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Implications of the *CLS v. Martinez* Supreme Court Decision

Last week's rare DC area earthquake, while hopefully unconnected, is perhaps helpful symbolism for the shock waves emanating from the June 28 decision by the U.S. Supreme Court in *Christian Legal Society v. Martinez.* The public square has been tilted decidedly uphill—at least for groups seeking to attract memberships supporting viewpoints (religious, political, or otherwise) outside the prevailing mainstream.

Background

In *CLS v. Martinez*, the Hastings College of Law sought to impose a nondiscrimination policy that required all student organizations to accept as members and officers any student who attended the law school, even if that student disagreed with the fundamental purpose or official positions of the student organization. The opinion refers to this policy as an "accept-all-comers" policy. According to a narrow 5-4 majority of the Supreme Court, compliance with this "accept-all-comers" policy was a constitutionally permissible method of conditioning access to the student-organization forum Hastings had set up for its student body.

The Christian Legal Society (CLS) chapter at Hastings sought "to select officers and members who are dedicated to a particular set of ideals or beliefs," namely those students professing the Christian faith and expressing certain traditional beliefs about human sexuality. As a result, CLS was denied official recognition at Hastings and did not receive access to campus facilities and official channels of communication. Even though Hastings posed a moving target by changing the requirements of its policy twice during the course of litigation, the Supreme Court found that the "accept-all-comers" policy was not designed as a mechanism for targeting religious viewpoints, which would constitute an unconstitutional form of discrimination under the First Amendment.

Legal Impact

It is important to note that the *CLS v. Martinez* decision does not directly overturn existing precedent protecting religious or unpopular viewpoints. If read broadly, however, the opinion creates a loophole that can be used by public officials to condition participation in government-created forums or receipt of government benefits on compliance with some form of an "accept-all-comers" policy. If a public school or other governmental body disagrees with a minority viewpoint, such an entity could attempt to fashion a system designed to withhold government benefits from the minority under the guise of an allegedly neutral "all-comers" policy.

Forthcoming Challenges

The seismic implications of the ruling in *CLS v. Martinez* will reverberate over the next several years. How steeply the public square has been tilted against the rights of association and advocacy of minority groups will be clarified as governmental bodies adopt different forms of "all-comers" policies and as those policies are challenged by disenfranchised minority groups in the lower federal and state courts. Consequently, any organization or group that expresses an unpopular message (or even just a minority viewpoint) should consult with legal counsel to examine its practices in at least the following areas:

- Acceptance of government benefits or subsidies
- Partnership with any governmental body or public entity, including government contracts or lease and loan agreements
- Employment practices and policies
- Membership practices and policies
- Leadership development practices and policies
- Use of or dependence on any goods or services that could be classified as a public accommodation

While comfort is seldom found in ground-shaking events, the adrenaline rush of energy they produce can be usefully channeled into a review of foundations and proactive risk management. Stay tuned to **G&G Law *Alert*™** for reports of new seismic activity in the Constitutional landscape.