No. 08-1371

In the Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, PETITIONER

v.

LEO P. MARTINEZ, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Constitution permits a public university law school to exclude a religious student organization from a forum for speech solely because the group requires its officers and voting members to share its core religious commitments.

PARTIES TO THE PROCEEDINGS

Petitioner is the Christian Legal Society Chapter at the University of California, Hastings College of the Law.

Respondents are Leo Martinez, Acting Chancellor and Dean of the University of California, Hastings College of the Law; Jacqueline Ortega, the Director of Student Services; and Donald Bradley, Tina Combs, Maureen Corcoran, Marci Dragun, Carin T. Fujusaki, Thomas Gede, Claes H. Lewenhaupt, James E. Mahoney, Brian D. Monaghan, and Bruce L. Simon, the Board of Directors of the University of California, Hastings College of the Law, in their official capacities.

Intervenor-Respondent is Hastings Outlaw, a student organization at the University of California, Hastings College of the Law.

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND UNIVERSITY REGULATIONS

The text of the First and Fourteenth Amendments to the United States Constitution is set forth at Pet. App. 71a

The Excerpts of Policies and Regulations Applying to College Activities, Organizations and Students adopted by the Board of Directors, University of California, as modified by Hastings College of the Law, are set forth at Pet. App. 72a-98a. Specifically, the campus regulations governing registered campus organizations are at Pet. App. 82a-87a, and those governing facilities use are at Pet. App. 78a-81a. The Nondiscrimination Policy is at Pet. App. 88a.

INTRODUCTION

This case involves a public law school's exclusion of a group of religious law students from a forum for speech. This group, the Christian Legal Society, welcomes all members of the university community to participate in its activities, but was excluded from the forum because it requires its officers and voting members—who speak on its behalf, vote on its policies and programs, and lead its Bible studies—to share and abide by the group's core beliefs.

Our submission to this Court is straightforward: All noncommercial expressive associations, regardless of their beliefs, have a constitutionally protected right to control the content of their speech by excluding those who do not share their essential purposes and beliefs from voting and leadership roles. For Hastings College of the Law to force the Christian Legal Society chapter to admit nonadherents into its leadership and voting ranks—on pain of exclusion from an otherwise open speech forum—violates Petitioner's rights of speech, expressive association, and free exercise of religion.

STATEMENT OF THE CASE

A. Registered student organizations at Hastings

The University of California-Hastings College of the Law ("Hastings" or "College") is a public law school in San Francisco. As is common at institutions of higher education, Hastings encourages a broad array of student organizations to meet, express their views, and conduct activities on campus. The University of California has charged the College administration with the responsibility "to ensure an ongoing opportunity for the expression of a variety of view-

points," and it has specified that this responsibility must be discharged "in accordance with the highest standards of * * * freedom of expression." Pet. App. 82a, 74a. To effectuate that purpose, Hastings annually grants "Registered Student Organization" ("RSO") status to a broad range of student groups reflecting many different interests and viewpoints. *Id.* at 82a-87a. In the 2004-2005 academic year, when this case arose, Hastings recognized approximately 60 RSOs. J.A. 236 (listing 2004-2005 groups), 407 (listing 2005-2006 groups).

RSOs at Hastings have formed around interests as diverse as politics, religion, culture, race, ethnicity, and human sexuality—not to mention lighter topics such as food, drink, sports, and recreation. Some RSOs are specific to Hastings; others, such as the American Constitution Society and the Federalist Society, are local chapters of national organizations. Some RSOs address legal subjects, such as environmental law or intellectual property; others engage the wider world of ideas. Some publish journals, such as the Women's Law Journal and the Race and Poverty Law Journal; others hold debates or organize around athletic and recreational pursuits.

Many RSOs at Hastings give students the opportunity to advocate their views on contentious topics. Law Students for Choice and the Silenced Right–National Alliance Pro-Life Group reflect opposing sides in the abortion controversy. The Hastings Democratic Caucus sits across the aisle from the Hastings Republicans. The National Lawyers Guild, Amnesty International, Hastings Student Animal Legal Defense Fund, and Phi Alpha Delta address a range of public issues. The views of other RSOs, such as the Hastings Association of Muslim Law Students,

Hastings Jewish Law Students Association, and Hastings Koinonia, are grounded in their religious faiths. Many RSOs organize around ethnic or racial identities: La Raza Law Students Association; Hastings Chinese Law & Culture Society; Black Law Students Association; and Asian/Pacific American Law Student Association, to name just a few. Still others —including Intervenor-Respondent Outlaw, as well as the Clara Foltz Feminist Association and Students Raising Consciousness at Hastings—focus on sexuality and gender.

RSOs are entitled to meet in university rooms, to apply for funding to support various group activities, and to access multiple channels for communicating with students and faculty—including posting on designated bulletin boards, sending mass emails to the student body, distributing material through the Student Information Center, appearing on published lists of student organizations, and participating in the annual Student Organizations Fair. *Id.* at 85a, 7a (comprehensively listing the incidents of RSO status).

Although it provides resources and facilities to all of these groups, Hastings makes clear that it "neither sponsor[s] nor endorse[s]" the views of any RSO, and it insists that RSOs inform third parties that they are not "sponsored" by the institution. *Id.* 83a, 85a-86a; J.A. 219.

Only one group has ever been denied the right to participate in the forum: Petitioner Christian Legal Society. Opp. 4; J.A. 233, 403.

B. The Christian Legal Society

Founded in 1961, the Christian Legal Society ("CLS") is a nationwide association of lawyers, law

students, law professors, and judges who share a common faith and seek to honor Jesus Christ in the legal profession. CLS provides opportunities for fellowship, as well as moral and spiritual guidance, for Christian lawyers; encourages and mentors Christian law students; promotes justice, religious liberty, and biblical conflict resolution; and encourages lawyers to furnish legal services to the poor. J.A. 65, 358. CLS presumably is familiar to this Court through the participation of its Center for Law and Religious Freedom in dozens of cases as counsel or amicus curiae.

The national Christian Legal Society maintains attorney and law student chapters across the country. Student chapters, such as that at Hastings, invite speakers to give public lectures addressing how to integrate Christian faith with legal practice (J.A. 302-303, 229), organize transportation to worship services (J.A. 229), and host occasional dinners (*ibid.*). The signature activities of the chapters are weekly Bible studies, which, in addition to discussion of the text, usually include prayer and other forms of worship. J.A. 230-231.

CLS welcomes all Hastings students—regardless of "race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation" (Pet. App. 88a)—to attend and participate in its meetings and other activities. *Id.* 12a-13a; J.A. 227, 231, 280. However, to be officers or voting members of CLS—and to lead its Bible studies—students must affirm their commitment to the group's core beliefs by signing the national CLS Statement of Faith and pledging to live their lives accordingly. J.A. 118; Pet. App. 11a-13a.

The CLS Statement of Faith provides:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> One God, eternally existent in three persons, Father, Son and Holy Spirit.
>
> God, the Father Almighty, Maker of heaven and earth.
>
> The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
>
> The presence and power of the Holy Spirit in the work of regeneration.
>
> The Bible as the inspired Word of God.

Pet. App. 100a-101a.

The chapter's constitution also sets forth guiding principles for the chapter and those who publicly associate with it. "Officers must exemplify the highest standards of morality as set forth in Scripture" in order "that their profession of Christian faith is credible." *Id.* at 102a-103a. Officers also must "abstain[] from 'acts of the sinful nature,' including those in *Galatians* 5:19-21; *Exodus* 20; *Matthew* 15:19; *Romans* 1:27; 1 *Corinthians* 6:9-10." *Ibid.*[1]

To confirm its position amid contemporary religious controversies regarding sexuality, national CLS

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[1] These passages list types of conduct and attitudes from which Christians are to refrain, including: adultery, murder, theft, false testimony, idolatry, and envy (*Exodus* 20); slander, hatred, discord, jealousy, anger, selfish ambition, dissensions, factions, drunkenness, and greed (*Matthew* 15:19; 1 *Corinthians* 6:9-10; *Galatians* 5:19-21).

adopted a resolution in March 2004, which explains: "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." J.A. 146. The resolution applies to "all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct." *Ibid.*

This policy applies to heterosexual as well as homosexual conduct. Nationwide, CLS has only once had to expel a member for beliefs inconsistent with the Statement of Faith, and it is unaware of any homosexual person being expelled from any chapter. J.A. 232.

Voting members are entitled to vote on chapter policies and programs, as well as amendments to the chapter constitution, to participate in choosing the group's officers, and to stand for election to those officer positions. Most importantly, voting members share the responsibility of teaching CLS's weekly Bible studies—which are its most frequent and essential activities, and are conducted by its voting members on a rotating basis. Pet. App. 100a, 102a; J.A. 118, 229-231.

C. Hastings' denial of access to CLS

Prior to 2002, Hastings recognized a Christian student group that called itself "Hastings Christian Legal Society" but was not formally affiliated with national CLS. This group required that voting members and officers affirm its statement of faith, which was patterned on that of the national organization.

J.A. 222-223, 143-144, 258-259. From 2002 to 2004, Hastings had a registered Christian student group called "Hastings Christian Fellowship." That group, which had no requirements for its officers or voting members (J.A. 272), also had no formal affiliation with the national CLS organization. J.A. 143-144, 223-225. During the 2003-2004 academic year, approximately five to seven students participated in the Hastings Christian Fellowship. One of these students was openly lesbian, and two held beliefs inconsistent with what CLS considers to be orthodox Christianity. J.A. 224; Pet. App. 10a.

At the outset of the 2004-2005 academic year, leaders of Hastings Christian Fellowship decided to affiliate officially with the national Christian Legal Society, and thus to adopt its national membership policies. J.A. 225. Around that time, the chapter vice president[2] inquired of the Hastings Director of Student Services, Judy Chapman, about the process for registering CLS as a student organization. Chapman handed the CLS vice president a copy of Hastings' "Policy on Nondiscrimination" and cautioned her that national organizations such as Christian Legal Society often have membership policies unacceptable to Hastings. J.A. 130-131.

1. Hastings' written Nondiscrimination Policy

Hastings' "Policy on Nondiscrimination" (hereinafter "Nondiscrimination Policy" or "Policy") states as follows:

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[2] The client has requested that we not unnecessarily use individual names in this brief because of concerns about possible retaliation.

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. The College's policy on nondiscrimination is to comply fully with applicable law.
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admissions, access and treatment in Hastings-sponsored programs and activities.

Pet. App. 88a.

The Policy comprises two paragraphs. The first, which is applicable to "[a]ll groups," forbids only "legally impermissible, arbitrary or unreasonable discriminatory practices," in accordance with the College's commitment to "comply fully with applicable law." It is undisputed that no "law" prohibits a student group such as CLS from confining its voting membership or leadership to those who profess and follow its religious creed. The second paragraph, by its terms, applies only to Hastings itself and to "Hastings-sponsored programs and activities." As we have noted, Hastings emphatically does not regard RSOs as "Hastings-sponsored." *Id.* 83a, 85a-86a; J.A. 219. Thus, it is not self-evident why the Policy, by its terms, would apply to or proscribes CLS's membership requirements.

Moreover, as is apparent from the list of prohibited types of discrimination, the only forbidden category that restricts a group's ability to be selective in terms of its members' *beliefs* or *viewpoints* is the *religious* nondiscrimination requirement. Similarly, the only one even arguably related to *behavior* is the sexual orientation nondiscrimination requirement. Although on its face the sexual *orientation* nondiscrimination requirement might appear to apply only to an individual's sexual inclinations or identity, Hastings has interpreted it to forbid discrimination on the basis of conduct as well, making homosexual conduct the only type of behavior addressed by the Nondiscrimination Policy.

2. Hastings' decision to exclude CLS

Shortly after speaking with Chapman and receiving a copy of the Policy, the chapter vice president applied to the Office of Student Services for travel funds to cover a portion of the costs for her and the chapter president to attend Christian Legal Society's 2004 annual conference. Chapman granted the students $250 for this purpose. J.A. 130, 227.

The vice president submitted CLS's registration materials, including the chapter's constitution, to the Office of Student Services. Although CLS does not believe that its moral stance against non-marital sexual conduct is discrimination based on "sexual orientation," the students chose not to include a pledge against sexual orientation discrimination in the group's constitution because they understood that Hastings interprets its Nondiscrimination Policy as forbidding a rule against nonmarital sexual conduct, and would understand any pledge in that light.

Chapman "informed the students that CLS's bylaws were not compliant with the religion and sexual orientation provisions of the Nondiscrimination Policy and that they would need to be amended in order for CLS to become a registered student organization at Hastings." *Id.* at 228.

National CLS wrote Chapman a letter pointing out that all students are welcome to attend and participate in CLS's meetings, and explaining CLS's religious principles and the application of those principles to the subject of human sexuality. *Id.* at 280, 284, 288. By letter, Hastings' counsel responded that "to be one of our student-recognized organizations, CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." *Id.* at 294, 228-229. In subsequent interrogatories, the College reiterated that its denial of recognition to CLS was based on those two specific grounds. *Id.* at 157-159.

3. The effect of Hastings' decision on CLS

As a result of Hastings' decision, CLS has no right to meet on campus for any official purpose, to use the ordinary communications channels at the College, or to enjoy any of the other rights accorded to RSOs. Pet. App. 39a, 85a; J.A. 300.

During the pendency of this litigation, Hastings has offered to allow the CLS chapter to use meeting rooms and audio-visual equipment as a matter of sufferance (J.A. 218-219, 232-233) on the same terms as *outside* community groups (*Id.* at 442-444). The chapter has no legal right to meet on the premises of the law school, however, and the College reserves the authority to charge a fee and to revoke the privilege

of meeting at any time. Pet. App. 79a; J.A. 443-444. As the district court observed, "[i]t is undisputed that CLS is being denied * * * access to particular areas of the campus and some avenues of communicating with its members and other students." Pet. App. 39a.

The district court found that "despite Hastings' refusal to grant CLS recognized status, the group continued to meet and hold activities throughout the 2004-05 academic year." *Id.* at 47a-48a. With one exception (a lecture held in a lounge area), those activities were either off campus or confined to students' dorm rooms. J.A. 442.

CLS has also been denied access to the customary means by which student organizations communicate with the student body, such as the annual Student Organizations Fair, the law school newsletter, bulletin boards, mailboxes, or weekly email announcements of activities. Pet. App. 45a; J.A. 216-219, 233. They can use only classroom chalkboards to make announcements—a privilege not reserved to RSOs. J.A. 300. They cannot identify themselves as the "Hastings" chapter. J.A. 233. And they are denied the right to apply for funds collected from student activity fees. *Id.* at 217. Indeed, after Hastings rejected CLS's registration, Chapman revoked the $250 previously granted for travel. *Id.* at 229, 295.

4. Hastings' treatment of other student organizations

As the record shows, other groups at Hastings are permitted to maintain their identity, cohesion, and message by limiting their leadership and membership to students who share their core beliefs. Intervenor-Respondent Outlaw, for example, reserves the right to remove any officer who "work[s] against the spirit

of the organization's goals and objectives." Pet. App. 138a. Similarly, the bylaws of Silenced Right, a pro-life advocacy group, state that "[s]o long as individuals are committed to the goals set out by the leadership, they are welcome to participate and vote in Silenced Right elections." *Id.* at 143a.

Under the constitution of the Hastings chapter of the Association of Trial Lawyers of America ("ATLA"), all members must "adhere to the objectives of the Student Chapter as well as the mission of [national] ATLA." *Id.* at 110a. Students may be members of the Hastings Democratic Caucus ("HDC") only "so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization as stated in [HDC's bylaws]." *Id.* at 118a. The sole objective identified in those bylaws is the group's ideological commitment "to advance Democratic party principles." *Id.* at 117a. All of these groups were accepted as RSOs. As Hastings acknowledged in its answer to CLS's complaint, "the Policy on Nondiscrimination permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." J.A. 93.

The record further indicates that Hastings' Policy was not applied where it would interfere with the identity and message of a student group. For example, the La Raza bylaws restrict "policy" membership to students "of Raza background" (meaning persons of Latino or Mexican descent) who timely pay their dues and regularly attend meetings. *Id.* at 192. Only "policy" members have the right to vote. *Ibid.* La Raza also has a category of "associate" members that "encompasses all [Hastings] students * * * who are of Raza background." *Ibid.* "Associate membership can

be conferred by the body upon a non-Raza and non-law students as an honorary gesture." *Ibid.* While recognizing that the La Raza bylaws "restrict voting rights to persons of La Raza background," Director Chapman certified those bylaws as "in compliance with the Nondiscrimination Compliance Code," in the same year in which she refused registration to CLS. *Id*. at 319.

D. The instant litigation

Having reached an impasse with the law school's administration, CLS filed this § 1983 suit in district court against relevant Hastings officers and administrators (hereinafter "Hastings" or "Respondents"). CLS challenged Hastings' denial of recognition as a violation of its expressive association, free speech, free exercise, and equal protection rights.

1. Hastings' subsequent change in its description of its Policy

During discovery, Hastings officials changed their description of the College's Nondiscrimination Policy. In its answer and interrogatory responses, Hastings had stated that its Policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." *Id*. at 93. Under deposition questioning regarding the Policy, however, Dean Kane put forward her "view that in order to be a registered student organization you have to allow *all* of our students to be members and full participants if they want to." *Id*. at 343 (emphasis added).

Under this restatement of the Policy, registered student groups are prohibited not just from discriminating on the basis of the listed categories, but on any basis. In other words, they must accept "all comers."

As the Dean explained: a Republican has a right to become a member of the Democratic Club; the Clara Foltz Feminist Association has no right to refuse membership to chauvinists; and the pro-life group may not refuse membership to students with pro-choice views. *Id.* at 221 (Joint Stip. ¶ 18) (citing Kane Dep.). In her deposition, Director Chapman testified to similar effect. *Id.* at 320. The record does not reveal any instance in which this version of the Policy has ever been enforced.

2. Proceedings below

Intervenor-Respondent Outlaw, a registered student group whose self-described objective is "to alleviate and eradicate homophobia, transphobia, racism, sexism, and other affronts to the dignity of individual human beings," sought leave to intervene. Pet. App. 136a. In support of intervention, Outlaw asserted two interests: its members "would be excluded from membership in CLS," and its members objected to their student activity fees supporting CLS. Hastings Outlaw's Reply Br. re Mot. to Intervene, at 1, 2, 6. The court granted intervention. J.A. 98, 100 n.1.

On cross-motions for summary judgment, the district court ruled in favor of Respondents. The court held that denying recognition to CLS had "no significant impact" on the ability of the CLS students to express themselves. Pet. App. 59a. This conclusion was based primarily on subsidiary judgments that (1) "despite Hastings' refusal to grant CLS recognized status," the group continued to meet without recognition and "CLS's efforts at recruiting members and attendees were not hampered" (*id.* at 47a, 48a); and (2) "CLS has not demonstrated that its ability to express its views would be significantly impaired" by

"requiring CLS to admit gay, lesbian, and non-Christian students" (*id.* at 54a). Even assuming that enforcement of the policy had a significant impact, however, the court held that "Hastings has a compelling interest in prohibiting discrimination on its campus." *Id.* at 61a.

The CLS students appealed to the Ninth Circuit, which affirmed in a two-sentence opinion, citing *Truth* v. *Kent School District,* 542 F.3d 634 (9th Cir. 2008). Pet. App. 2a-3a. In *Truth,* the court had ruled that a public high school could deny recognition to a Christian student group that imposed religious requirements even on non-voting members who merely attended the group's meetings. The panel in *Truth* explicitly "limit[ed] [the] analysis to the general membership restrictions" and distinguished cases such as *Hsu* v. *Roslyn Union Free School District*, 85 F.3d 839 (2d Cir. 1996), in which a group's religious criteria were applied to voting members and leaders. 542 F.3d at 644, 647. The Ninth Circuit did not explain why the rule of *Truth* should apply to a case such as this one, which involves membership criteria limited to voting members and officers.

Instead, the Ninth Circuit's analysis turned on the understanding that "all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." Pet. App. 2a. Applying a lesser standard of scrutiny, the court held that Hastings' denial of recognition of CLS was "viewpoint neutral and reasonable," although it did not say why. *Ibid.* The court also did not analyze whether Hastings' refusal to accept CLS's registration infringed its right of expressive association.

In every case outside of the Ninth Circuit where public universities have denied recognition to religious groups based on the rationales asserted here, either the courts have ruled for the religious student group or the university has settled or mooted the case by revoking its unconstitutional policy.[3]

This Court granted certiorari.

SUMMARY OF ARGUMENT

Recognizing that universities are "peculiarly the marketplace of ideas," this Court has long held that a public university's "denial of recognition" to a student group that seeks to participate in a campus speech forum is a "form of prior restraint"—and thus presumptively unconstitutional. *Healy* v. *James*, 408

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[3] *Christian Legal Soc'y Chapter at So. Ill. Univ.* v. *Walker*, 453 F.3d 853 (7th Cir. 2006); *Beta Upsilon Chi* v. *Machen*, 586 F.3d 908 (11th Cir. 2009) (University of Florida); *Alpha Iota Omega Christian Fraternity* v. *Moser*, No. 04-765, 2006 WL 1286186, at *3 (M.D.N.C. May 4, 2006) (University of North Carolina); *Univ. of Wis.-Madison Roman Catholic Found.* v. *Walsh*, No. 06-649, 2007 WL 1056772, at *4 (W.D. Wis. Apr. 4, 2007); *Christian Legal Soc'y* v. *Holbrook*, No. C2-04-197 (S.D. Ohio) (Ohio State); *Christian Legal Soc'y Chapter at Ariz. State Univ.* v. *Crow*, No. 04-2572 (D. Ariz.); *CLS at the Univ. of Toledo* v. *Johnson*, 3:05-cv-7126 (N.D. Ohio); *Intervarsity Multi-Ethnic Campus Fellowship* v. *Rutgers*, No. 02-06145 (D.N.J.); *Beta Upsilon Chi* v. *Adams*, No. 3:06-cv-00104 (M.D. Ga.) (University of Georgia); *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law* v. *Farley*, No. 04-4120 (D. Kan.); *Maranatha Christian Fellowship* v. *Regents of the Bd. of the Univ. of Minn. Sys.*, No. 03-5618 (D. Minn.); *DiscipleMakers* v. *Spanier*, No. 04-2229 (M.D. Pa.) (Penn State); *Cordova* v. *Laliberte*, No. 08-543 (D. Idaho) (Boise State); *Intervarsity Christian Fellowship UW-Superior* v. *Walsh*, 06-0562 (W.D. Wis.). See also Ga. Op. Att'y Gen., No. 97-32 (Dec. 12, 1997) (ruling that Georgia Tech could not deny recognition to ReJOYce in Jesus because of its faith standards for voting members and officers).

U.S. 169, 180, 184 (1972) (quotation omitted). The First Amendment protects "the right of individuals to associate to further their personal beliefs," and the "denial of official recognition * * * to college organizations burdens or abridges that associational right." *Id*. at 181. Otherwise-eligible student organizations may be denied recognition only if the university surmounts a "heavy burden" to "justify its decision of rejection." *Id*. at 184. See also *Widmar* v. *Vincent*, 454 U.S. 263, 268-270 (1981) (applying *Healy* to religious clubs); *Rosenberger* v. *Rector of the University of Virginia*, 515 U.S. 819, 834 (1995) (applying *Widmar* to financial benefits extended as part of a speech forum).

This "right of individuals to associate to further their beliefs" (*Healy*, 408 U.S. at 181) includes the right of these associations to control their own message and identity—by requiring that those holding positions affecting the group's formation and communication of views share its core beliefs. *Democratic Party of U.S.* v. *Wisconsin* ex rel. *La Follette*, 450 U.S. 107 (1981); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984); *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000). Because a group's leaders define and shape the group's message, the right to select leaders is an essential element of its right to speak.

Hastings' exclusion of CLS from the forum for speech violates both of these related principles. Indeed, Hastings points to CLS's exercise of its freedom of association as the sole reason for denying the group its free speech right to equal participation in the forum. Even if done on a neutral basis, it would not be permissible for a governmental entity to penalize a

voluntary expressive association for the exercise of its rights by excluding it from an otherwise wide-open forum for speech. But this exclusion is not imposed neutrally, and its viewpoint-discriminatory character renders it all the more clearly unconstitutional. As written and enforced, the Policy targets solely those groups whose beliefs are based on "religion" or that disapprove of a particular kind of sexual behavior. Groups committed to other viewpoints are free to select their leaders from among members who support their purposes and core beliefs.

The right that CLS is asserting, however, is by no means limited to religious groups. The speech and expressive association rights of all groups are at risk if a public university may require unpopular student groups to admit as leaders and voting members those who disagree with their core beliefs and viewpoints. As Justice O'Connor once observed, "the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts,* 468 U.S. at 633 (concurring opinion). Hastings' Policy is a threat to every group that seeks to form and define its own voice.

Respondents' justification for denying recognition to CLS has vacillated between two dramatically different accounts of its Nondiscrimination Policy. Under one version, put forward during depositions (the "all-comers policy"), every registered student group must admit every student who wishes to participate in, vote on, and even lead the group, even if that student's views are divergent from or antithetical to the group's stated purposes and beliefs. This all-comers

rule is vastly overbroad and manifestly unreasonable in light of the purpose of the forum.

Under a second version of the Policy—one based on the Policy's written terms—student groups are generally free to set and enforce limits on membership and leadership; they are forbidden only to discriminate on the basis of a finite list of forbidden categories, of which only one (religion) is based on opinion or beliefs and only one (sexual orientation) is arguably based on conduct. This rule is explicitly viewpoint discriminatory: A political or cultural group can insist that its leaders support its purposes and beliefs; a religious group cannot. Neither version of the Policy provides constitutional justification for denying CLS's freedom of speech, association, or religion under the circumstances of this case.

In Section I, we explain the nature of the constitutional rights involved (freedom of speech within a public forum, freedom of expressive association, and free exercise of religion) and show that Hastings' denial of recognition to CLS is a severe burden on each. We also show that the written Policy discriminates against religious and morally traditional viewpoints. In Section II, we address Hastings' two alternative justifications for its actions and show that neither passes muster under the applicable standard of review. Finally, in Section III we demonstrate that these principles apply to cases involving the denial of generally available public benefits.

ARGUMENT

I. Hastings' Policy Severely Burdens The Freedoms Of Speech, Association, And Religion.

A. Freedom of speech

In *Healy*, a public university created a forum for speech similar to that in this case, but excluded the local chapter of Students for a Democratic Society (SDS), largely because of fear that the group would use violent or disruptive tactics. Analogizing the exclusion to a "prior restraint," this Court held that a public university may not exclude an otherwise-eligible group from a speech forum unless the university can bear the "heavy burden" of justifying the exclusion. 408 U.S. at 184. In a long line of decisions since *Healy*, this Court has consistently required public schools and universities to recognize disfavored student organizations, including religious groups.

In *Widmar*, the Court held that a public university that operates a "public forum" for "registered student groups" may not "close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion." 454 U.S. at 265 & n.5. "[D]enial to particular groups of use of campus facilities for meetings and other appropriate purposes must be subjected to the level of scrutiny appropriate to any form of prior restraint." *Id.* at 268 n.5 (quotation and brackets omitted).

Excluding religious groups from the forum was neither "necessary to serve a compelling state interest" nor "narrowly drawn to achieve that end." *Id.* at 270. The university's argument that the exclusion was neutral because *all* groups were subject to the same prohibition on engaging in "worship or religious

teaching" did not fool the Court, which recognized the university's policy as a blatant form of content- and viewpoint-based discrimination.

In a similar vein, *Rosenberger*, 515 U.S. at 829, 834, held that a public university must grant a student newspaper that advocates a religious perspective equal access to a "limited public forum" that "expends funds to encourage a diversity of views from private speakers." Although "money is scarce," the "State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum." *Id*. at 829 (quotation omitted), 835. Moreover, "viewpoint discrimination[] * * * is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id*. at 830. See also *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-394 (1993); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001).

1. Hastings has established a classic public university forum for group speech, entitling all viewpoints to participate.

It is undisputed that Hastings has created a forum in which a broad and diverse range of ideas and opinions may be expressed. Under official University policy, Hastings must "ensure an ongoing opportunity for the expression of a variety of viewpoints," and it must carry out this duty "in accordance with the highest standards of * * * freedom of expression." Pet. App. 82a, 74a. Strong constitutional protection is warranted to ensure equal participation in this forum.

Registered student groups at Hastings are entitled to all of the speech, association, and free exercise rights of private organizations. They do not speak for the College, but only for themselves. Indeed, Hastings requires each RSO to inform the public "that it is *not* College-sponsored." *Id.* at 86a (emphasis added). Thus, as in *Widmar*, this is not a case involving the College's control of its own expression: It "does not * * * endorse or promote any of the particular ideas aired" in the forum, or "confer any imprimatur of state approval on" RSOs. 454 U.S. at 272 n.10, 274.

In 2004, when this dispute arose, more than 60 student groups had qualified as RSOs. Further, "[i]t is the avowed purpose of [Hastings] to provide a forum in which students can exchange ideas." *Id.* at 272 n.10. In the history of the forum, there has been one and only one exclusion—CLS.

2. Hastings' denial of recognition imposes a severe burden on CLS's speech.

The ability to participate in a campus forum on equal terms with other groups is the very lifeblood of a student organization. As this Court has explained, a student group needs recognition and its attendant benefits "to remain a viable entity in a campus community in which new students enter on a regular basis." *Healy*, 408 U.S. at 181. Indeed, under this Court's decisions, a university's denial of recognition itself—quite apart from the loss of specific benefits—substantially burdens a group's expression, and is treated as equivalent to a "prior restraint." *Widmar*, 454 U.S. at 268 & n.5, 270 n.7; *Healy*, 408 U.S. at 184; see also *Rosenberger*, 515 U.S. at 835.

Noting that CLS continued to meet in dorm rooms, private homes, and churches, the district court concluded that "Hastings' denial of official recognition was not a substantial impediment to CLS's ability to meet and communicate as a group." Pet. App. 13a, 47a-48a, 49a. But as this Court held in *Healy*, "[a] group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [university's] action * * * ." 408 U.S. at 183 (quotation omitted). The fact that a group "may meet as a group off campus," "distribute written material off campus," and "meet together informally on campus—as individuals, but not as [an official group]"—will not save a public university's actions in denying the group recognition. *Id.* at 182-183.

Similarly, in *Widmar* and *Mergens*, this Court required official recognition of the religious groups despite the fact that they could have continued to meet near campus. *Id.* at 288 (White, J., dissenting); *Board of Education* v. *Mergens*, 496 U.S. 226, 247 (1990). The ability of these groups to engage in expression elsewhere, through channels open to non-student members of the public, did not satisfy the First Amendment. As the Court put it in *Schneider* v. *New Jersey,* 308 U.S. 147, 163 (1939), "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

In any event, this Court has made clear that the free speech right in the context of a public forum is a right of *equal* access; no group may be "disfavored" on constitutionally illegitimate grounds. *Rosenberger*, 515 U.S. at 528-529; *Lamb's Chapel,* 508 U.S. at 394; *Mergens,* 496 U.S. at 248; *Widmar*, 454 U.S. at 268

n5. If a right-wing law school recognized the Federalist Society but not the American Constitution Society (ACS), that act would not escape scrutiny merely because ACS did pretty well without recognition.

To be sure, the College here has offered to allow CLS to meet on campus, at least during the pendency of this litigation. But Hastings made clear to the students that this privilege—to use rooms, if available, on the same basis as the general public—may be revoked at any time. See *supra* at 11-12. It is an indulgence, not a right.

Moreover, even apart from recognition and meeting space, CLS has been denied access to mass email, bulletin boards, and other ordinary media by which campus groups communicate with students. As *Healy* stressed, "denial of access to the customary media for communicating" with students and others "cannot be viewed as insubstantial." 408 U.S. at 181-182. Numerous courts have likewise recognized that denial of these incidents of registered status, even with access to meeting space, is a constitutional infringement under *Healy*. *E.g.*, *Christian Legal Soc'y* v. *Walker*, 453 F.3d 853, 864 (7th Cir. 2006); *Child Evangelism Fellowship of N.J.* v. *Stafford Township School Dist.*, 386 F.3d 514 (3d Cir. 2004) (Alito, J.); *Gay Student Servs.* v. *Tex. A&M Univ.*, 737 F.2d 1317, 1327 (5th Cir. 1984); *Gay Activists Alliance* v. *Bd. of Regents of Univ. of Okla.*, 638 P.2d 1116 (Okla. 1981); *Gay Lib* v. *Univ. of Mo.*, 558 F.2d 848 (8th Cir. 1977); *Gay Alliance of Students* v. *Matthews*, 544 F.2d 162, 164-165 (4th Cir. 1976); *Gay Students Org. of Univ. of N.H.* v. *Bonner*, 509 F.2d 652, 659-660 (1st Cir. 1974).

Respondents must surmount a "heavy burden" to justify exclusion of an otherwise-eligible student

group from participation in a public university speech forum. *Healy*, 408 U.S. at 184. All limitations must be "reasonable in light of the purpose served by the forum," and any limitation that is viewpoint discriminatory can be justified only if it is the least restrictive means of achieving a compelling governmental purpose. *Rosenberger,* 515 U.S. at 829; *Widmar,* 454 U.S. at 270 & n.7 (citing *Healy*, 408 U.S. at 184).

B. Freedom of expressive association

Implicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to gather together to express ideas—what this Court terms a "right of expressive association." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 68 (2006) (hereinafter *FAIR*); *Roberts,* 468 U.S. at 622. As Representative Theodore Sedgwick said during the debates in the First Congress over what became our First Amendment: "If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called into question * * * ." 1 ANNALS OF CONG. 731 (Joseph Gales ed., 1789) [Aug. 15, 1789].

Interference with the right of expressive association may "take many forms" (*Dale,* 530 U.S. at 648), including "impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group" and "interfer[ing] with the internal organization or affairs of the group" (*Roberts,* 468 U.S. at 622-623). Hastings' Policy does both.

1. Private expressive associations have a right to exclude those who do not share the group's beliefs.

"There can be no clearer example of an intrusion into the internal structure or affairs of an association" than forcing it to relinquish control to those who do not share its message. *Roberts*, 468 U.S. at 623; see also *FAIR*, 547 U.S. at 69 (laws that permit outsiders to become "members" of the "expressive association" touch the core of the First Amendment). Such intrusions "impair the ability of the original members to express only those views that brought them together." *Id.* at 623; see also *New York Club Ass'n* v. *City of New York*, 487 U.S. 1, 13 (1988); *Hurley*, *supra*. "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 791 (1978).

Groups express their views through their leaders. Just as "the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice," *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring), forcing a group to offer leadership roles to outsiders entails the distortion or destruction of that voice. *Dale,* 530 U.S. at 654. And for religious groups, "[d]etermining that certain activities are in furtherance of an organization's religious mission, and that *only those committed to that mission should conduct them*, is * * * a means by which a religious community defines itself." *Corp. of Presiding Bishop* v. *Amos,* 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (emphasis added).

The bylaws of other student organizations at Hastings powerfully illustrate the importance of being able to confine leadership positions to those who share the group's beliefs. The student chapter of the Association of Trial Lawyers of America, for example, requires all members to "adhere to the objectives of the Student Chapter as well as the mission of [national] ATLA." Pet. App. 110a. The pro-life group states that "[s]o long as individuals are committed to the goals set out by the leadership, they are welcome to participate and vote in Silenced Right elections." Pet. App. 143a. And even the bylaws of Intervenor-Respondent Outlaw reserve the right to remove any officer that "work[s] against the spirit of the organization's goals and objectives." Pet. App. 138a. We cite these examples not to complain about "exclusion," but because they corroborate common sense: Expressive associations of all sorts perceive the same need as CLS to protect their identity and message.

The example Dean Kane invoked during her deposition—allowing a Republican the right to lead the Hastings Democratic Caucus—aptly illustrates the impact of the College's Policy on the ability of an expressive association to define and communicate its positions. If the Democratic Caucus sent its members out to spread its views to the public, Republican participants would be able to sabotage the enterprise and wreak havoc on the group's chosen message. If numerous enough, the Republican *agents provocateurs* could muster a majority vote to invite Karl Rove to be the Caucus's keynote speaker. The de-

structive effect on speech and association is manifest.[4]

The government has no right to insist that the Democratic Caucus, or CLS, allow random students, including those critical of the group's views, to lead its discussion groups, speak publicly in its name, or vote on its speakers and policies. If the right of association means anything, it "presupposes the freedom to identify the people who constitute the association and to limit the association to those people." *Democratic Party*, 450 U.S. at 108.

2. Freedom of association is particularly important to small or unpopular groups.

All expressive groups have, and benefit from, the freedoms we invoke here on behalf of CLS. After all, "[i]f the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect." *FAIR*, 547 U.S. at 68.

Although the freedom of expressive association is potentially valuable to everyone, it is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppres-

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[4] This scenario is not speculative. In April 1993, members of the College Republicans at the University of Nebraska hijacked the Young Democrats' election process. Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882, 2885 & n.20 (2005). They showed up at the Young Democrats' election meeting and, outnumbering the Young Democrats, elected themselves as the new officers of the group. *Ibid.* For numerous examples of similar incidents, see the amicus brief of the Foundation for Individual Rights in Education (FIRE).

sion by the majority." *Dale*, 530 U.S. at 648 (quoting *Roberts,* 468 U.S. at 622). Large and broadly accepted groups can generally defend their identity through sheer force of numbers and informal means of control. But smaller groups—and those whose views are contrary to the reigning zeitgeist—are far more vulnerable to takeover or harassment by students empowered to obstruct and even change the group's unpopular stance. See *supra* note 4.

Which groups find themselves in that unenviable position varies with time and place. In an earlier era, public universities frequently attempted to bar gay rights groups from recognized student organization status on account of their supposed encouragement of what was then illegal behavior. The courts made short shrift of those policies. See, *e.g.*, *Gay & Lesbian Student Ass'n* v. *Gohn*, 850 F.2d 361, 366 (8th Cir. 1988); see also *supra* at 25 (collecting cases). The shoe is now on the other foot in much of academia. The question here is whether groups such as CLS will receive comparable First Amendment protection.

3. Hastings' Nondiscrimination Policy severely burdens CLS's ability to control and present its message.

If non-Christians could walk in and insist on taking a turn leading one of CLS's weekly studies of the Bible—a book whose interpretation is not free from controversy—those meetings would cease to be an expression of CLS's beliefs, and "the group as it currently identifies itself [would] cease to exist." *Walker,* 453 F.3d at 863. It would be no less devastating to allow Hastings students with religious views that CLS regards as heterodox to vote on its policies and programs or determine its officers, or to allow stu-

dents hostile to CLS to represent the group at the Organizations Fair. As the Second Circuit has observed, a religious group's faith requirements are a "legitimate self-definitional goal." "[J]ust as a secular club may protect its character by restricting eligibility for leadership to those who show themselves committed to the cause," CLS "may protect [its] ability to hold Christian Bible meetings by including the leadership provision in [its] constitution." *Hsu*, 85 F.3d at 861 & n.20.

The district court rejected CLS's constitutional claims below in large part because it speculated that "requiring CLS to admit gay, lesbian, and non-Christian students" would not "significantly impair[]" the group's "ability to express its views." Pet. App. 54a. If this is a finding of fact, it is clearly erroneous. But more fundamentally, this statement is based on an error of law—on a misunderstanding of what counts as a burden on an expressive organization's ability to express its views, and a misunderstanding of the judicial role in assessing the needs and practices of a religious organization.

Giving nonadherents the right to an equal role in running the organization renders CLS's ability to survive and control its message dependent on how other students will choose to respond. Either no outsiders will join CLS, in which case the College's Policy is essentially symbolic and does not serve any concrete legitimate purpose, or the opposite: Heterodox or hostile students will join and seek to assume leadership positions, in which case CLS's message will be distorted, and quite possibly sabotaged. See *Hsu*, 85 F.3d at 861 (describing as reasonable the "concern that the Club risked facing non-Christian leadership

and might be taken over by students inimical to the Club's purpose") (quotation omitted).

Contrary to the district court, this Court has recognized the importance to religious groups of the right to organize around shared beliefs. Worship, prayer, the singing of hymns and spiritual songs, and religious reflection are communal activities, acts of common faith among co-believers. As Justice Brennan explained in his concurring opinion in *Amos*: "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community." 483 U.S. at 342. That community "represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." *Ibid.* Religious groups, in other words, are not simply debating societies (unless they choose to be). And the very freedom to insist that its leaders share its beliefs is the "means by which a religious community defines itself." *Ibid.* To require a religious group like CLS to admit nonbelievers is a severe burden on its freedom of religious association.

The same is true of requiring CLS to accept leaders who do not follow its moral teachings. Actions speak louder than words, and there are few developments more corrosive to a religious group than to discover that a leader is violating its precepts on the side. "CLS's beliefs about sexual morality are among its defining values; forcing it to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist." *Walker*, 453 F.3d at 863. Even if CLS could somehow ensure that nonbelievers did not explicitly stray too far from the group's orthodox message, the group is entitled to insist that its leaders "teach * * * by example." *Dale*, 530 U.S. at

655. And common sense teaches that many would think CLS hypocritical if it claimed to stand for its views on extramarital sex while its voting members and officers were unrepentantly engaged in it.

Respondents may argue that even if nonadherents join the CLS chapter, they likely would not be chosen for leadership positions and thus would not greatly affect the group's direction or message. This overlooks practical realities. First, many leadership and speaking roles, such as conducting Bible studies and representing the group at the Organizations Fair, are rotated among the voting membership. If nonadherents must be allowed to vote and lead, they will have a right to serve in these roles. Members of Outlaw could join CLS and lead Bible studies on why the Bible is a hate-filled and homophobic book, and a Muslim discussion leader could turn the conversation toward the Prophet Mohammed.[5] For CLS to respond by taking away the right of every voting member to lead Bible studies would change the structure and practices of the organization in important ways.

Second, as we have noted, a group as small and controversial on some campuses as CLS is vulnerable to sabotage or takeover by a relative handful of hostile fellow students, who need only show up at a meeting *en masse* and exercise their rights to join and vote.

Third, the requirement of nondiscrimination applies not just *ex ante*, to prevent CLS from initially excluding nonadherents, but to its subsequent deci-

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[5] At Washburn University, CLS's recognition was revoked after a Mormon student sought to lead the chapter's Bible study. *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law* v. *Farley*, No. 04-4120 (D. Kan. Sept. 16, 2004).

sions. Presumably it would be impermissible under the Policy for CLS to systematically deny leadership positions to non-Christians, after they had joined. And Hastings has asserted that investigations into such decisions would be constitutionally permissible. J.A. 30-32.[6]

Finally, even if there were doubt about the need for CLS to insist that its voting members adhere to the Statement of Faith, courts must give "deference to an association's assertions regarding the nature of its expression * * * [and its] view of what would impair its expression." *Dale*, 530 U.S. at 653. The district court erred in thinking it knows better than the group what rules the group needs to maintain its identity.

4. CLS's membership rule is entitled to constitutional protection as speech rather than conduct.

To justify employing a less exacting standard of review, the district court characterized CLS's enforcement of membership criteria as "conduct" rather than expression of "CLS's philosophies or beliefs." Pet. App. 44a. That approach is inconsistent with this Court's cases. See *Hurley*, 515 U.S. at 572-573 (applying strict scrutiny in forced-inclusion cases); *Roberts*, 468 U.S. at 624 (same); *Democratic Party,* 450 U.S. at 108 (same).

CLS's leadership and voting membership requirements are not "impermissible conduct" in the

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[6] At Ohio State, litigation commenced when members of Outlaw discovered that they could not expect to serve as leaders, even if they joined. *Christian Legal Soc'y* v. *Holbrook*, No. C2-04-197 (S.D. Ohio).

sense that the term is used in *Healy*. 408 U.S. at 189. They do not "pose[] a substantial threat of material disruption," "interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Ibid.* Rather, membership rules are the means by which an expressive association defines itself, establishes its identity, and controls the content of its speech. The rights of expression and association thus "overlap and blend; to limit the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U.S. 290, 300 (1981). Indeed, where one of the central purposes of a noncommercial expressive association is the communication of a moral teaching, its choice of who will formulate and articulate that message is treated as the functional equivalent of speech itself. *E.g.*, *Dale*, 530 U.S. at 647-648, 659.

A special feature of this case makes it particularly clear that application of the College's interpretation of the sexual orientation prohibition to CLS is an infringement on the rights of *belief*. In accordance with traditional Christian teaching, the CLS chapter does not exclude all those who engage in what they regard as immoral conduct, sexual or otherwise: The CLS membership policy excludes only those who do so "unrepentantly," which is religion-speak for those who do not regard the conduct as wrong or sinful and resolve to cease acting in that manner.[7] Thus, far from excluding people on the basis of orientation, the CLS Statement of Faith excludes them on the basis of

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[7] CLS does not exclude persons simply for having sinned, or it would have no members at all. See *Romans* 3:23 ("For all have sinned and fall short of the glory of God.").

a conjunction of conduct and the *belief* that the conduct is not wrong. CLS's conviction about nonmarital sex may be anathema to the Hastings authorities, but it is a constitutionally protected belief, and a government body like Hastings has no right to penalize anyone for adhering to it.

C. Hastings' Policy deprives CLS of rights based on the group's viewpoint.

As this Court's cases make clear, the most "egregious" of all First Amendment violations is for the state to discriminate among speakers on the basis of their viewpoint or opinion. *Texas* v. *Johnson*, 491 U.S. 397, 416-417 (1989); *Rosenberger*, 515 U.S. at 830; *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 391-392 (1992). Hastings' written Policy does just that. Such viewpoint discrimination warrants the most exacting possible level of constitutional scrutiny, and has never been upheld by this Court.

1. The "religion" provision of the Nondiscrimination Policy is viewpoint-discriminatory.

Hastings' written Policy forbids those to whom it applies to discriminate on the basis of a familiar list of protected categories: race, color, religion, national origin, ancestry, disability, sex or sexual orientation.[8] The salient fact about this list is that the only forbidden ground that is based on belief or opinion is *religion*.

The prohibition on religious discrimination is untroubling, indeed commendable, as applied to gov-

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[8] This entire controversy would have been averted if the Policy had been applied only according to its terms—to the College itself and "Hastings-sponsored" activities. See *supra* at 9.

ernmental institutions, businesses, and even nonreligious clubs. But when applied to groups that are organized around shared religious beliefs, this prohibition is unfair, counterproductive, disabling, and unconstitutional.

Of all the various opinion-based organizations at Hastings, religious groups are the only ones stripped of their right to control their message by controlling their leadership.[9] Hastings' written Policy does not tell the environmentalist club to let climate change skeptics conduct its discussion groups. Nor does it tell Respondent Outlaw to let supporters of Proposition 8 take a turn at its podium. As Hastings once admitted, "the Policy on Nondiscrimination permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." J.A. 93.

In contrast, Hastings insists that atheists (for example) or those who understand Christianity differently from CLS must be allowed to lead CLS Bible studies, vote on CLS activities and policies, and represent CLS in the law school community. Under the written Policy, only religious groups are denied the freedom to select leaders based on their beliefs.

The College's Policy is therefore unconstitutional for precisely the same reason the discriminatory policies in *Widmar*, *Lamb's Chapel*, *Good News Club*, and *Rosenberger* were unconstitutional: It places groups organized on the basis of a religious viewpoint at a disadvantage compared to other groups. As in *Rosenberger*: "By the very terms of the [Policy], the

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[9] The argument here applies only to Hastings' written Policy. We address the broader "all-comers" variant of the Policy below.

University * * * selects for disfavored treatment those student [groups] with religious * * * viewpoints." 515 U.S. at 831.

Indeed, Hastings' written Policy is but a thinly veiled recapitulation of the discriminatory policies struck down by this Court in those cases. It is as if the University of Virginia in *Rosenberger* had allowed *Wide Awake* to participate in the student media forum, but only if the publication permitted non-Christian students to flood its pages with their own writings—while allowing every other publication to maintain a consistent point of view. Or as if the University of Missouri–Kansas City in *Widmar* had allowed Cornerstone to meet on campus, but only if it allowed random students to lead the group in worship and Bible study—while permitting every other student group to insist that those who lead their meetings share their core views. The First Amendment does not allow governmental institutions to deny this associational freedom to religious groups, while protecting the rights of everyone else. See Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 64, 67 (Viewpoint-based "selective subsidization" is "more troublesome than a complete absence of public funding," and warrants a "strong presumption of unconstitutionality * * * rebuttable only upon a showing of great need and near-perfect fit.").

It is no answer to say that the written Policy is neutral in that it imposes the same restriction on all groups, and thus does not discriminate based on religion. Essentially the same argument was rejected in *Widmar* and *Rosenberger*. By singling out "religion" as the only ideational ground on which a group

may not constitute itself, the written Policy necessarily (not incidentally) disfavors religious groups.

2. The "sexual orientation" provision, as interpreted, is also viewpoint-discriminatory.

Much the same analysis applies to Hastings' conclusion that CLS violated its Policy against sexual orientation discrimination. As the CLS students explained to the College at the time, CLS actually has no policy excluding anyone on the basis of the person's sexual "orientation." Instead, CLS adheres to the belief—unfashionable at Hastings, but still common among major religious denominations and much of society at large—that Christians should remain chaste until married and then be faithfully monogamous. This is not discrimination based on "orientation"; it is a moral conduct rule, and it applies across the board to both heterosexuals and homosexuals. *Walker,* 453 F.3d at 860 ("CLS's membership policies are thus based on belief and behavior rather than status"). But Hastings has made it clear that it interprets "orientation" as comprising conduct and that it views moral standards based on marital status as discriminatory, thus making it impossible for the CLS students to include the nondiscrimination pledge in their chapter's constitution.

Just as religion is the written Policy's only forbidden ground that is based on belief or opinion, sexual "orientation," as Respondents interpret it, is the only forbidden ground based on *conduct*. Under the written Policy, every other student group is permitted to insist that its leaders conduct themselves in accordance with the group's stated beliefs—that they practice what they preach. The animal rights group need

not permit hunters to seize the group's microphone; the pro-life group need not make an abortion provider its Social Chair.

For Hastings to apply its interpretation of the written Policy to a religious group with a moral conviction opposed to nonmarital sex, without imposing restrictions on the rights of other groups to exclude students based on behavior relevant to their beliefs, "selects for disfavored treatment" those whose beliefs differ from the College on this disputed question. *Rosenberger*, 515 U.S. at 831. That is unconstitutional.

D. When applied to religious groups, Hastings' Policy violates free exercise rights as well.

Hastings' Policy not only infringes CLS's freedoms of speech and association, but also its right to the free exercise of religion.

It is well established that discrimination against religious groups or viewpoints violates free exercise rights. *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 545 (1993). It is also well-established that this rule applies to the denial of benefits in the context of a forum for speech. *Locke* v. *Davey*, 540 U.S. 712, 720 n.3 (2004). Thus, to the extent that the Policy disfavors religious groups, as such, by denying them the right that other opinion-based groups enjoy—the right to confine their leadership to students who share their viewpoint—the Policy violates the principle of *Lukumi*.

Moreover, even if the Policy were construed as nondiscriminatory, it would still violate CLS's right of religious association. As the Court recognized in *Employment Division* v. *Smith,* that right—rooted in both the Free Exercise Clause and the Speech

Clause—protects "assembling with others" for religious purposes. 494 U.S. 872, 882, 877 (1990); see *Amos*, 483 U.S. at 338 (religious organizations' Title VII exemption from religious nondiscrimination law permissibly lifts a regulation that "burdens the exercise of religion."). The right of religious association includes the "right to organize voluntary religious associations" (*Watson* v. *Jones*, 80 U.S. 679, 728 (1871)), to choose the leaders of those associations (*Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976)), and to require "conformity of the members of the [association] to the standard of morals required of them" (*Watson*, 80 U.S. at 733).

Hastings' Policy infringes precisely these rights. The resulting burden on religion is subject to strict and generally fatal scrutiny, particularly where, as here, "a challenge on freedom of association grounds [is] reinforced by Free Exercise Clause concerns." *Smith*, 494 U.S. at 882 (citing *Roberts*, 468 U.S. at 622).

II. Hastings' Nondiscrimination Policy Does Not Justify Denial Of The CLS Students' First Amendment Rights.

Respondents have put forward two different descriptions of their Nondiscrimination Policy. In discussions with the students when they were denied recognition, the Director of Student Services explained that the denial was predicated on CLS's discrimination based on religion and supposed discrimination based on sexual orientation. In their Answer to the Complaint and in their responses to interrogatories, Respondents reiterated these two grounds for denial of recognition. Respondents' explanations are consistent with the list of forbidden grounds for dis-

crimination in the written Nondiscrimination Policy provided to the students when they sought to register. This written Policy forbids discrimination based on religion and sexual orientation, but allows RSOs to have membership and leadership criteria based on any other form of belief and behavior.

Later, in the midst of discovery, Respondents put forward a different account of their Policy, under which RSOs must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." J.A. 221 (Joint Stip. No. 18) (citing Kane Dep.). Neither the written Policy nor the all-comers variant constitutionally justifies excluding CLS from the forum, interfering with its freedom of association, or violating its right to free exercise of religion.

A. Hastings' written policy serves no legitimate, let alone compelling, purpose as applied to religious student groups.

1. Hastings has no interest in preventing religious groups from favoring co-religionists in the context of their religious activities.

Because it is viewpoint discriminatory, Hastings' written Policy is subject to the most exacting constitutional scrutiny. In no variety of forum for speech has this Court ever upheld rules that discriminate against religion. Although eliminating discrimination in some contexts can be a compelling governmental interest (*Roberts*, 468 U.S. at 623), such an interest has been held to override the rights of a private noncommercial expressive association only in cases where enforcement of nondiscrimination statutes "would not materially interfere with the ideas that

the organization sought to express." *Dale*, 530 U.S. at 657 (citing the exclusion of women from the Jaycees, which had no institutional belief inconsistent with the equal participation of women).

More importantly, it is a category error to extend the idea of "eliminating discrimination" based on "religion" to religious associations. This nation has a compelling interest in eradicating racism, along with other badges and incidents of slavery, in all corners of society, private as well as public, see U.S. Const. amend. XIII, and to some extent the same is true of sex discrimination. The government has no such interest, however, in eliminating the desire or ability of co-religionists to flock together. Although the *government* cannot prefer one religion to another, it is not invidious in the slightest for *private religious groups* to do so.

For example, a Talmud study group is not invidiously "discriminating" when it chooses a Jewish discussion leader rather than a Baptist. This is simply the free exercise of religion. And while it would be invidiously discriminatory and wrong (even absent state action) for a white group to exclude African-Americans from leadership posts, the same cannot be said of a Methodist prayer group that excludes Deists, who do not believe in the efficacy of prayer. Indeed, such "discrimination" is among our most highly protected constitutional freedoms. *Amos,* 483 U.S. at 342 (Brennan, J., concurring). Not only does government lack a "compelling" interest in telling religious groups not to favor co-religionists for purposes of their religious activities, but pursuit of such an interest is not even legitimate. *Smith,* 494 U.S. at 882 (intentional state action to suppress religious association violates the core of free exercise).

That is why the federal government and every state, including California, exempt religious societies from laws that would otherwise prevent them from hiring or otherwise choosing leaders on the basis of religion. 42 U.S.C. §§ 2000e-1 & 2000e-2(e)(1) (exempting religious organizations from the religious nondiscrimination provisions of Title VII); Executive Order No. 13279 (exempting religious organizations from the religious nondiscrimination requirement applicable to federal contractors); CAL. GOV. CODE § 12926(d) (exempting religious organizations from law prohibiting religious discrimination in employment); 22 CAL. ADMIN. CODE tit. 22, §§ 98100, 98222 (exempting religious organizations from prohibition on religious discrimination by state contractors and recipients of state funds).

2. Nor does Hastings have a legitimate interest in forcing a private non-commercial expressive group to abandon its moral code.

The same is true of CLS's moral as well as its strictly doctrinal beliefs. Petitioner does not dispute the right of Hastings to include sexual orientation among the categories on which Hastings itself and its sponsored organizations may not discriminate. But the government has no legitimate, let alone compelling, interest in forcing private, non-Hastings-sponsored religious groups to renounce their views that homosexual or other disputed sexual conduct is wrong. This is a diverse country, and its citizens are entitled to disagree about issues of sexual morality. *Dale*, 530 U.S. at 660.

The CLS students are not trying to impose their moral principles on others, but to adhere to those

principles themselves, to associate with others who share them, and to express those principles to the rest of the student body. We cannot imagine why government in a free society would think itself entitled to interfere with that. If an Hibernian society (which has no discernible set of principles other than the celebration of Irishness) has the right to prevent gay rights groups from carrying banners in their parade, see *Hurley*, 515 U.S. at 566, surely a religious group with a well-established set of convictions regarding human sexuality has the right to prevent people who conduct their lives (unrepentantly) in violation of those convictions from leading its Bible studies or voting on which speakers it should invite to campus.

Indeed, this is an *a fortiori* case under *Dale*. That case was difficult because (1) it was disputable whether the principles of the Boy Scouts were genuinely opposed to homosexual conduct, and (2) the Boy Scouts provided important services to boys and young men (summer camps, first aid instruction, hiking experiences, merit badge work, and the like) that are valuable independently of any moral teaching the group might impart. Here, there is no possible room for doubt that CLS's traditional teaching is opposed to nonmarital sex, including homosexual sex. And CLS is purely an expressive association. With the arguable exception of its occasional dinners, which (like its other activities) are open to all Hastings students, CLS does *nothing but* engage in speech: conducting Bible studies, facilitating attendance at worship, and sponsoring speakers. One can conceive how the losing side in *Dale* might argue that the state had a legitimate interest in ensuring that everyone could participate in the valuable activities of the Boy

Scouts organization. Here, by contrast, it is absurd to say that non-Christians and those who do not share CLS's views on sexual morality should be able to lead the organization, vote on its policies, select its officers, and conduct its Bible studies.

To the extent that Hastings seeks to justify its exclusion of CLS as a necessary incident to a broad policy of nondiscrimination, the Court should evaluate that claim by comparison to other comparable contexts. Title VII does not prohibit discrimination based on sexual orientation, and proposals to expand it to sexual orientation are invariably accompanied by exemptions for religious groups with conflicting moral views. *E.g.*, Employment Non-Discrimination Act of 2009, H.R. 3017 § 6. Every state law extending nondiscrimination protections to sexual orientation has some exemption for religious groups.[10] The same is true of most university student-group regulations. As these examples show, it is not necessary to force religious groups to violate their religious tenets in order to maintain robust protections against discrimination.[11]

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[10] See COLO. REV. STAT. §§ 24-34-401(3), 24-34-402(7), 24-34-601(1); CONN. GEN. STAT. § 46A-81p; 19 DEL. CODE § 710(6); D.C. CODE § 2-1402.41(3); HAW. REV. STAT. § 515-4b; 775 ILL. COMP. STAT. §§ 5/5-102.1(b), 25/3; IOWA CODE §§ 216.6(6)(d), 216.7(2)(a), 216.9(2), 216.12(1)(a); MASS. GEN. LAWS 151B §§ (1)(5), (4); 5 ME. REV. STAT. §§ 4553(10)(G), 4602; MD. CODE, STATE GOV'T § 20-604(2); MINN. STAT. § 363A.26(2); NEV. REV. STAT. § 613.320; N.H. REV. STAT. § 354-A:2(XIV-C); N.J. STAT. §§ 10:5-5(n), 10:5-12(a); N.M. STAT. § 28-1-9(C); N.Y. EXEC. LAW § 296(11); OR. REV. STAT. § 659A.006(3), (5); R.I. GEN. LAWS §§ 28-5-6(15), 34-37-3(16); 9 VT. STAT. § 4502(L), 21 VT. STAT. § 495(e); WASH REV. CODE §§ 49.60.040(2), (11); WIS. STAT. § 111.337(2)(am).

[11] See also William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and*

B. Hastings' alternative "all comers" account of its Policy also does not constitutionally justify the denial of recognition to CLS.

Notwithstanding the terms of its written Nondiscrimination Policy, which proscribes only a finite set of grounds on which those to whom it applies may not discriminate, Respondents maintain that registered student groups must permit any interested Hastings student to join and to seek leadership roles. As described in Joint Stipulation No. 18:

> Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs. See Kane Depo. at 49; Chapman Depo. at 29-31. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization. See Kane Depo. at 50.

J.A. 221. As the internal citations indicate, this stipulation is based entirely on the depositions of the Dean and the Director of Student Services. The all-comers policy has never been incorporated in the College's written Nondiscrimination Policy and, so far as the record shows, has never been applied to any student group. At an earlier stage of this litigation,

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Equality in American Law, 106 YALE L.J. 2411, 2456 (1997) ("Gay rights advocates put [the religious exemption] provision in ENDA, and it should be retained."); Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006).

Hastings insisted that it "permit[ted] political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." J.A. 93. Indeed, the record shows that the bylaws of a number of registered student groups limit their members or leaders to students who share their goals or beliefs. See *supra* at 12-14.

1. This case should be decided under the rules applicable to the forum at the time.

Respondents' shift in its description of its practices is a tacit admission that its written Policy is constitutionally indefensible. Evidently the College came to realize during discovery that it cannot constitutionally burden religious groups with restrictions not imposed on any others.

The usual rule is that once the government has set the boundaries of its forum, it must respect them. *Rosenberger*, 515 U.S. at 829; *Walker*, 453 F.3d at 866 (noting that when a forum is "declared open to speech ex ante," participants "may not be censored ex post" when government decides the speech is not welcome) (citation omitted). As the record shows, the written Policy was in effect when the forum was opened to speech. Moreover, the Director of Student Services handed the CLS vice president a copy of the written Policy when she inquired about registration, and referred to the written Policy when explaining the basis for denial. The first mention of an all-comers policy arose during depositions. Thus, to the extent that the all-comers policy differs from Hastings' written Policy, it is the latter, not the former, which should govern the constitutional analysis.

2. The all-comers policy infringes the rights of all student groups at Hastings without any discernible reasonable purpose.

In any event, the "all-comers" variant of the Policy is no less unconstitutional than its original written form. The only difference is that, whereas the original written Policy infringed the First Amendment rights of only some student expressive associations, the all-comers policy infringes the rights of all such groups.

It is well settled that "[r]egulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest." *Clingman* v. *Beaver*, 544 U.S. 581, 586-587 (2005); *Dale*, 530 U.S. at 648, 657-658. Moreover, these principles apply with full force to interference with students' "rights of speech and association on the campus," which "must be subjected to the level of scrutiny appropriate to any form of prior restraint." *Widmar*, 454 U.S. at 268 n.5 (citing *Healy*, 408 U.S. at 181, 184).

As we have shown, application of Hastings' Policy to CLS imposes a severe burden on CLS's associational rights. See *supra* at 26-35. The burden is no less severe if imposed via an all-comers rule rather than the written Policy. It follows that strict scrutiny applies to the all-comers policy as well. In this context, however, Hastings' all-comers policy is not even reasonable, let alone compelling.

Far from being compelling, the all-comers policy is frankly absurd. The notion that the Democratic Caucus should not be able to "discriminate" against Republicans in the selection of officers or discussion

group leaders is risible. In her deposition, Dean Kane suggested that the purpose is to ensure that students of different beliefs and interests mingle together. J.A. 346. That is all well and good, but surely no one thinks that all people should mingle together randomly at all times. Groups are built around common interests and beliefs—interests and beliefs that are typically less than universal. Free association, including the right to exclude, better facilitates the goal of promoting an exchange of ideas; it protects the seedbeds where ideas emerge and mature in the first place. There can be no diversity of viewpoints in a forum if groups are not permitted to form around viewpoints.

As compared to the written Policy, the all-comers policy is vastly more intrusive, yet it serves no discernible reasonable purpose. Whatever interest a public university may have in enforcing a properly structured, viewpoint-neutral rule against invidious discrimination, it has no good reason to prevent students from associating on the basis of noninvidious differences such as shared interests or beliefs.

Hastings' lack of a compelling interest is confirmed by the fact that the College never had such a policy in the past and (so far as the record shows) has never put this one into effect. Moreover, according to our research, few if any other public law schools have seen fit to adopt such a policy. If other schools can get along without an all-comers policy, we would suggest that it is not compelling at Hastings. Indeed, it appears to be little more than a pretext for the viewpoint discrimination embodied in the written Policy, which Respondents evidently found too difficult to defend.

3. The all-comers policy disadvantages small and unpopular groups.

It is not even clear that the all-comers policy is viewpoint neutral. Although nominally neutral, it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream. Allowing all students to join and lead any group, even when they disagree with it, is tantamount to establishing a majoritarian heckler's veto. It has a homogenizing effect, flattening diversity of opinion, disadvantaging outliers, and potentially turning every group into an organ for the already-dominant opinion. See *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 304 (2000) ("[T]he majoritarian process * * * guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."); *Board of Regents* v. *Southworth*, 529 U.S. 217, 235 (2000) ("Access to a public forum * * * does not depend upon majoritarian consent.").

As this Court has observed, conditions on government benefit programs that have the systematic effect of skewing debate in a particular direction "implicate[] central First Amendment concerns." *Legal Services Corp.* v. *Velazquez,* 531 U.S. 533, 547 (2001). The government "cannot recast a condition * * * as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Ibid.* For example, a university caught up in anti-war fervor, as some have been, cannot keep student chapters of the VFW or American Legion from participating in its speech forum by forcing it to admit all students. Similarly, a university cannot exclude a student chapter of the ACLU by barring groups that engage in litigation—claiming this is an

activity that it does not wish to support. *Univ. of So. Miss. Chapter of the Miss. Civil Liberties Union* v. *Univ. of So. Miss.*, 452 F.2d 564 (5th Cir. 1971).

Thus, in *Velasquez*, the Court invalidated limits on legal services funding that forbade legal services lawyers from bringing constitutional challenges to statutes. Although this restriction was nominally viewpoint-neutral (it applied to all possible constitutional challenges, from any perspective), in practice it "operate[d] to insulate current welfare laws from constitutional scrutiny." *Velasquez*, 531 U.S. at 547. Hastings' all-comers policy—which would work to the advantage of large, politically dominant groups and to the injury of small, politically vulnerable groups—suffers from the same infirmity.

4. The all-comers policy is unreasonable in light of the purpose of the forum.

Even if the all-comers policy could be viewed as neutral toward all viewpoints, it cannot be deemed "reasonable in light of the purpose served by the forum." *Cornelius* v. *NAACP Leg. Def. Fund*, 473 U.S. 788, 806 (1985). This requirement is not the same as a rational basis test, which permits restrictions based on any rational basis at all. *Ibid.*; see also *Tucker* v. *California Dep't of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996). Rather, "the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-651 (1981). The purpose of Hastings' forum is clearly set forth in the University policy: "to ensure an ongoing opportunity for the expression of a variety of viewpoints."

Pet. App. 82a. The question, then, is whether an all-comers policy reasonably relates to the fostering of such an opportunity.

If taken seriously, the all-comers policy would frustrate, not promote, the purposes of the forum. Not only would it allow Republicans to undermine the activities of the Democratic Caucus and Zoroastrians to take over CLS, but it would make it impossible to have a Graduating Class association (which would have to admit first years), a vegetarian club (whose menus could be voted upon by carnivores), a tutoring program targeted to economically disadvantaged students (which would have to be open to the rich), or even an intramural football team (which could not limit its captains to those skilled in the game).

A "variety of viewpoints" is far more likely to be achieved when students are allowed to sort themselves out by interest and viewpoint—Republicans in one club, Democrats in another; Muslims in one organization, Lutherans in another. Without such sorting, all viewpoints are blurred. The Democratic Caucus becomes the Bipartisan Caucus; the Christian, Jewish, and Muslim clubs become the Ecumenical Society; and every other group organized around a belief becomes a Debate Club. Each group becomes no more than its own diverse forum—writ small. The all-comers rule thus defeats the very purpose of recognizing any group *as a group* in the first place. Preventing students from organizing around shared beliefs does not foster a robust or diverse exchange of views.

III. These First Amendment Principles Apply To The Denial Of Generally Available Benefits Within The Context Of The Campus Forum.

A. The government may not penalize the exercise of a group's constitutional right by denying the benefit of access to a forum to which the group is constitutionally entitled.

It is no answer to say, as did the district court (Pet. App. 42a), that these constitutional principles do not apply because the Hastings policy does not force CLS to admit non-adherents to its rolls, but "merely" denies the group access to public facilities and benefits. That is an old argument (see *McAuliffe* v. *Mayor of New Bedford*, 29 N.E.2d 517, 517 (Mass. 1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.")), and it has long been rejected by this Court. *O'Hare Truck Serv., Inc.* v. *City of Northlake,* 518 U.S. 712, 716-717 (1996). Permitting government to condition benefits on the sacrifice of constitutional rights "would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible." *Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972) (quotation omitted); see also *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); William Van Alstyne, *The Demise of the Right-Privilege Doctrine in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

Indeed, Hastings' Policy is doubly illegitimate, because the penalty it imposes for exercising one constitutional right (the freedom of association) is the

forfeiture of another constitutional right (equal treatment within a forum for speech). If it is true, as this Court has stated unanimously, that "government may not deny a benefit to a person on a basis that infringes his constitutionally protected * * * freedom of speech even if he has no entitlement to that benefit," it must be doubly true that the government may not deny such a benefit when the person is constitutionally *entitled* to that benefit. *FAIR*, 547 U.S at 59. It cannot be a "reasonable" limitation on the constitutional right to participate in a forum to require speakers to relinquish other constitutional rights in order to enter.

The district court's argument also flies in the face of this Court's long line of cases upholding the right of unpopular or disfavored student groups to participate on an equal basis in speech forums on public university campuses, see *Healy*, 408 U.S. at 184, *Widmar*, 454 U.S. at 269-270, *Rosenberger*, 515 U.S. at 830, as well as those involving other public property, see *Hurley*, 515 U.S. at 573-574; *Lamb's Chapel*, 508 U.S. at 392-393; *Mergens*, 496 U.S. at 249-250. This Court would be compelled to overrule all of those decisions if it accepted the district court's argument that government can require waiver of speech or association rights as the price of access to public facilities, parade permits, campus participation, or other benefits of an open forum.

B. Equal access principles apply to funding in the context of a forum for speech.

The same principles apply to the disbursal of funds where "the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views

from private speakers." *Rosenberger*, 515 U.S. at 834; *Southworth*, 529 U.S. at 229.

Eligibility to apply for funding for certain activities is one of the incidents of RSO status at Hastings. Petitioner's complaint did not seek funding for any particular activity, but it did seek recognition and the attendant benefits; and if that relief is granted, CLS would be eligible, going forward, to apply for funding of any otherwise eligible activities. J.A. 80-81. Insofar as Hastings maintains that CLS is barred from eligibility to apply for any sort of funding, that argument is inconsistent with this Court's decisions.

The government generally has considerable latitude to decide how to expend the citizens' tax dollars, but that latitude does not extend to the use of student activities fees that are collected from all students, including CLS members, and dispensed for the purpose of fostering diverse activities that are initiated by students and not by the government. *Southworth*, 529 U.S. at 229. In that context, equal access principles prevail. *Rosenberger*, *supra*.

In evaluating selective funding, this Court has distinguished between two categories. The first comprises programs, epitomized by the student activities fund in *Rosenberger*, whose purpose was to "indiscriminately 'encourage a diversity of views from private speakers'" or allocate benefits objectively to all speakers on a nonselective basis. *Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 586 (1998) (quotation omitted). In this category, the government's freedom to pick and choose recipients is circumscribed by the First Amendment, and viewpoint-based selectivity is subject to the strictest scrutiny. Accord *id.* at 588-589 (Scalia, J., concurring) (agree-

ing that the government may not engage in selective or discriminatory funding where the funding program is a limited public forum).

The second category comprises both (1) programs (like that in *Finley*) where, by the nature of the program, the government "may decide to fund particular projects for a wide variety of reasons" and must do so on the basis of subjective evaluations of content, 524 U.S. at 585, and (2) programs in which the government uses subsidies as a means of promoting its own viewpoint. See *Velazquez,* 531 U.S. at 541 (explaining subsidy cases such as *Rust* and *Regan* on the latter ground). In this category, the government "has wide latitude to set spending priorities" and "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Finley*, 524 U.S. at 587-588.

There is no need to delve into this dichotomy in detail, because this case falls squarely within the first category. See *Southworth*, 529 U.S. at 229. Indeed, Hastings' RSO scheme is identical in all relevant respects to the University of Virginia's program in *Rosenberger*. Here, as there, the entire purpose of the funding, as of the provision of meeting space and access to communications, is to facilitate and encourage "a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834; see Pet. App. 82a. Because any funding in this case is incidental to a "forum for speech," *Davey*, 540 U.S. at 720 n.3, the constitutional principles applicable to funding are the same as those applicable to the provision of meeting space.

* * * * *

Under a proper understanding of the First Amendment, this case is most emphatically *not* a clash between religious freedom and rights pertaining to sexual orientation. Religious groups and gay rights groups share common ground in the need for freedom of association. Both are vulnerable (in different parts of the country) to the hostile reactions of university administrators and fellow students. Both can pursue their objectives best if free to decide for themselves who will lead and speak for them.

On the other hand, if Respondents were to prevail in this case, it *would* provoke a collision between religious freedom and rights of sexual orientation. That would mean, in essence, that when sexual orientation is added to the list of forbidden grounds under nondiscrimination laws, religious and other groups that adhere to traditional moral views could be driven from the public square in the name of enforcing nondiscrimination. This would raise the stakes in the political battles over sexual orientation discrimination to a dangerous extent. It would be far better to adhere to the framers' wisdom of "live and let live" under the First Amendment than to treat religious and sexual orientation discrimination laws as a rationale for ostracizing dissenters.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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