature of [its] inquiry in [Establishment Clause cases]." *Mueller v. Allen*, 463 U.S. 388, 394 (1983).

The university's application of its discrimination policy fails all three prongs of the *Lemon* test. The university's discrimination policy fails the first prong because it does not

further the stated secular purpose and because it has no secular purpose when applied to religious groups. The discrimination policy fails the second prong because it favors certain religions over others and because it favors nonreligion over religion. The discrimination policy fails the third prong because it requires substantial and enduring monitoring of religious groups, fostering greater government entanglement than a religious exemption would foster.

A. The university's application of its discrimination policy fails *Lemon*'s first prong because the policy has no secular purpose in general or as applied.

The university lacks a secular purpose for its discrimination policy. Government action that does not have a secular purpose fails the first prong of the *Lemon* test and violates the Establishment Clause. *Lemon*, 403 U.S. at 612-13. The secular purpose prong seeks to ascertain the actual purpose of a government action. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). When a government action is purportedly motivated by a secular purpose, a court should look beyond the stated purpose to determine whether the purpose is sincere. *Id.* at 586-87. Additionally, if the government action does not further the purported secular interest, it fails the secular purpose prong. *Id.* at 586. When a government action lacks a valid secular purpose, a court's inquiry may end because the government action violates the Establishment Clause. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). The university's discrimination policy does not further the stated secular purpose, and it has no secular purpose when applied to religious groups.

1. The university's discrimination policy does not further a secular purpose.

The university's discrimination policy does not further its declared secular purpose. The university claims that the discrimination policy "promote[s] openness and free exchange of ideas in the campus community." R. at 3. In fact, on its face and as evidenced by the university's application of the discrimination policy against GSCF, the policy serves to prohibit the exchange of certain ideas. R. at 2, 10. By silencing organizations that do not endorse the university's

viewpoints, the university's discrimination policy contravenes the ostensibly secular purpose of promoting the free exchange of ideas. *Cf. Edwards v. Aguillard*, 482 U.S. at 586 (holding that a law requiring the teaching of creationism in public schools violated the Establishment Clause because it did not further the declared secular purpose of "protect[ing] academic freedom"). Like the government action scrutinized in *Aguillard*, the university's discrimination policy accomplishes the opposite of what it purports to accomplish. *Id.*; R. at 10. This failure to further the declared secular purpose is alone sufficient to demonstrate a violation of the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 255 (1982) (holding that a regulation that "is not closely fitted to the furtherance of any compelling governmental interest asserted . . . therefore violates the Establishment Clause"). However, the university's lack of a secular purpose for the discrimination policy is even more apparent in light of the university's application of the policy against GSCF.

2. The university has no secular purpose for regulating the religious functions of religious groups.

As applied to religious organizations like GSCF, the university's discrimination policy has no secular purpose. A violation of the Establishment Clause in the application of a regulation is just as fatal as a violation apparent on the regulation's face. *See Gillette v. United States*, 401 U.S. 437, 451-52 (1971). Due to the potential for a government actor to apply a facially neutral regulation in a manner that violates the Establishment Clause, the Court should not merely conduct a facial examination. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 600-24 (1988) (probing the Adolescent Family Life Act for both facial and as-applied violations of the Establishment Clause). When applying its discrimination policy to religious organizations like GSCF, the university has no secular purpose. Even assuming that the discrimination policy in fact furthers the ostensibly permissible purpose of ensuring a free exchange of ideas, there

simply is no conceivable secular purpose for regulating the exchange of ideas that occurs within a religious group. R. at 3. Restricting the ability of religious organizations to discriminate on a religious basis does not serve a secular purpose. Andrew R. Varcoe, *The Boy Scouts and the First Amendment: Constitutional Limits on the Reach of Anti-Discrimination Law*, 9 Law & Sexuality 163, 259 n.511 (2000). This principle is especially evident when a government actor like the university supervises the manner in which a religious organization like GSCF provides services and determines leadership positions. R. at 2. Because there is no secular purpose for regulating the religious functions of a religious group, the university's application of its discrimination policy against GSCF fails *Lemon's* first prong.

B. The university's application of its discrimination policy fails *Lemon's* second prong because the policy favors certain religions over others and favors nonreligion over religion.

The university's discrimination policy inhibits religion. Government action that advances or inhibits religion fails the second prong of the *Lemon* test and violates the Establishment Clause. *Lemon*, 403 U.S. at 612-13. The advancing or inhibiting effect of government action is measured in terms of aid to one religion, aid to all religions, or preference for one religion over another. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). When government action affects religion, the effect must exhibit "neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). This neutrality is the "central purpose of the Establishment Clause." *Gillette*, 401 U.S. at 449. When measuring the advancing or inhibiting effect of government action, it is relevant whether the community would interpret the action as an endorsement of religion or of a religious group. *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993).

The university's discrimination policy favors certain religions over others, and it favors nonreligion over religion.

1. The university's discrimination policy favors some religions over others.

The university's discrimination policy favors some religious organizations over others. Denominational preference of this variety violates the Establishment Clause. *Allegheny v. ACLU*, 492 U.S. 573, 605 (1989) (citing *Larson v. Valente*, 456 U.S. at 244). The prohibition on denominational preference extends to preferences that are not apparent on a regulation's face. *Gillette*, 401 U.S. at 452. The university's discrimination policy favors certain religions. R. at 11. Religions that share the university's opinion regarding which social groups are entitled to special protection are permitted to engage in campus discourse, but religions with different beliefs are ostracized. *Id.* This preferential effect negates any ostensible neutrality of the discrimination policy. *Gillette*, 401 U.S. at 452. Additionally, the extent of the preferential effect demonstrates that the university's policy does more than merely coincide with the tenets of a particular religion. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Harris v. McRae*, 448 U.S. 297, 319 (1980). Rather, the university employed the discrimination policy to deliberately remove particular views from campus discourse. R. at 2-3. The effect of the university's discrimination policy is a clear denominational preference.

The denominational preference inherent in the university's discrimination policy is impermissible. Government preference is impermissible if it "make[s] a person's religious beliefs relevant to his or her standing in the political community" or creates "any incentive to modify [one's] religious beliefs or practices." *Agostini v. Felton*, 521 U.S. 203, 232 (1997); *Allegheny v. ACLU*, 492 U.S. at 627 (O'Connor, J., concurring). The university's discrimination policy makes religious beliefs relevant to standing in the political community because religious

groups that do not conform to the policy are removed from the “marketplace of ideas.” R. at 3, 9-10. Likewise, the discrimination policy creates an incentive to modify one’s religious beliefs and practices because conformity with the policy entitles a religious group to considerable state resources otherwise unavailable. R. at 1-2, 9-10. The university’s discrimination policy sent the message to GSCF that its religious views concerning homosexuality were unsuitable and in need of modification. R. at 2. This direct, substantial coercive effect of the university’s discrimination policy distinguishes it from permissible government actions that have a merely “indirect” or “incidental” effect on religious groups. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). The price GSCF paid for exercising its denominational beliefs amounted to exclusion from the campus community. R. at 9-10. Due to its preferential effect, the university’s discrimination policy violates the Establishment Clause.

2. The university’s discrimination policy favors nonreligion over religion.

The university’s discrimination policy impermissibly burdens religious organizations. A government action may not inhibit religion. *Widmar*, 454 U.S. at 274-75; *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). The United States Supreme Court held in *Widmar* that allowing religious organizations to use university facilities would not promote religion, but it is difficult to see how Grace State University can avoid inhibiting religion when it denies religious organizations access to university resources available to other groups. *Widmar*, 454 U.S. at 274-75; R. at 11. As the State of Grace Court of Appeals noted, the inhibiting effect of the university’s discrimination policy is amplified by the fact that the policy “excludes a significant number of religious viewpoints.” R. at 11. In fact, the university’s discrimination policy inhibits all religions, because religion is a basis for preferential treatment prohibited by the policy. R. at 2, 11. The policy therefore prevents all religious groups from choosing

members and providing services on a religious basis. R. at 2. No religious organization can survive under this regime because no organization can permissibly limit its membership to adherents of a similar religious background. *Id.* Such an inhibitory effect creates an obstacle that applies exclusively to the operation of religious RSOs. Moreover, the fact that the university has not reprimanded any secular RSOs under the discrimination policy reflects the policy's disproportionately inhibitory effect with respect to religious organizations. R. at 7, 11. Due to its lack of neutrality, the university's application of its discrimination policy against GSCF fails *Lemon's* second prong.

C. The university's application of its discrimination policy fails *Lemon's* third prong because the policy fosters excessive government entanglement with religion.

The university's discrimination policy fosters excessive government entanglement with religion. Government action that fosters excessive entanglement with religion fails the third prong of the *Lemon* test and violates the Establishment Clause. *Lemon*, 403 U.S. at 612-13. Entanglement is excessive when it involves "comprehensive, discriminating, and continuing state surveillance." *Id.* at 619. The duration of any necessary monitoring is particularly relevant. *Id.*; *Walz v. Tax Comm'n*, 397 U.S. 664, 674-75 (1970). The government may not become involved in the daily operation of a religious organization. *See Bowen v. Kendrick*, 487 U.S. at 616. In addition to routine monitoring, the entanglement prong seeks to avoid the "political strife" and "undue [political] fragmentation" that is likely to result from government regulation of religious bodies. *Nyquist*, 413 U.S. at 794; *Walz*, 397 U.S. at 695 (Harlan, J., concurring). The university's discrimination policy requires substantial and enduring monitoring of religious groups, fostering greater government entanglement than a religious exemption would foster.

1. The university’s discrimination policy requires excessive monitoring of religious groups.

The university’s discrimination policy requires extensive monitoring of RSOs. A policy that creates a continuing need to monitor religious groups fosters excessive entanglement. *Widmar*, 454 U.S. at 272 n.11 (1981). Likewise, a regulation that asks the government to determine when a religious entity is discriminating fosters excessive entanglement. John C. O’Quinn, “*How Solemn is the Duty of the Mighty Chief*”: *Mediating the Conflict of Rights in Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), 24 Harv. J.L. & Pub. Pol’y 319, 365 n.317 (2000). The university’s discrimination policy requires that the government monitor groups not only to ascertain whether discrimination is taking place, but also to determine whether any existing discrimination is of a forbidden type. R. at 2. University monitoring extends to the selection of RSO members, the selection of RSO officers, and the conferral of all RSO services. *Id.* Therefore, the university must carefully examine all activities of a considerable number of religious organizations to determine whether any discrimination occurs and whether any discrimination is motivated by an impermissible purpose. Monitoring of this substantial extent and duration constitutes excessive entanglement.

2. Exempting religious groups from the discrimination policy would prevent excessive entanglement.

Contrary to the conclusion reached by the North County District Court, an exemption for religious groups would foster less entanglement than the current discrimination policy fosters. *See* R. at 5. The District Court correctly noted that the government may not “determine for itself if the organization’s religious beliefs require the exclusion” of a class of persons or “delve into [a] particular religion’s internal debates about the validity of certain tenets.” R. at 7-8. Courts have consistently demonstrated a reluctance to question the validity of religious tenets. *See, e.g.,*

Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981); *United States v. Ballard*, 322 U.S. 78, 82 (1944). However, an exemption for religious RSOs would not require such investigation. An exemption would require only that the university determine whether a particular RSO is religious in nature. Once entitled to the exemption, a religious organization would face no additional government monitoring.

Exemptions based on religious status are commonplace and do not present excessive entanglement. The United States Supreme Court has approved exempting religious organizations from regulations that would otherwise foster entanglement. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 393 (1990); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987) (upholding a federal statute that exempts religious organizations from a ban on employment discrimination); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504-07 (1979) (construing the National Labor Relations Act to not apply to religious schools for entanglement reasons); *Walz*, 397 U.S. at 675-77. The Establishment Clause leaves “ample room for accommodation of religion” by permitting the exemption of religious organizations from discrimination regulations. *Amos*, 483 U.S. at 338. Exempting religious RSOs from the university’s discrimination policy would accomplish this type of permissible accommodation without incurring excessive entanglement.

A status-based exemption like the one discussed by the North County District Court is distinct from the religious activity exclusion contemplated by the United States Supreme Court in *Widmar*. In *Widmar*, the Court reasoned that prohibiting the use of university facilities for religious activity would involve considerable entanglement. *Widmar*, 454 U.S. at 272 n.11. Such an exclusion would require investigation into the purpose of any activity conducted on campus property. *Id.* However, religious status is distinct from religious activity. In order to

exempt RSOs like GSCF from its discrimination policy, the university need only determine which RSOs are religious. The university would not have to perform the continuing monitoring described in *Widmar. Id.* Once an organization demonstrates its religious status, no further entanglement need arise. The university's present discrimination policy, on the other hand, demands an excessive degree of investigation that is analogous to the entanglement expressly criticized in *Widmar. Id.*; R. at 2. This degree of entanglement fails *Lemon's* third prong.

The university's discrimination policy fails all of the *Lemon* prongs, which entitles GSCF to judicial relief. The university fails the first *Lemon* prong because the discrimination policy has no secular purpose. The university fails the second *Lemon* prong because the discrimination policy prefers some religions over others and prefers nonreligion over religion. The university fails the final *Lemon* prong because the discrimination policy fosters excessive government entanglement with religion. Therefore, this Court should affirm the appellate court and restore GSCF's RSO status.

Conclusion

For the foregoing reasons Respondent requests that this Court restore GSCF's RSO status and affirm the judgment of the State of Grace Court of Appeals, which held that Petitioner violated Respondent's First Amendment right to free association and violated the Establishment Clause by enforcing its discrimination policy against Respondent.