IN THE SUPREME COURT
OF THE UNITED STATES

No. 2012-2013

Samantha Sommerville and Sydney Kirsch, Petitioners-Appellants

vs.

Olympus State University, OSU-Appellee

On Writ of Certiorari to the Court of Appeals for the Fourteenth Circuit.

ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

1. Whether Respondent's preferential admissions program, which provides extra weight to male applicants in order to balance its student body, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether Respondent violated Petitioner's right to free association under the First Amendment to the United States Constitution?

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT No. 01--76318

SAMANTHA SOMMERVILLE AND SYDNEY KIRSCH, PETITIONERS-APPELLANTS

vs.

OLYMPUS STATE UNIVERSITY, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Central District of Olympus

Before Chief Circuit Judge KRUGER, and Ewing and Richard, Circuit Judges.

OPINION BY JILL EWING, with Chief Judge Katie Kruger concurring:

I

(A)

Overview of the Facts

Samantha Sommerville and Sydney Kirsch appeal the decision of the District Court for the Central District of Olympus which affirmed the constitutionality of Olympus State University's preferential-admissions program ("the program") and its anti-discrimination policy that forbids any student organization from adopting any discriminatory policies in terms of leadership, membership, or services offered ("the policy"). No claims were brought under the Olympus Constitution or any law of the State of Olympus. The federal district court had jurisdiction under 28 U.S.C., §§1331 and 1343(3), and our jurisdiction rests on 28 U.S.C. § 1291. Because of the similarity in subject matter, and the overlap of facts, the district court consolidated the two cases for oral argument. All parties have stipulated that they accept its continued consolidation.

(B)

Equal Protection Facts

Olympic State University (OSU) is a highly selective institution with a long and storied history as the flagship university of a ten campus state system. OSU has 15,000 enrolled students and in

2010 it accepted 15% of all applicants.[1] It is consistently ranked among the top 100 colleges and universities in the United States by *U.S. News and World Report,* and is among the top twenty schools according to *The Princeton Review,* scoring highly in the areas of Academics/Administration and Quality of Life. The one area that this institution lags behind its peer institutions, however, is in the area of demographics. This is due in large part to a growing gender imbalance which exists at the school. OSU is presently 64% female and 36% male. These numbers represent a long-term trend. Over the last ten years, the percentage of females who comprise the student body has never dipped below 60%.

Admissions officers at OSU have devoted considerable time and resources trying to bridge this gender gap. The school has recruited talented male students, hosted application workshops for males only, offered male applicants, who sign up for campus tours, free tickets to athletic events, and even offered baseball caps to the first 500 male students who apply. Despite these efforts, the gap persists. This is part of a national trend. Presently in the United States, only 43% of undergraduate students who enter college are men. In terms of graduation rates, for every 100 women who earn a college degree, only 73 men will do so. Further, 83% of all U.S. colleges and universities have more female than male students. This does not appear to be a short-term trend. Rather, it began in 1980, and continues until the present day.[2]

A U.S. Department of Education report projects that women's enrollment will increase 16% by 2020, compared to 8% for men during that time frame. There is no easy explanation for these numbers. While there are a myriad of theories, at least part of the reason is that men who have recently graduated from high school are more likely than women to seek out opportunities in the military or in manual labor fields. In addition, at least one study finds that women are more likely than men to value a college education.[3]

OSU's gender imbalance is inconsistent with other top colleges. OSU believes that achieving gender balance is necessary for it to retain its status as a top school.[4]

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[1] This acceptance rate for 2010 is comparable to universities and colleges such as Pennsylvania (14%), Duke, (16%), Cornell (18%), Vanderbilt (18%), and Chicago (19%). OSU is less selective than universities and colleges such as Stanford (7%), Harvard (7%), Yale (8%), Princeton (9%), MIT (10%), Columbia (10%), and Dartmouth (10%). It is more selective than universities and colleges such as Georgetown (20%), Johns Hopkins (21%), Washington University in St. Louis (21%), UC Berkley (22%), UCLA (23%), Northwestern (23%), USC (24%), Tulane (26%), Emory (29%), George Washington (32%), North Carolina (32%), and Virginia (33%).

[2] According to the U.S. Department of Education, men out-numbered women by 2-to-1 in the early 1970s, but a decade later, nearly 350,000 more women than men enrolled in college (approximately 5.5 million women to 5.15 million men enrolled in 1980). By 2010, out of 20.6 million students, 11.7 million were women and 8.9 million were men. Estimates indicate this gap will only widen women's super-majority status over time.

[3] This study, released by the Pew Research Center in 2012, found that "[w]hile 50 percent of female college graduates say the higher education system is doing an excellent or good job of providing value, only 37 percent of men agree. Women are also more likely than men to say that college was very useful in 'increasing their knowledge and helping them grow intellectually' (81 percent vs. 67 percent), 'helping them grow and mature as a person' (73 percent vs. 64 percent)' and 'preparing them for a job or career' (58 percent vs. 52 percent)."

[4] Elite private universities and Ivy League schools have more balanced student populations as the following 2010 statistics show in male-female percent ratios respectively—Harvard and Vanderbilt (48-52); Cornell, Dartmouth,

While gender balance was not a major concern of previous generations, most students today view a roughly equal balance of men and women as crucial to a well-rounded college experience. Thus, top administrators at OSU worry that men and women each question the benefits of attending a predominantly female institution. The social aspect of the college experience cannot be underestimated in considering the factors that students look at in choosing a school. Beyond the social side of college life, gender balance matters in ways both large and small on college campuses. Once a college or university becomes decidedly female in enrollment, fewer students, male or female, find its campus an attractive option. Most students want to attend a school where the number of students of each sex is in some way proportional. At the elementary and secondary level, where students have far fewer choices, same sex-education has grown rapidly. The number of single-sex public high schools in the U.S. has grown from 2 in 1995 to 95 in 2009, and the number of single-sex classrooms has increased from 12 in 2002 to over 360 in 2008. However, at the college level where student choice is unlimited, there are virtually no all-male colleges left in the United States, and only a small number of all-female colleges remain.

OSU has taken the position that having a proper gender balance is critically important from an academic standpoint. Simply put, men and women bring different experiences, perspectives, and analytical approaches which to provide diversity to the classroom. Women also have different ways of viewing things compared to their male counterparts based on the very different histories each sex has experienced. Accordingly, the discussion, the analysis, and the learning that take place are viewed more positively when conducted in a diverse classroom. This, in turn, creates cross-gender understanding, helps break down stereotypes, and enables students to better understand people of the opposite sex.

Given the gender imbalance at OSU, on August 15, 2005, OSU President Dr. William DeNolf, Sr. directed the University's Dean of Admissions, Bobby Bronner, to begin a program of affirmative action designed to help reduce the gender gap and to increase diversity overall at OSU. While OSU is careful to give each applicant an individualized review, and does give consideration to a range of attributes that would add to the diversity of each entering class beyond gender, it admits that in many instances male applicants are admitted with lower grades and test scores than their female counterparts. The school does not employ any fixed numerical quota for men or women. It simply has stated a preference to have as much balance between the sexes as possible.

Samantha Sommerville applied to OSU for acceptance starting in the fall of 2011. Her application was rejected. Ms. Sommerville scored 2100 on her Scholastic Aptitude Test (SAT) exam which put her in the 90th percentile nationally and had a 3.8 GPA which placed her in the top 10% of her graduating class. She was a peer tutor and was the captain of her high school

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and Yale (50-50); Columbia, Duke, Princeton, Stanford, and University of Chicago (51-49); Pennsylvania (49-51); Brown (47-53); and MIT (55-45). Data from 2000 finds that OSU had male-female ratios that roughly matched those of its competitors. A comparison of application data from 2000 to 2010 finds a fairly stable number of applicants to OSU meaning that that there has been no significant drop in the overall number of applications to OSU over the past decade, In that same time frame, the number of males choosing to apply has declined. Thus, OSU reports a male-female percent ratio not quite in-line with schools that it has traditionally competed for students with such as Georgetown (45-55), UC Berkley (47-53), UCLA (45-55), USC (49-51), Tulane (43-57), Emory (45-55), Washington University in St. Louis (50-50), George Washington (44-56), Virginia (45-55), and North Carolina (41-59). This data shows the situation that OSU now finds itself in. Schools with fairly similar student body sizes, including those that are less selective, are able to attract more male students.

mock trial team. Ms. Sommerville grew up in an upper middle class neighborhood in southern Olympus, attended public schools throughout her life, and worked part time in a local bookstore all through high school. Obviously, she was a very attractive applicant for any school. However, on March 17, 2011, she was waitlisted and eventually rejected by OSU. Using the Freedom of Information Act to get data from the school, Ms. Sommerville discovered that while every female who was accepted met or exceeded her portfolio, many of the male students who were accepted were not academically equal with regard to admission. Male students were admitted with GPA's as low as 3.0 and with SAT scores as low as 1600.

OSU does not deny any of the above. However, it contended in the district court that the male students in question all brought other soft variables and experiences in addition to gender, which allowed them to add to the diversity of the incoming class in ways in which Sommerville did not add. Some of the admitted male students, for example, came from impoverished backgrounds, had traveled broadly and experienced other cultures, were single fathers, had started their own businesses, had been student athletes in high school, or brought unique artistic talents. Thus, while gender was a factor in their admission (and by extension Ms. Sommerville's rejection) and it is beyond dispute that gender was a deciding factor, it was not the only factor considered by the school. Even though the OSU policy considered a number of factors in the admissions process, OSU concedes that had Petitioner been a male she would have been accepted into OSU.

Ms. Sommerville filed suit in federal district court on March 26, 2011 alleging that the use of sex-based preferences in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment. On September 21, 2011, the court granted OSU's motion for summary judgment. To date, Ms. Sommerville is not enrolled in a degree-seeking program at any college or university.

(C)

Freedom of Association Facts

Sydney Kirsch is a close friend of Samantha Sommerville. They grew up in the same home town and attended high school together. Ms. Kirsch graduated high school one year ahead of Ms. Sommerville and attends OSU. Ms. Kirsch was completing her freshman year at OSU when all of the conflict over male affirmative action erupted.

In April of 2011, Ms. Kirsch, along with four of her friends, Laila Abboud, Carroll Jordan, Lindsay DuMee and Abigail Wallach, founded a student group called Women for True Equality (WTE). WTE was formed with the expressly stated core purpose of opposing "the program" and had as its core purpose persuading the Administration to cease preferential treatment of male applicants. In a letter to President DeNolf posted on the WTE's website, Kirsch, who was elected WTE president, stated that "WTE might disband if OSU meets our demands." The organization grew in size quickly – numbering 100 students by the end of the spring term.

WTE adopted the following measures in their Club Constitution:

- We believe that affirmative action demeans the equality of everyone. Gender should not matter in admission. Preferential admissions programs perpetuate the

stereotype that men and women are fundamentally different in their capacities and duties—a view that WTE utterly rejects.

- We note the dominance of men in the decisional positions of OSU and conclude that men on this campus cannot be trusted to treat women fairly. Given that men dominate leadership in academia as well as in political and corporate America and to ensure that the group remains focused on women's issues and speaks with a reputable voice that communicates the female perspective, the membership and leadership of WTE is limited to women.

- WTE will consider disbanding if OSU ceases affording a preference to male applicants.

On May 4, 2011, WTE asked the Dean of Students, Chester Comerford, for permission to schedule a town hall meeting at OSU's student union building. Dean Comerford informed WTE that to be permitted to host such a meeting, it would have to submit an application to become a sanctioned student organization. OSU has never allowed a non-sanctioned student organization to meet in its facility. OSU has used the facilities for fundraising events, and its campus sanctioned "speakers forum" where various public figures speak on a variety of topics. Kirsch filled out the application for sanctioning. It is undisputed that WTE met all of the criteria for a student organization except for one.

OSU has a written policy which prohibits any student organization from adopting any discriminatory policies in terms of leadership, membership, or services offered. Kirsch was aware of this policy. Included in the list of prohibited categories of discrimination is a rule against gender-based discrimination. In addition, this written policy required that: (1) all student organizations have one recruitment meeting a semester for the purpose of promoting diversity; (2) all student organizations allow all members to vote and run for leadership; (3) all student organizations report annually to the Dean of Students about their efforts to combat discrimination on campus and in their community; and (4) students who participate in groups that discriminate are subject to a range of sanctions up to and including expulsion. Kirsch informed Dean Comerford that WTE would comply with all of these requirements except for gender inclusiveness. WTE did not discriminate on any other basis and was willing to meet the diversity requirements as to race, religion, etc. Accordingly, WTE's application for student recognition was denied. In the past several other groups had been denied recognition for failure to comply with the policy. This included groups that were not opposed to the OSU admissions program opposed by WTE.

Kirsch was incensed by the decision of Dean Comerford and announced that WTE would continue to meet at a coffee shop directly across the street from the OSU campus. The coffee shop was on private property. When five male OSU students who opposed "the program" and who wanted to join WTE sought to attend one of these sessions at the coffee shop they were asked to leave. The men complied with that request; however, they contacted Dean Comerford to complain. In addition to holding regular weekly meetings, Kirsch continued to promote

meetings for WTE using her personal email account, a WTE website and person-to-person distribution of flyers on campus.

The student honor code prohibited any student from engaging in any activity that "constitutes persistent and intentional discrimination on the basis of race, gender, or religion." Dean Comerford notified Kirsch that if she did not cease promoting WTE on campus, she would face disciplinary sanctions for violation of the honor code. Kirsch responded by continuing to hold regular meetings of the WTE off campus to promote the group to female students.

On July 7, 2011, after a hearing conducted in accordance with the rules of OSU student discipline, Dean Comerford informed Kirsch that she was being expelled from OSU because of her leadership in a discriminatory group. At her hearing, Kirsch stated for the record that, "[i]f OSU has the authority to discriminate against women in admission, then my group should have the right to discriminate against men. Being a women's organization is essential to who we are and what we seek to accomplish: which is first and foremost the elimination of 'the program.'"

Kirsch sued OSU in federal district court solely on the matter of her expulsion. She claimed that her expulsion violated her First Amendment right of freedom of association as well as the free association rights of WTE. To her the issues were "intertwined." The case was assigned to Judge Matthew Price of the Western District of Olympus. Judge Price had also drawn Ms. Sommerville's suit. Judge Price consolidated Ms. Sommerville's suit with Ms. Kirsch's suit. Judge Price did so because the free association dispute arose in direct response to OSU's decision to reject Ms. Sommerville's application for collegiate study. Judge Price granted summary judgment to OSU on September 21, 2011.

(D)

Standard of Review

The parties to this case have stipulated to the aforementioned facts. Accordingly, all issues raised are legal. We review all questions *de novo.* We AFFIRM the ruling of the district court.

II

Equal Protection Analysis:

The question before this court is whether OSU may take action to address the real world demographic challenges facing administrators at schools at every level throughout the United States. As the diversity achieved by the special admissions program will enrich the education of all students, we see no obstacle to this measured approach.

The U.S. Supreme Court has long held that colleges should be allowed great leeway in crafting entering classes as they see fit despite decades of established precedent that have chipped away at affirmative action in other areas. In college admissions, the Court has held for nearly forty years that diversity is a compelling governmental interest, which can justify special consideration in admission. This case is one of first impression for this circuit in that it addresses the

application of the equal protection clause to preferences based on gender rather than race. While the histories on race and gender discrimination may differ, the outcome must be the same.

Since *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court has held that the equal protection clause of the Fourteenth Amendment applies to discrimination on the basis of gender. However, the *Reed* Court also found that when a classification is reasonable, not arbitrary, and rests upon some ground of difference having a fair and substantial relation to the object of the program, it would survive equal protection analysis. OSU's plan is such a program. It looks at each individual and that person's contribution to the diversity of the student body. No person is excluded from consideration and any distinction made is done on an individualized basis regarding the entire applicant's characteristics which contribute to a diverse entering class.

The Court first ruled on affirmative action in higher education in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In that case, a divided Court struck down a medical school affirmative action admissions program. Yet, a majority agreed diversity is a compelling interest in the context of a university's admissions program. The flaw in the University of California program was that it did not look at the individual at all but rather substituted race as a proxy for diversity. OSU's program has no such flaws because it involves no rigid quota and no applicant is disqualified for consideration for a place in the OSU class. Consistent with *Bakke,* gender "may be deemed a plus in a particular applicant's file, yet it does not insulate the individual from comparison with all others." Sensitive admissions decisions are the business of college administrators, not courts. As Justice Powell stated so eloquently in *Bakke*: "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body . . . `It is the business of a university to provide that atmosphere which is most conductive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"

The Court revisited the question of preferences in college admissions less than a decade ago in two cases coming out of the University of Michigan. The fact that these two cases produced opposite results provides clear guidance as to where the line must be drawn for preferential admissions programs. In *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court struck down a program from the undergraduate school which gave an additional 20 points (out of a possible 150) to applicants who were considered to be underrepresented minorities. Despite recognizing the compelling interest in diversity, the Court rejected this program because it failed to examine each individual's qualifications, including the potential for contributions to diversity, in favor of a rigid point system, which used minority status as a proxy for diversity regardless of the actual experiences of the individual violated the Fourteenth Amendment.

That same day, however, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court upheld a special admissions law school program. There the school had no point system, but looked to assemble a "critical mass" in each entering class which would ensure the diversity of the class as a whole. While the characteristics comprising this critical mass varied annually depending on the applicant pool, every file was reviewed holistically. This ensured that diversity could take many forms and that no person was excluded from consideration. The lessons from these decisions are clear. First, ensuring the diversity of college admissions remains a compelling governmental

interest, which can justify an affirmative action program. Second, the program must be set up to achieve meaningful diversity, not simply a statistical closing of a perceived gap. In many ways, this was the original message from *Bakke,* which remains unchanged to this day.

While most affirmative action challenges have come against programs with racial preferences, the Court has held that the rationale of affirmative action applies to gender discrimination as well. *See Johnson v. Transportation Agency, 480 U.S. 616 (1987).*[5] In upholding a plan which gave women preference in job categories where they were traditionally underrepresented, the *Johnson* Court held that: "[a]n employer seeking to justify the adoption of an affirmative action plan need not point to its own prior discriminatory practices, nor even to evidence of an arguable violation on its part. Rather, it need point only to a conspicuous imbalance in traditionally segregated job categories." That same logic applies in the case before us today. OSU has pointed to a manifest imbalance in the male to female student ratio that impacts its ability to attract and retain quality students.

While there are differences between sex and gender, the Supreme Court uses the same balancing test for cases alleging sex-based or gender-based discrimination in college admissions. This test since *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) has been intermediate scrutiny. The decision in *United States v. Virginia*, 518 U.S. 515 (1996) applied the same test. In that case, the Court warned against automatically "equating gender classifications, for all purposes, to classifications based on race or national origin." *Virginia.* The dissent fails to heed this warning. Both courts held that in order for a program to survive, the school must demonstrate an important governmental interest which is substantially related to achieving this objective. OSU's program clears these hurdles. The Court has held that diversity is a compelling interest, and it certainly fits the lower bar required here. The program in question will undoubtedly increase the number of men in each entering class and thus is substantially related to closing the gender gap. Accordingly, the state has met its burden.

III

First Amendment Analysis:

The issue before the Court is whether OSU violated Ms. Kirsch's right to free association under the First Amendment to the United States Constitution by expelling her for her refusal to follow OSU policy regarding sanctioned student organizations. For the reasons set forth below, we hold that OSU did not violate the First Amendment and affirm the lower court's judgment.

The Supreme Court has long recognized a First Amendment right to associate with others. *Healy v. James,* 408 U.S. 169 (1972). This right of free association is among those that are essential to a democracy and as such apply to the states through the Fourteenth Amendment.

Of this right, the Court has written "[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

[5] Note that there is a difference between claims brought under Title VII and the 14th Amendment. Title VII is the basis for claims alleging discrimination against individuals in employment whereas the 14th amendment applies to claims alleging discrimination based on a group classification.

of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). This right is not absolute. This is especially true in the context of a school environment. *Christian Legal Society Chapter v. Martinez,* 130 S. Ct. 2971 (2010).

A close review of Supreme Court case law finds that in some instances the freedom to associate entails an affirmative right of individuals to join with others. *Roberts.* This can be true even when an individual seeks to associate with a group that would prefer to exclude that individual. This has been true of both gender and religion. See *New York State Club Ass'n. v NYC,* 487 U.S. 1 (1988) and *Martinez* respectively. In other instances, the Court has recognized that freedom to associate entails a right to exclude others. *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000). Such can be true if forced inclusion would irreparably alter or harm a group's message. *Hurley vs. Irish-American Gay, Lesbian, and Bisexual Group of Boston Inc.*, 515 U.S. 557 (1995). It *may* also be true if forced inclusion would sabotage a group. *California Democratic Party v. Jones,* 530 U.S. 567 (2000). In the present case, we are asked to find that the non-discrimination policy before us falls into the category of free association cases that rest upon a right to exclude others. This, we cannot do. WTE is not a group like the Boy Scouts, or the South Boston Allied War Veterans Council, or the California Democratic Party and the facts differ. Accordingly, we decline the opportunity to extend the analysis and conclusions of *Boy Scouts, Hurley,* or *Jones* to the immediate case.

Private clubs, social or professional, can in certain instances be compelled to open their membership. A strong parallel can be drawn to *New York State Club Ass'n.* In that case, a private professional club sought to exclude women so as to preserve an unfair playing field by establishing and maintaining a discriminatory admissions or access policy. The Court seized on that fact to affirm a New York City law that forbids discrimination of clubs with greater than 400 members. It found that the law did not diminish "the ability of individuals to form associations" and that the Club's admission policy put professional women at a considerable disadvantage as much business was done at the Club. Such is similar to the present case. The WTE promises to work for equality between the sexes – yet men who wish to assist in that cause cannot gain entry and help shape the policies and decisions of a group dedicated to their cause – simply because of their gender. Such exclusion doomed the club policy in *New York State Club Ass'n.* WTE's policy of exclusion is equally problematic and as such must be subject to the same legal fate.

We turn now to a review of Supreme Court forum analysis. Over time, the Court has identified four types of forums. These include: traditional public forums, limited public forums, designated public forums, and non-public forums. Petitioner, relying on *Widmar v. Vincent,* 454 U.S. 263 (1981), avers that public universities are public forums by definition. This confuses *both* the issue before us today and what *Widmar* held. While *Widmar* observes that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum" it at the same time recognized that "[a] university differs in significant respects for public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." That said, in the more recent case of *Martinez,* the Court deemed the public law school in that case a limited public forum. The Court in that case wrote that "[g]overnmental entities establish limited public forums by opening property 'limited to use by certain groups or dedicated solely to the

discussion of certain subjects.'" *Martinez.* The *Martinez* Court found the law school had created a limited public forum by limiting certain benefits to registered student organization. In the present case, OSU created a limited public forum in its student union building by only allowing sanctioned student organizations or school sanctioned activities to access the forum. To hold otherwise would snatch from the OSU its ability to control its own facilities. This policy for sanctioned groups is content neutral and therefore meets constitutional muster.

We now turn from forum analysis to address the issue of the appropriate standard for judging the policy. Generally, in order to infringe on an individual's right to freely associate, the government must show a compelling state interest. See *Roberts*. However, *Martinez* held that when a claim of freedom of association arises in the context of speech occurring in a limited public forum, the government only need show the denial of access is reasonable and view-point neutral. *Martinez* is the controlling case because the Court faced a similar issue. In *Martinez,* the Court upheld a law school's denial of a student organization's application to be recognized as a registered student organization finding the school's all-comers policy did not violate the First Amendment because it was reasonable and viewpoint neutral.

In determining reasonableness in the context of a school environment, the Court has given deference to the special characteristics of the school environment and school administrators. *Martinez.* As noted in *Widmar,* "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules." The Court has rejected a freedom of association claim when the complaining speaker's own message is affected by the speech it is forced to accommodate. *Hurley.* Here, if OSU is forced to accommodate WTE's objection to its anti-discriminatory policies, it would fly in the face of the university's own affirmative action policy. This would be contrary to *Hurley.* In applying the same deference to OSU as Supreme Court precedent establishes, we find OSU's justifications for its affirmative action policy are reasonable.

In addition, as was the case in *Martinez,* the denial of WTE's application is viewpoint neutral. OSU's affirmative action policy is applied equally to all of its students. OSU does not pick and choose which student organizations must comply with its policy based on viewpoint. Further, OSU is merely rejecting the WTE as a sanctioned student organization. Nothing prohibits the WTE from forming in an unofficial fashion and getting its message out without being affiliated with OSU. It leaves the WTE in no worse of a situation than any other community organization seeking access that does not meet the non-discrimination policy. Nor would it preclude Ms. Kirsch from associating with or helping to lead WTE – so long as she conducted such activity off campus – or from utilizing alternative means of communicating WTE's message.

The fact is that groups cannot always choose with whom they associate – even where strong policy objections exist separate from animus for the class a group seeks to exclude. Consider for example *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). In *Rumsfeld,* the Court held a law school's freedom to associate was not violated when Congress passed the Solomon Amendment requiring schools to allow military recruiters equal access to campus as all other employers or jeopardize losing federal funding.

The dissent's reliance on *Hsu v. Roslyn School District,* 85 F.3d 839 (2d. Cir. 1996) is misplaced. That case turned on a federal equal access policy for religious groups that is not before this court today and which was not addressed in any of the proceedings or briefs relevant to this case.

The ruling of the district court is AFFIRMED.

Colin B. Richard, Circuit Judge Dissenting:

I

Equal Protection Analysis

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schools v. Seattle School District 1,* 551 U.S. 701 (2007). This court is well advised to heed this refrain from Chief Justice Roberts as not limited to race. Rather, the way to stop discrimination in general is to stop discriminating at all. Government programs that draw distinctions based on any immutable characteristic are inherently suspect and in the interest of ensuring fairness to all citizens must be found unconstitutional.

The majority quotes approvingly from *Bakke;* however, it is missing the central point of that decision. The *Bakke* Court did strike down the special admissions program at issue in that case. While it also speculated about what types of programs may survive, the key element which doomed the California program was that it focused solely on race to the exclusion of all other factors. The key line of thought from that decision was the concept that "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." Substitute race for gender and you have the exact program that OSU has enacted and which this court mistakenly affirms today.

In *Bakke,* the University of California had a much greater need for such a program than OSU presents. Yet the Court rejected its claim holding that "without findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm." OSU asserts a general need for a more balanced student body but provides no evidence as to why this is necessary or how it improves the education of other students. To harm Sommerville on such slim a justification is impossible to justify.

Following *Bakke,* the Court went on to narrow the ground for affirmative action in a series of cases involving government set-asides in the contracting industry. The rationale of these decisions can be fairly represented by the holding in *Adarand v. Pena*, 515 U.S. 200 (1995). There, the Court held that any preferential program will be viewed with skepticism. Further, the holding made clear that "the standard of review under the equal protection clause is not dependent on the race of those burdened or benefited by a particular classification, and the single standard of review for racial classifications should be strict scrutiny." The rationale the Court used should not be limited to race. The fact that race was in play in *Pena* had little to do with why the set-aside program failed. Rather, it was the differential treatment of individuals based on a history, which the individual did not cause, create, benefit from, nor impact that was dispositive. It is for that reason that lower courts now apply strict scrutiny to all affirmative action programs, regardless of whether that beneficiaries were race or gender based. For

example, the Federal Circuit Court of Appeals treated race and gender the same when considering preferential programs holding that "[a]t the heart of the United States Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class. Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Berkley v. U.S.*, 287 F. 3d. 1076 (Fed. Cir. Cir. 2002).

The majority applies the wrong test. The correct test for affirmative action case – including those of involving gender - is strict scrutiny. See *Berkley.* Applying strict scrutiny to the case at hand, the policy would clearly fail. First, diversity may well be a compelling interest. However, OSU has not shown why in this instance that would be true. There has been no history of discrimination against men by OSU to remedy and no individual has ever been denied admission based on gender prior to the creation of this odious program. Rather than solving a problem, OSU has created new problems instead. "A school's recognized compelling interest in diversity in education is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups that can justify the use of race. Instead, what is upheld is consideration of a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Parents Involved in Community Schools v. Seattle School District 1*, 551 U.S. 701(2007). Even if it could clear that hurdle, the program in question today simply is not necessary to achieve that objective. There are many ways to attract male students beyond the discriminatory practices employed here. A school, for instance, might utilize enhanced recruitment techniques, advertise in male dominated media markets, or reach out to alumni, to name but a few. Such methods might accomplish similar results. The existence of such alternatives is enough to sink the policy.

In the end, this policy turns logic on its head. For centuries, women have been subject to the most significant forms of discrimination. This limited their opportunities in the workplace and in education. In the last forty years, significant progress has been made to the point where women are achieving record levels and rates of education. Now that parity has come into view and women are beginning to take advantage of the opportunities presently available, the state now steps in to limit them once again. Whether the state is acting with good intentions is beside the point. OSU has not shown how "the program" will increase diversity in its enrolled classes if males are self-selecting out of entering into higher education. Further, any increase in male enrollments will come at the price of lost opportunities for women. It is as if we have come full circle. "More than good motives should be required when government seeks to allocate its resources by way of an explicit…classification system." *Adarand.*

II

First Amendment Analysis

The majority correctly states that freedom of assembly is a fundamental right. Typically, as such, laws restricting such a freedom trigger strict scrutiny. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Such would be the appropriate test here and the majority contends that forced association in the name of preventing discrimination is a compelling state interest and narrowly

tailored. While there is precedent to support prevention of discrimination as a compelling state interest, there are two key exceptions. First, if the group is an "intimate association" then it has the right to limit its membership. *Boy Scouts of America v. Dale, 530 U.S. 640 (2000).* Second, if exclusive membership is integral to the activity of the group, then it has the right to limit its membership. WTE could fall under either of these exceptions. Thus, the state lacks a compelling interest. While the majority pays judicial lip service to *Jaycees,* in reality it applies a different standard. Relying on *Christian Legal Society Chapter v. Martinez,* 130 S. Ct. 2971 (2010), it asks if the policy is reasonable and if it is viewpoint neutral. The majority finds that the statute satisfies both inquiries. It arrives at both the use of this test and the conclusions drawn from its application in error. First, because *Martinez* and the record are easily distinguishable – *Jaycees* is the appropriate case to follow. Second, the University is clearly seeking to enforce a "correct" view of the world on its students. This it cannot do. It is one thing to encourage honesty or ethics or espouse the benefits of exercise and diet. It is quite another for a public university, a place where minds are to grow and question, to send the message that students must embrace certain ideals and that they cannot organize as they see fit for causes in which they believe. This is especially problematic when a public university acts because of the views of its administration. *Healy v. James,* 408 U.S.169 (1972).

The Supreme Court has stated that the critical factors in judging freedom of intimate association are a group's "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Roberts.* Most cases to which *Roberts* has applied deal with large state or national organizations like United States Jaycees, Boy Scouts of America, or the California Democratic Party. Unlike these cases, WTE is a small, intimate group of women seeking to protest the discriminatory admissions practices in place and to promote women's interests on campus. Their activities presently only extend campus wide and to a membership of 100. An application of *Roberts* to the present case finds that the WTE's rights to freedom of association are violated by "the policy."

The administration's forced association policy undermines the integral activities of the group. Not only is 'Women' in the group's name itself, the issues related to the male dominated society is central to the group's mission. If the group believes men cannot be trusted in leadership positions and that women need more leadership opportunities, it follows that restricting leadership to women is an integral activity. This core belief is clearer and better documented than it was in *Boy Scouts of American v. Dale,* where none of the group's literature explicitly stated it was antigay. Despite this absence the Boy Scouts were allowed to discriminate based on sexual orientation. The same is true of the parade which was not explicitly an antigay event or organization. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston Inc., 515 U.S. 557 (1995).* I would have this court follow *Hsu v. Roslyn School District,* 85 F.3d 839 (2d Cir. 1996). That case ruled a school board's non-discrimination policy could not be applied to the leadership of a club if a particular category of people is relevant to the message and purpose of the club. I concede that the equal access policy which was central to *Hsu* is irrelevant and was not considered in any of the briefs or oral argument before the district court or this court.

The majority overlooks a key aspect of the case before us today. To quote the majority, "WTE was formed with the expressly stated core purpose of opposing 'the program' and persuading the Administration to cease preferential admission treatment of male applicants." In fact, Kirsch

went so far as writing "a letter to President DeNolf" which "stated that 'the WTE might disband if OSU meets our demands.'" This is the key fact of the case because it puts opposition to preferential admissions at the forefront of the group's reason to exist and, as such, forcing WTE to admit male members constitutes a value-laden rejection of that association's primary purpose for being. Such is an unconstitutional attack on WTE based on its ideals and not its methods.

There is a larger issue present in this case which the majority overlooks. Increasingly, our colleges and universities, in a well-intended quest to produce a better society, have sought to eliminate all bias, including thoughts that contribute to or facilitate bias.[6] Such sanitization of the mind runs contrary to our history and is at odds with our self-interest. More to the point, it conflicts with much of the Court's jurisprudence. "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld.* Eliminating bias in action is one thing; eliminating bias in people's thoughts is another. The state cannot tell people what to think. Our constitutional history rebels at such a proposition. As Justice Souter wrote in *Hurley*, in a case that arose from a similar set of facts, "[o]ur holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."

Ms. Kirsch rightly points out that the student union is a public forum. *Widmar v. Vincent,* 454 U.S. 263 (1981). Even the majority notes that *Widmar* held "the campus of a public university, at least for its students, possesses many of the characteristics of a [traditional] public forum." Certain places on campus, like classrooms, are limited forums, or even non-public forums, for teaching on certain topics. Student unions at state-created universities, cannot be non-public forums *per se.* They must be traditional, designated, or limited forums. Regardless of which of these it is, the union was created so that students could assemble. Even the university used this facility as a public forum when it allowed its "speakers forum." The fact that the school only allowed "sanctioned speech" detracts from public forum analysis and frames the issue inappropriately. The design specifically accommodates student groups. Unlike *Widmar* or *Martinez,* there is no establishment clause issue here. WTE is a typical student group with First Amendment rights to meet on campus. The union was not designated for groups that have all-access policies or that only those that espouse views on public issues which mirror the president's. Thus, it must be a traditional public forum.

The decision to follow *Rumsfeld v. Forum for Academic and Institutional Rights,* 547 U.S. 47 (2006), is misguided. The facts are too different – to confuse the personal rights of individuals with the collective rights of universities regarding who has access to career development offices and employment dissemination process is to trivialize the former and falsely elevate the latter. Further, there were fiscal dynamics in that case which are absent here. If the individuals here are like any organization it is the Democratic Party from the case of *California Democratic Party v. Jones,* 530 U.S. 567 (2000). If California could not force a political association to accept non-

[6] Consider the five student members of the University of Southern Mississippi pep band who were disciplined for heckling an opposing player. This heckling occurred at a neutral site off campus. The students, who lost their scholarships, taunted a student from an opposing team with cries of "where is your green card?"

members because of the likely effect on the group, its message and the nature of that message, or its leadership, then it follows that Olympus cannot force a group such as WTE to do so.

For these reasons, I respectfully DISSENT.

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