

No. 08-1371

In the

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE 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 *AMICI CURIAE* AMERICAN CENTER FOR
LAW AND JUSTICE, BRIDGET MERGENS, JONATHAN
WILLIAMS, WIDE AWAKE PRODUCTIONS, CHOOSE HIM,
FELLOWSHIP OF CHRISTIAN ATHLETES, CAMPUS
CRUSADE FOR CHRIST, INTERVARSITY CHRISTIAN
FELLOWSHIP, CAMPUS BIBLE FELLOWSHIP
INTERNATIONAL, CHI ALPHA CAMPUS MINISTRIES,
YOUNG LIFE, THE NAVIGATORS, REJOYCE IN JESUS
MINISTRIES, INC., FELLOWSHIP OF CATHOLIC
UNIVERSITY STUDENTS, ALPHA DELTA CHI, AND
ALPHA GAMMA OMEGA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it held, directly contrary to the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), that the Constitution allows a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.

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INTEREST OF *AMICI CURIAE*¹

The American Center for Law and Justice (“ACLJ”) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for *amici* in cases involving a host of constitutional issues, primarily under the First Amendment. In particular, ACLJ Chief Counsel Jay Alan Sekulow argued before this Court the equal access cases of *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). ACLJ attorneys have also litigated a number of equal access cases in the lower courts.

Bridget Mergens was one of the plaintiffs in the *Mergens* case. Pastor Jonathan Williams was a plaintiff in the *Widmar v. Vincent*, 454 U.S. 263 (1981), equal access case.

Wide Awake Productions (“WAP”) produces Wide Awake, the journal at issue in *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995), and was a plaintiff in that case. CHoosE Him (Christian Hoos Exalt Him) is a Christian a capella singing group at the University of Virginia, founded in 1995, that combines evangelism with

¹ The parties have consented to the filing of this brief in letters being filed herewith. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

singing. Recognizing the importance to its ministry of having members not only embrace but personally witness to Gospel values in their lives, CHoosE Him limits membership to professing Christians. The University of Virginia has a non-discrimination policy that generally prohibits certain student groups (CIOs or FOs) from discriminating on the basis of, *inter alia*, religion, but also includes a proviso: “Notwithstanding these requirements, the CIO or FO may restrict its membership based on an ability to perform the activities related to the organization’s purpose.” Policy: Terms and Conditions for Contracted Independent Organizations and Fraternal Organizations, Part II(6) (available at <https://policy.itc.virginia.edu/policy/policydisplay?id=STAF-002>). *See also* SAF Guidelines, at 3 (available at https://atuvanet.student.virginia.edu/files/saf_guidelines.pdf). Under that proviso, WAP limits editorial positions to those who share its Christian viewpoint, and CHoosE Him enforces its religious restrictions on its membership.

The Fellowship of Christian Athletes, Campus Crusade for Christ, the InterVarsity Christian Fellowship, Campus Bible Fellowship International, Chi Alpha Campus Ministries, Young Life (through its Young Life College program), the Navigators, ReJOYce IN JESUS Ministries, Inc., and the Fellowship of Catholic University Students (FOCUS) each operate Christian campus ministries across the nation.

Alpha Delta Chi is a national Christian sorority. Alpha Gamma Omega is a national Christian fraternity.

Amici have encountered resistance, at various public school campuses, to organizational recognition or equal benefits based upon their supposed violation, by insistence upon religious standards, of official non-discrimination policies. Each of the *amici* recognize the importance of having leadership, and the authority to select leadership, vested in individuals who personally share the principles that guide a religious ministry.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly thirty years, this Court has recognized and enforced a fundamental right of religious groups to enjoy equal access to public forums created by government entities. Despite that case law, the University of California, Hastings College of the Law (“Hastings”) denied access to the Christian Legal Society (“CLS”) because CLS requires its officers and members to adhere to the *religious* principles that define CLS as a *religious* group. By upholding Hastings’ exclusion of CLS, the Ninth Circuit has set forth a formula for educational institutions to deny equal access to religious groups and evade this Court’s precedents.

Religious groups by their nature embrace religious principles and, as a matter of organizational identity and coherence, will normally require adherence to such principles as a criterion for membership and certainly for leadership. This is not “discrimination” but rather part and parcel of what defines them as religious groups. Wooden application of religious “non-discrimination” policies therefore forces religious groups to choose between their religious identity and access to the forum. That “choice” is an unconstitutional one between yielding to government intermeddling and no access at all. Far from a permissible condition on benefits, this is a choice that the government, under the Religion Clauses, has no business imposing on religious groups.

A religious non-discrimination policy necessarily disfavors religious expression and religions that depend on meaningful membership and leadership criteria. Indeed, it makes adherence to *religious* principles the only illegitimate belief basis for group organization. By definition, that constitutes viewpoint discrimination.

The Court's precedents make clear that non-discrimination policies plainly implicate First Amendment associational rights, even for non-religious groups. But government intrusion into leadership and membership qualifications for *religious* groups, especially imposition of a government condition of religious "non-discrimination," raises constitutional concerns beyond associational rights. A policy of non-discrimination *by the government* on the basis of religion preserves the neutrality required by the Religion Clauses. The government, after all, has no legitimate basis for imposing a religious test. But that same policy becomes a violation of the Religion Clauses if it is imposed on *private* religious groups. The government simply has no legitimate basis for denying religious groups the ability to impose their own religious standards.

ARGUMENT

I. The Ninth Circuit's Reasoning Would Allow Non-discrimination Policies To Eviscerate This Court's Landmark Equal Access Decisions.

In no fewer than five cases, this Court has held that state-run educational institutions must provide religious groups the same access to school

facilities received by groups with secular interests. Equal access promotes virtually every clause of the First Amendment. It protects the free speech rights of religious groups while serving the constitutional requirement of government neutrality toward religion. The Ninth Circuit's reasoning threatens to undermine this longstanding jurisprudence by allowing schools to require student religious groups to comply with religious non-discrimination policies as a condition of receiving access to campus facilities. Religious organizations, by their nature, "discriminate" in the realm of religious *ideas*. If the group's leaders and members do not in turn embrace those *ideas*, the group has no coherent identity. Making a Jewish group welcome Muslim officers, for example, simply denies the group's identity. It follows that a religious non-discrimination policy, by its nature, constitutes forbidden discrimination against religion. The same holds true for policies requiring non-discrimination as to conduct incompatible with the group's religious norms. Requiring a Jewish kosher group not to discriminate on the basis of diet obviously nullifies the group's religious standards. Far from being neutral, such policies burden religious groups by prohibiting membership criteria essential to expressing a religious message and preserving religious identity.

A. A Long Line Of This Court's Cases Recognize A Fundamental Right to Equal Access.

1. Religious groups have always enjoyed a right to equal access to traditional public forums, such as public parks. *See Niemotko v. Maryland*,

340 U.S. 268, 272-73 (1951). And it has been clear for nearly thirty years that the principle of equal access for religious groups extends to nontraditional public forums created by state-run educational institutions. *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, the University of Missouri at Kansas City (“UMKC”) encouraged an active campus life by opening its facilities to over 100 registered student groups. *Id.* at 265. One of those student groups, an evangelical Christian group known as Cornerstone, initially received the same access to facilities accorded to all students. *Id.* But in 1977, citing a university ban on the use of facilities “for purposes of religious worship or religious teaching,” UMKC denied Cornerstone access to campus facilities. *Id.* at 265.

This Court struck down UMKC’s ban on religious activities and speech in campus facilities. By “creat[ing] a forum generally open for use by student groups,” UMKC “assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.” *Id.* at 267. Cornerstone’s proposed use of the forum—for religious worship and discussion—constituted “forms of speech and association protected by the First Amendment.” *Id.* at 269. As a result, UMKC’s content-based singling out of Cornerstone could be justified only if “necessary to serve a compelling state interest and [if] narrowly drawn to achieve that end.” *Id.* at 269-70. The Court rejected the notion that compliance with the Establishment Clause supplied this compelling state interest. Instead, the Court held that equal access to a public forum does *not* suggest

government favoritism for religion or have a primary effect of advancing religion. *Id.* at 273-74.

Widmar was a landmark decision, and its principles have been reaffirmed time and again. Indeed, Congress endorsed *Widmar*'s equal access principle in passing the Equal Access Act in 1984. *See* 20 U.S.C. §§ 4071-4074. The Act prohibits public secondary schools from foreclosing access to a "limited open forum" by discriminating on the basis of a student group's religious or other speech. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 235 (1990) (citing 20 U.S.C. § 4071(a), (b)). This Court applied the Act to uphold a high school student's right to form a Christian club and to meet on school premises, *id.* at 247, and repeated *Widmar*'s holding "that an 'equal access' policy would not violate the Establishment Clause," *id.* at 235; *see also id.* at 253. Indeed, the Court underscored that the fundamental distinction between speech the school permits and speech the school itself sponsors was readily grasped by high school students. *Id.* at 250.

2. But while the principle of equal access is easily stated, and its compatibility with the Establishment Clause easily understood, ensuring compliance with this principle has required this Court's continuing involvement. While both this Court and the Congress have readily embraced this principle, many institutions of public education have been slow to accept this Court's teaching. The resulting line of this Court's cases has reinforced the basic guarantee of equal access and extended it to churches, religious publications, and students from kindergarten through the university.

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), a local New York school district made its facilities available to the community, not just to students. Lamb's Chapel, an evangelical church, applied for access to school premises for purposes of exhibiting a film series addressing family and child-rearing issues from a religious perspective. *Id.* at 387. The school district denied the application under a local rule forbidding use of school facilities for religious purposes. *Id.* at 388-89. Accepting the lower courts' assessment that the school district had created a limited public forum, this Court analyzed the exclusion of Lamb's Chapel only for reasonableness and viewpoint neutrality. *Id.* at 392-93. The Court rejected the school district's assertion that the policy was facially neutral because "all religions and all uses for religious purposes are treated alike." *Id.* at 393. The Court stressed that merely treating all religions the same "does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* Accordingly, the exclusion of the film display because of its religious perspective was neither viewpoint neutral nor constitutional. *Id.* at 393-94.

Similar factors were at play in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), in which the University of Virginia had denied funding for a student magazine with a Christian perspective. The Court acknowledged

that content discrimination “may be permissible if it preserves the purposes of that limited forum” but that viewpoint discrimination “is presumed impermissible when directed against speech otherwise within the forum’s limitations.” *Id.* at 829-30. Following *Lamb’s Chapel*, the Court held that the university had discriminated against the magazine’s Christian viewpoint: “Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.” *Id.* at 831.

The Court reaffirmed these principles once again in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). As in *Lamb’s Chapel*, a local New York school district opened its facilities to the community, not solely to student groups. *Id.* at 102. The school district nonetheless denied access to the Good News Club, a private Christian group for children between 6 and 12 years old, because the group engaged in religious instruction. *Id.* at 103-04. The Court held the exclusion of the Good News Club to be unconstitutional viewpoint discrimination, indistinguishable from *Lamb’s Chapel* and *Rosenberger*. *Id.* at 107.²

² In *Lamb’s Chapel*, *Rosenberger*, and *Good News Club*, the Court reiterated *Widmar*’s key holding that affording equal access to religious and non-religious institutions simply does not expose the government to any risk of violating the Establishment Clause. *Lamb’s Chapel*, 508 U.S. at 395; *Rosenberger*, 515 U.S. at 837-46; *Good News Club*, 533 U.S. at 119.

B. The Ninth Circuit's Reasoning Permits An End Run Around This Court's Equal Access Jurisprudence.

From *Widmar* to *Good News Club*, this Court has firmly established religious groups' right to equal access to public forums. The Ninth Circuit, however, has created a loophole. It has held that educational institutions may deny access to religious groups if they "discriminate" on the basis of religion. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649-50 (9th Cir. 2008). Should this approach prevail, it would dismantle this Court's equal access jurisprudence.

1. As an initial matter, under the Ninth Circuit's reasoning, the public educational institutions in this Court's cases almost certainly could have thwarted equal access by the simple expedient of relying on a non-discrimination policy. This takes no great imagination. UMKC could have excluded the worship in *Widmar* based not on exaggerated Establishment Clause fears but on Cornerstone's refusal to allow atheists to hold leadership positions. Likewise, the University of Virginia could have denied funding to the Christian student magazine in *Rosenberger* based on a refusal to permit non-Christians to obtain editorial positions. And the school in *Good News Club* could have prevailed by requiring the club to open its doors to non-Christian instructors.

The potentially pervasive effect of the Ninth Circuit's reasoning is most clearly revealed in *Lamb's Chapel*. There can be no doubt that the evangelical Lamb's Chapel church required at least

some minimal religious adherence by its pastor and other leaders. Had the school district in that case imposed a religious non-discrimination condition on access to the forum, neither Lamb's Chapel nor any other church could have obtained access. That reality conflicts sharply with the basic principle of *Widmar* and subsequent cases that religious institutions cannot be excluded because of their religious nature.

2. More generally, the Ninth Circuit's reasoning provides a formula for denying access to religious groups. Religions, by their nature, exert control over religious doctrine and the conduct of adherents. *See Watson v. Jones*, 80 U.S. 679, 729 (1871) ("It is of the essence of . . . religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance . . ."). Obedience to a non-discrimination policy would compromise these innate aspects of religion and, as a result, would necessarily impose unique and dramatic burdens on religious groups.

It is in the nature of religions to make claims of transcendent truth and to require adherence to such truths. "Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714-15 (1976) (footnote omitted). If ordinary followers are expected to believe in and follow religious dogma, the demand for religious leaders to do so is all the more central. Religious

leaders are entrusted to interpret and communicate religious teachings, both to edify adherents and to convert non-adherents. *See, e.g., id.* at 717. It is indisputable that religions *do not* open the ranks of leadership to everyone, including non-believers. In this respect, religions “exclude” non-adherents on religious grounds. While this can be described as “discrimination” on the basis of religion, government efforts to stamp out such discrimination threaten values at the heart of the Religion Clauses. *See infra* pp. 17-19.

It is also in the nature of religions to prescribe behavioral codes and to demand that adherents refrain from certain conduct inconsistent with such codes. The examples are endless. Kosher and halal dietary laws require abstinence from pork. The Religious Society of Friends has a lengthy tradition of pacifism. Many religious sects insist upon attendance at weekly religious observances and impose codes of sexual morality. These behavioral codes embody religious beliefs and are therefore essential to preserving and propounding a religious message.

3. Because of these inherent characteristics of religion, membership and leadership selectivity are critical pieces of the message espoused by religious organizations. *Cf. Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 574-75 (1995). Moreover, some religions and religious groups will place greater or lesser emphasis on such criteria, often as a matter of religious doctrine. While one group might limit leadership, but not membership, based on a profession of faith, others might insist that

membership be strictly limited to adherents (especially where, as with CLS, members have the power to select the leadership). By eliminating religion as a legitimate leadership or membership criterion, a non-discrimination policy interferes with religious groups and denies the group control over its message. A policy prohibiting student groups from restricting leadership or membership based on religious views therefore has an obvious, powerful, and unique impact on religious groups—an impact that cannot be squared with the concept of equal access.

Applying a *religious* non-discrimination policy to *religious* groups interferes with those groups in ways that are both unique and forbidden by the Religion Clauses.

First, it impermissibly forces the group to serve as a mouthpiece for dissenting or heretical leaders. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.”); *Hurley*, 515 U.S. at 576 (“[W]hen dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”). An organization cannot be compelled to act as a conduit for speech where the speech will be attributed to the organization. *See, e.g., PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980). But a religious non-discrimination policy will have precisely this effect on religious groups alone. The religious views of leaders of a

religious group will be attributed to the group, precisely because it is a religious group. By contrast, the religious views of the presidents of the chess club or motorcycle enthusiast chapter would not be attributed to those organizations.

Second, and related, a religious non-discrimination policy impermissibly limits the ways in which religious groups can respond to dissenting voices. Leaders, once selected, may have a change of heart regarding certain tenets espoused by the group. Non-discrimination policies confound efforts to restore leadership to members who espouse core ideals. In other words, the student Hillel group would not be able to relieve Paul of Tarsus of his chapter leadership after his change of heart during a semester abroad in Damascus. And the student Catholic group would have to sit idly by as Luther nailed his 95 theses to the student lounge door. By preventing a religious group from removing a dissenting leader, the University disables the religious group from defending its beliefs and identity.

4. The inherent need for religious organizations to maintain some degree of religious unity demonstrates exactly why non-discrimination policies run afoul of this Court's equal access jurisprudence. Since *Widmar*, this Court has made clear that educational institutions (and other government entities) may not exclude religious groups because of their religious character or because they engage in religious worship. But it makes no more sense to allow a university to discriminate against religious groups because they engage in religious "discrimination" or impose

religious discipline or apply religious standards. To have any real impact, the overriding principle of *Widmar* and its progeny—that religious groups cannot be excluded on the basis of *espousing* a religious perspective—must also mean that religious groups may not be excluded on the basis of requiring *adherence* to that perspective, for the two are insolubly linked.

It is not a sufficient response to hold up religious non-discrimination as a laudable goal. *See Truth*, 542 F.3d at 649. Preventing the *government* from discriminating on the basis of religion is a laudable goal, one enshrined in multiple clauses of the Constitution. But when the government seeks to prevent religious groups from making distinctions on the basis of religion, it veers into unconstitutional territory. Religious “discrimination” by religious groups is not invidious; it is inherent. And allowing universities to exclude religious groups that insist upon criteria rooted in religion is not meaningfully different from allowing universities to discriminate against religious groups. Simply put, the government has no legitimate interest in ensuring religious indifference by religious groups: “It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.” *Lee v. Weisman*, 505 U.S. 577, 589 (1992); *see also Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First

Amendment protection.”). Thus, the government has no legitimate reason to compel religious organizations to abandon the distinction between orthodoxy and heresy.

C. Imposing A Non-discrimination Policy On Religious Groups Amounts To Forbidden Discrimination Against Religion.

1. The Religion Clauses reflect two sides of the same coin, working together to “mandate[] accommodation, not merely tolerance, of all religions, and forbid[] hostility toward any.” *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *see also McDaniel v. Paty*, 435 U.S. 618, 636 n.9 (1978) (Brennan, J., concurring in judgment) (“[U]nder the Religion Clauses government is generally prohibited from seeking to advance or inhibit religion.”). At a deeper level, these clauses declare “that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.” *Lee*, 505 U.S. at 589. At bottom, the Religion Clauses mandate neutrality with respect to religion and forbid religious coercion.

It is therefore well settled that the government may not discriminate based on religious status or belief. For example, the government may not require officeholders to declare a belief in the existence of God, *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), or foreclose the clergy from serving as a delegate to a constitutional convention, *McDaniel*, 435 U.S. at 629 (plurality opinion). The former impermissibly advances religion; the latter impermissibly inhibits it.

This Court's equal access cases make the same point. Although the schools invoked the Establishment Clause to justify excluding religious groups, it is equal access, not exclusion, that evinces government neutrality toward religion. *Lamb's Chapel*, 508 U.S. at 395; *Rosenberger*, 515 U.S. at 837-46; *Good News Club*, 533 U.S. at 119. Indeed, the educational institutions had it exactly backward: it was the *exclusion* of religious groups due to their religious nature that "risk[ed] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger*, 515 U.S. at 845-46.

Hastings, likewise, gets it backward. Imposing non-discrimination requirements on religious groups does not foster neutrality. While adoption of a policy of *government* non-discrimination against individuals and groups on the basis of religion produces the neutrality that the religion clauses demand, imposing a non-discrimination policy on *private* groups that organize around religious precepts amounts to forbidden discrimination against religion. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 n.15 (1987). "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Lee*, 505 U.S. at 589. A non-discrimination policy obstructs the "preservation and transmission of religious beliefs" in the private sphere, thereby disfavoring religious groups. Precisely for this

reason, government restrictions on the membership criteria of religious groups have *never* found constitutional favor. *See infra* pp. 27-31.

2. In this regard, religion is quite different from race, and constitutional principles inform that difference. Certainly, imposing non-discrimination policies on the basis of immutable characteristics, such as race, can implicate associational interests. *See, e.g., Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). “There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. . . . Freedom of association . . . plainly presupposes a freedom not to associate.” *Roberts*, 468 U.S. at 623.

But even though racial non-discrimination requirements raise associational concerns, they do so while serving equal protection interests. When it comes to imposing non-discrimination policies on the basis of religion on religious organizations, however, there is no constitutional counterweight. The government policy implicates associational interests while directly offending the Religion Clause values discussed above. *See supra* pp. 17-18. In contrast to the government’s legitimate interest in ensuring racial equality, the government simply has no legitimate interest whatsoever in seeing to it that Jewish groups admit Hindus to membership or leadership positions, that Protestants admit Catholics, that Baha’i admit Eastern Orthodox, or any other conceivable example. *See Watson*, 80 U.S. at 730 (“We cannot

decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church.” (citation and quotation marks omitted)).

Government intrusion into church membership and leadership does not reflect the neutrality required by the Religion Clauses. To the contrary, any government effort to require a church to open its leadership ranks to non-believers would exhibit disrespect, if not antipathy, toward religion. More dangerously, the surest way to marginalize a religious group—particularly a minority group—would be to prevent it from defending its theological integrity. *See Goldman v. Weinberger*, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting) (“A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.”).

D. Applying A Non-discrimination Policy To All Groups Does Not Make The Non-discrimination Policy Neutral.

It is no answer for Hastings to suggest that its policy is just a neutral limit that treats all student groups alike. In the first place, the policy is not neutral—religion is one of the stated bases for the policy, and religion is thus singled out without consideration of the unique difficulties a religious non-discrimination principle causes religious groups. More broadly, the policy of non-

discrimination *über alles* is not neutral, but exposes a decided skepticism about the need to differentiate on any basis, including religion, and imposes distinct burdens on religious groups.

1. There is some debate about the extent to which Hastings' non-discrimination policy is limited to a few forbidden grounds for "discrimination," including on the basis of religion, or if it extends more broadly to prohibit all "discrimination" in membership so that no group can maintain coherent membership requirements. *See* Pet. Br. at 12-15. Even if the latter description is accepted, it does not save Hastings' policy.

Presumably, Hastings expects market forces to prevail for most groups such that even a broad non-discrimination policy would have no practical impact. Indeed, absent unusual circumstances, the average student will not attend—let alone seek a leadership role in—the meetings of a group out of line with his or her personal interests or beliefs. Moreover, out of self-interest, the voting membership of a group would almost certainly resist any leadership bid by a person opposed to the group's core ideals. It strains the imagination to believe the rank-and-file membership of the College Republicans would elect to leadership a Democrat.

These market forces expose a serious hole in Hastings' logic. Where such forces prevail, a non-discrimination regulation on membership is at best a facade. It is entirely possible, even likely, that a religious group—like any other idea-oriented group—would maintain a homogeneous leadership simply by not voting non-adherents into leadership

positions. The same is true for any other club; chess club members surely would not elect leaders dedicated to eliminating chess in favor of Chinese checkers.

If market forces simply replicate a world without a non-discrimination policy, the question then becomes why Hastings has an interest in forcing organizations to promise to admit prospective members who have no interest in applying. Such a policy has a practical effect in only two situations. First, it prevents a religious organization with doctrinal reasons for limiting membership and leadership to adherents from signing, as a matter of principle, a non-discrimination pledge and accepting funds, even though the pledge if made would have no practical effect. Second, it may allow opponents of a minority group to exercise a heckler's veto by overwhelming groups with "fake" members. Neither scenario reflects well on the policy.

The market forces fallacy also brings to the fore the fact that Hastings' non-discrimination policy has a particularly destructive impact on some groups. Groups that take their membership criteria seriously face exclusion, unlike groups that rely on collective interest to maintain a cohesive identity. While one religious group may welcome non-adherents to worship as part of an interest in proselytization, other religions may feel limiting membership to adherents is central. Moreover, the policy has a debilitating impact on minority and controversial viewpoints. Small groups are far more vulnerable to infiltration and takeover when lacking the ability to maintain enforceable

organizational boundaries. As applied to small religious clubs, this danger raises historically familiar concerns for minority religious viewpoints: “A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.” *Goldman*, 475 U.S. at 524 (Brennan, J., dissenting).

2. Hastings’ supposedly neutral approach also fails at a more fundamental, theoretical level. The policy of non-discrimination *über alles* is not viewpoint neutral. It reflects an official rejection—at the expense of private groups—of the viewpoint that adherence to organizational principles matters. This is a distinct viewpoint, and the Religion Clauses have a different one. For private groups organized around an expressive message, membership criteria may be essential to the effective advocacy of the group’s “desired *viewpoints*” because each member and especially each leader necessarily shapes that message. *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 13 (1988) (emphasis added); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000); *Hurley*, 515 U.S. at 572. The message of religious groups depends directly on the fealty of members to certain religious beliefs and codes of conduct. *See, e.g., Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 848 (2d Cir. 1996) (prohibiting application of non-discrimination policy where Christian affiliation of club officers was “essential to the

expressive content of the meetings and to the group's preservation of its purpose and identity”).

Hastings' policy also fails because it “proscribe[s] more religious conduct than is necessary to achieve” not only religious neutrality but also viewpoint neutrality. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993) (plurality opinion). Both kinds of neutrality are better served by the possibility of forming other groups as alternatives to CLS. Hastings students may form groups affiliated with other religions or espousing agnosticism or atheism. Likewise, Hastings students who are so inclined may form a religious group committed to open membership and no religious restrictions on leadership. Permitting access to CLS does nothing to prevent students from exploring these other options. Such an approach would not only encourage a diversity of viewpoints but would also be neutral. By contrast, a non-discrimination policy that permits only groups with no religious membership requirements has plainly taken a non-neutral stance.

II. State Efforts To Regulate The Membership And Leadership Criteria Of Religious Organizations Raise Problems Under The Religion Clauses Above And Beyond More General Associational Interests.

The First Amendment protects a “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts*, 468 U.S. at 622. Interference with the membership criteria of private groups plainly implicates those

associational rights. State regulation of the leadership and membership qualifications for *religious* groups, especially on religious grounds, runs afoul of constitutional church-state barriers above and beyond those groups' associational rights. Because the government may not directly interfere with leadership and membership criteria of religious groups, neither may it condition access to public benefits on compliance with a religious non-discrimination policy.

A. The Imposition Of Non-discrimination Requirements Raises Associational Concerns Even When They Are Imposed On Non-religious Groups.

“Freedom of association . . . plainly presupposes a freedom not to associate.” *Roberts*, 468 U.S. at 623. When the government regulates the membership criteria of private groups, it impedes associational rights. It follows that requiring private groups to comply with a non-discrimination regulation inherently impinges on the “freedom not to associate.”

This Court has twice struck down non-discrimination laws that interfered with *non-religious* private groups' right of expressive association. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, the Court held that Massachusetts could not require the private organizer of Boston's St. Patrick's Day parade to allow a group of homosexuals to participate in the parade. Because “every participating unit affects the message conveyed by the private organizers,” 515 U.S. at 572, mandating

participation by an unwelcome group unconstitutionally deprived the parade organizer of its “autonomy to choose the content” of its message, *id.* at 573. The Court reaffirmed these principles in *Boy Scouts of America v. Dale*. In *Dale*, the Boy Scouts asserted a First Amendment right of expressive association in the removal of an openly homosexual scoutmaster. 530 U.S. at 645. The Court agreed because the presence of a homosexual scoutmaster “would, at the very least, force the organization to send a message” that it accepts homosexual conduct. *Id.* at 653.

Even in cases where the Court has upheld non-discrimination laws that applied to private groups, it has acknowledged that the groups possessed associational interests. *See, e.g., Roberts*, 468 U.S. at 628; *Duarte*, 481 U.S. at 549. Religious groups have at least the speech-related associational rights possessed by other private organizations. *Widmar*, 454 U.S. at 273 n.13. Even for non-religious speakers, the government may not force a speaker to propound a message with which it disagrees, lest “the government . . . require speakers to affirm in one breath that which they deny in the next.” *Hurley*, 515 U.S. at 575-76. That principle surely has greater force when the speaker is a religious group espousing a belief about ultimate reality. If anything, religious groups have additional associational rights, deriving from the Religion Clauses. *See Roberts*, 468 U.S. at 622. At a minimum, the Religion Clauses clarify the nature of the associational rights held by religious groups and the scope of the government’s latitude to interfere with those rights.

For this reason, a state effort to prevent religious organizations from reserving leadership positions to co-religionists or limiting membership to adherents would manifestly interfere with associational interests and independently run afoul of the Religion Clauses. And while in other contexts the government may have a freer hand in conditioning benefits on an agreement to adopt a non-discrimination policy than it would have to impose the condition directly, that proposition avails Hastings not at all. Hastings has no legitimate interest in interfering with the leadership criteria of religious groups. That proposition is underscored by the lengths to which the government goes in other contexts to avoid entanglement in such matters.

B. Even Beyond Associational Interests, There Are Distinct Concerns Under The Religion Clauses When The State Attempts To Interfere With The Membership And Leadership Criteria Of Religious Organizations.

1. The free exercise of religion entails the freedom to associate (or not) around certain religious principles. Moreover, the Religion Clauses, more broadly, prohibit government action that interferes with religious associational interests and grant religious groups a degree of autonomy. Religious organizations hold “an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*,

344 U.S. 94, 116 (1952); *see also Watson*, 80 U.S. at 720-21. This “independence from secular control” requires the government to accommodate a degree of autonomy for religious groups to define not only doctrine but also membership and leadership criteria. And as a corollary to the associational right, “[f]reedom to select the clergy, . . . , must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.” *Kedroff*, 344 U.S. at 116; *see also id.* at 123 (Frankfurter, J., concurring) (“A legislature is not free to vest in a schismatic head the means of acting under the authority of his old church . . .”).

For that reason, leadership qualifications for religious organizations are generally immune from government interference. These constitutional limitations reflect the common-sense notion that “questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern.” *Serbian E. Orthodox Diocese*, 426 U.S. at 717; *see also id.* at 721 (matters of internal governance are “issue[s] at the core of ecclesiastical affairs”). “[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.” *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). Accordingly, it was improper for the Supreme Court of Illinois to attempt to reinstate a defrocked bishop of the Serbian Orthodox Church. *Serbian E. Orthodox Diocese*, 426 U.S. at 708-09. And the Court struck down a New York statute that “passe[d] the control of matters strictly

ecclesiastical from one church authority to another.” *Kedroff*, 344 U.S. at 119.

General membership, too, is a matter outside the reach of civil authorities. As early as the 1870s, this Court held that courts “cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church.” *Watson*, 80 U.S. at 730 (citation and quotation marks omitted). Religious adherents become church members “upon the condition of continuing or not as they and their churches might determine” *Id.* at 731 (quoting *Ferraria v. Vasconcelles*, 23 Ill. 456, 459 (1860)). The government has no place in those membership decisions.

2. Nor are concerns about intermeddling in religious membership and leadership criteria limited to affirmative government attempts to interfere. The government instead goes to great lengths to ensure that even facially neutral government programs do not have the effect of entangling the government in such issues. For example, courts refrain from adjudicating disputes concerning internal religious governance even when the claim would be justiciable according to otherwise neutral jurisdictional principles. This abstention principle manifests itself frequently in property disputes between church factions. *See, e.g., Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) (“[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.”). Where

ecclesiastical authorities recognize one faction as the legitimate adherents, civil courts will not question that decision. *See Serbian E. Orthodox Diocese*, 426 U.S. at 709 (“[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.”). The danger is that “the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.” *Id.*

Courts are particularly hesitant to second-guess a religious body’s determination of its leadership. In *Gonzalez*, this Court found no role for civil courts in adjudicating the rights to a testamentary gift that depended upon an individual’s appointment to a chaplaincy in the Catholic Church. The appointment depended directly on “the essential qualifications of a chaplain . . . and whether the candidate possesses them”—the domain of church authorities. 280 U.S. at 16. Accordingly, “although affecting civil rights,” those ecclesiastical determinations regarding *religious* leadership qualifications controlled the outcome of the *civil* case. *Id.*

The same principles apply in other contexts, and are not limited strictly to questions of church leadership. The Court applied the doctrine of constitutional avoidance to hold that lay teachers

in church-operated schools fall outside the jurisdiction of the National Labor Relations Board. *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). That the NLRB applying facially neutral labor-law principles might interfere with the church-teacher relationship raised “difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.” *Id.* at 507. The Court’s hesitance stemmed directly from wariness about intervening in church governance, and it refused to “open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions.” *Id.* at 503.

In the same vein, the Court upheld Title VII’s exemption for religious organizations from the “prohibition against discrimination in employment on the basis of religion” even for non-religious jobs. *Amos*, 483 U.S. at 329. Although the Court framed its holding in terms of what the Religion Clauses *permit* government to do, it suggested “that the Free Exercise Clause *required*” Congress to exempt religious organizations at least for religious discrimination in “religious activities.” *Id.* at 335-36 (emphasis added).

C. For This Reason, It Makes No Difference Whether The Interference Comes In The Form Of A Direct Imposition Or A Condition On Benefits.

Hastings undoubtedly will fall back on its authority, as the creator of the public forum, to condition access to the forum on compliance with regulations that apply to all student groups. But

whatever additional authority Hastings enjoys over conditional policies, as opposed to direct mandates, it does not enjoy authority to interfere with the membership and leadership criteria of religious groups, especially on religious grounds. The autonomy accorded religious organizations by the Religion Clauses greatly restricts the conditions that can be applied to them. Religious non-discrimination policies pose exactly the kind of “state interference” with internal religious affairs forbidden by the Religion Clauses.

1. Generally speaking, a government entity that creates a public forum has the authority to establish conditions on access to the forum. *Lamb’s Chapel*, 508 U.S. at 390-91. Some benefit conditions could be described as neutral restrictions on a public forum that would apply equally to religious groups. For example, schools may condition access to a public forum on after-hours use, on lawful use, or on a maximum amount of available funds. *Widmar*, 454 U.S. at 276. Indeed, Hastings characterizes its non-discrimination as a permissible condition on access to university facilities and funds.

But it is one thing for a school to condition a Catholic church’s ability to use a public school classroom on the condition that meetings occur after school hours, and quite another to condition access on the Catholic church agreeing to have female priests or Lutheran ones. The former condition is perfectly reasonable; the latter is *ultra vires*. The meddling in the membership criteria of the religious groups in the latter example is independently problematic whether it comes in the

form of a direct imposition or a condition on benefits. Governments do not have unfettered discretion in the conditions they can attach to benefits, just because they are conditions. The government has no legitimate interest in squelching dissent and so it cannot condition benefits on a loyalty oath. *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Hastings has no more legitimate interest in conditioning benefits on an oath that religious organizations will allow non-adherents to join the organization.

It is indisputable that infringements upon the liberties of religion and expression may come in the form of “the denial of or placing of conditions upon a benefit or privilege.” *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Conditioning “the availability of benefits upon . . . willingness to violate a cardinal principle of . . . religious faith effectively penalizes the free exercise” of religion. *Id.* at 406. Non-discrimination policies force religious groups to make an inherently coercive choice between adhering to their religious tenets and accessing the forum. The Court has already held that government may not force an *individual* “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.” *Sherbert*, 374 U.S. at 404. The same must be true for religious *groups*, where the condition not only compromises the religious group’s private adherence to religious precepts but also gives the government a seat at the decisionmaking table that the Religion Clauses expressly forbid. Such a

policy intrudes into a religious group's membership standards and, hence, improperly invades its constitutionally protected sphere of choosing its religious message and leadership.

Moreover, the Court has recognized that its equal access cases dealt with a species of unconstitutional conditions. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996) (plurality opinion) (citing *Lamb's Chapel*, 508 U.S. at 390-94). Educational institutions may not condition access to a public forum on censorship of religious speech. Surely, those institutions may not condition access on accepting the government as de facto membership czar to determine who *must* be accepted as a leader or member by the group.

2. Moreover, as a practical matter, Hastings' policy is much more than a mere condition on benefits. The regulatory interference is coextensive with the political jurisdiction occupied by the regulated entity. In other words, a university-wide condition applies to the entire universe in which religious student groups operate. The adoption of a non-discrimination policy is thus in effect a police power regulation that forces noncomplying groups underground. This is far more than a condition on a marginally relevant forum or benefit.

That Hastings' policy operated as a direct, police-power regulation is borne out by CLS's options. CLS could either permit non-adherents as members and leaders, or it could *cease to exist* as a student organization. Certainly, students could continue to gather on their own, but in so doing, they would be no different from any other

community organization with no relationship to the university or its jurisdiction. This reality makes the situation facing CLS far worse even than that facing the community groups in *Lamb's Chapel* and *Good News Club*, which faced no similar comprehensive regulatory interference. As a consequence, to the extent the Court perceives greater latitude to impose religious non-discrimination policies as a condition on benefits in those cases, the same latitude could not apply here.

III. The Threats of Exclusion And Interference With Membership And Leadership Criteria Are Real.

CLS's conflict with Hastings is not some isolated phenomenon. CLS and organizations with similar religious orientation have faced numerous threats of exclusion or interference with leadership qualifications by a host of educational institutions. In many cases, religious organizations have for years enjoyed the equal access guaranteed by this Court's cases only to be ousted for refusing to pledge adherence to a non-discrimination policy that conflicted with church teachings. In effect, CLS and other religious organizations must re-fight battles already waged and won to secure equal access for religious groups. *See supra* pp. 5-10. The prospect that non-discrimination policies could be used to re-impose *unequal* access is a real one.

A. Litigation Experiences In Other Cases Confirm The Threats.

1. CLS itself has faced numerous similar confrontations regarding its membership and leadership criteria. The Seventh Circuit correctly

held that Southern Illinois University's School of Law could not revoke recognition of its CLS chapter under a non-discrimination policy. *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). But other cases have not ended so favorably. The District Court for the District of Montana, for example, upheld the decision by the University of Montana School of Law to deny recognition to a student CLS chapter. *Christian Legal Society v. Eck*, 625 F. Supp. 2d 1026, 1033 (2009). And CLS has had to fight to retain or to restore its existing access to campus facilities in law schools around the country. *See, e.g., Christian Legal Society Chapter of Washburn Univ. School of Law v. Farley*, No. 04-4120 (D. Kan. Sept. 16, 2004); *Christian Legal Society Chapter of the Ohio State Univ. v. Holbrook*, No. 04-197 (S.D. Ohio 2004).

2. Of course, CLS is not the only student religious organization that has faced this type of exclusion. In the high school context, a student Bible Club had to litigate to maintain its right to require officers to be Christian. *See Hsu*, 85 F.3d at 848. At the collegiate level, the Christian fraternity Beta Upsilon Chi received recognition at the University of Florida only after the school revised its non-discrimination policy during litigation. *Beta Upsilon Chi v. Machen*, 586 F.3d 908, 910 (11th Cir. 2009); *see also Beta Upsilon Chi v. Adams*, No. 06-104 (M.D. Ga. 2006) (similar facts at University of Georgia); *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 04-765, 2006 WL 1286186 (M.D.N.C. 2006) (similar facts at University of North Carolina). And for every successful effort, it is likely that other groups have

had their speech chilled and acquiesced rather than pursue costly and time-consuming litigation.

B. Threats Of Exclusion Are Widespread And Do Not Always Result In Litigation.

1. Not all disputes over non-discrimination policies result in litigation. Universities frequently issue initial rejections for religious student groups before reversing after persistent student efforts. The InterVarsity Christian Fellowship (“IVCF”), for example, has faced several threats from universities that have sought to ban the group under a non-discrimination policy. Harvard University, Rutgers University, and the University of North Carolina at Chapel Hill have all endeavored to exclude IVCF from campus facilities because it requires members to share basic religious convictions. IVCF was able to resolve its disputes with Harvard and North Carolina through negotiation and public debate, but it was forced to pursue litigation against Rutgers before reaching an out-of-court settlement. *See, e.g.*, Press Release, Foundation for Individual Rights in Education, Victory for Religious Liberty at the University of North Carolina-Chapel Hill (Jan. 7, 2003), *available at* <http://www.thefire.org/index.php/article/4912.html> (last visited Feb. 3, 2010). IVCF chapters have faced numerous similar threats, including at Montclair State University and Castleton State College.

2. Finally, discrimination against religious groups is not solely a Christian phenomenon. Louisiana State University derecognized its Muslim Student Association in 2003 even though

the group had existed for three decades on campus. The University restored recognition to the group only after more than a year of negotiation, during which the group could not enjoy its campus privileges. Press Release, Foundation for Individual Rights in Education, Victory for Religious Freedom at Louisiana State University (Mar. 17, 2005), *available at* <http://www.thefire.org/index.php/article/5436.html> (last visited Feb. 3, 2010).

CONCLUSION

A policy of non-discrimination *by the government* promotes a wholesome neutrality. But when the government extends that same policy to *private religious groups* and directs them not to discriminate on religious grounds, it strays into forbidden territory. Such a policy inevitably undermines the Court's equal access cases, discriminates against religion, and injects the government into matters—the leadership and membership criteria of religious groups—that the Religion Clauses put squarely out of bounds. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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