May a Public Law School Deny Recognition to a Religious Student Group Based on the School's Nondiscrimination Policy?

CASE AT A GLANCE

In this case, the Supreme Court will decide whether Hastings Law School violates the First Amendment rights of the petitioners, a student group, by refusing to recognize it as a "registered student organization" (RSO). The group welcomes all Hastings law students but requires its voting members and officers to sign and adhere to a Statement of Faith. The law school denied the group's RSO request on the grounds that the membership policies violated the school's nondiscrimination policy. The Court will decide whether the law school has violated the petitioners' free speech rights, rights of expressive association, or free exercise of religion.

Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez et al.
Docket No. 08-1371

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From: The Ninth Circuit

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ISSUE

Does the Constitution permit a public university law school to refuse to recognize a religious student organization on the grounds that the group violates the school's nondiscrimination policy by requiring its officers and voting members to share its core religious commitments?

FACTS

Respondent Leo Martinez is acting chancellor and dean of the University of California, Hastings College of Law. Hastings Law School sponsors a wide variety of registered student organizations (RSOs) devoted to a wide range of interests, both serious (such as politics, religion, culture, race, ethnicity, and human sexuality), and lighthearted (such as food, drink, and sports). Many of these groups advocate their views on controversial topics. Recognition as an RSO qualifies a group to receive funding from the school, to use classrooms and other facilities, to have access to official mediums of communication, and to use the university's name in its title. According to Hastings' policies, an RSO must be a noncommercial organization whose membership is limited to Hastings students and must abide by the university's rules and regulations, including its nondiscrimination policy. RSOs may impose membership requirements that are unrelated to "status or beliefs," such as attendance requirements, dues, and even conduct requirements. For example, student-sponsored journals use academic and writing requirements but are open to all students on equal terms.

The Christian Legal Society (CLS) is a national association of lawyers and law students "who share a common faith and seek to honor Jesus Christ in the legal profession." Pet. Br. at 5. Law school student chapters, such as the one at Hastings, sponsor a variety of activities including public lectures, socials, and Bible study, which includes prayer and other forms of worship.

Prior to 2002, Hastings recognized a Christian student group, the Hastings Christian Fellowship, that was not formally affiliated with national CLS. That group had no requirements for its officers or voting members. During the 2003–04 academic year, there were approximately five to seven students who participated in the Hastings Christian Fellowship, including one who was "openly lesbian and two [who] held beliefs inconsistent with what CLS considers to be orthodox Christianity." Pet. Br. at 8.

At the beginning of the 2004–05 academic year, leaders of the Hastings Christian Fellowship decided to affiliate with the national CLS and to adopt its national membership policies. The Law School's director of student services cautioned the students that national organizations such as CLS often have membership policies that violate Hastings' nondiscrimination policy.

Attendance at CLS events remains open to all Hastings students, but beginning in the fall of 2004, pursuant to the CLS national bylaws, voting members and officers 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." The Statement of Faith is designed to exclude Christians who do not share an orthodox view of the Trinity ("One God, eternally existent in three persons, Father, Son and Holy Spirit"). In addition, officers are expected to "exemplify the highest standards of morality as set forth in scripture" including abstaining from "acts of the sinful nature," which includes

"unrepentant participation in or advocacy of a sexually immoral lifestyle," a prohibition which includes fornication, adultery, and homosexual conduct. Pet. Br. at 7 (quoting the CLS national Statement of Faith and the chapter's constitution).

CLS was denied registration on the grounds that its bylaws "were not compliant with the religion and sexual orientation provisions of the Nondiscrimination Policy," and the group was told that the bylaws would have to be amended before CLS could become an RSO. CLS responded by explaining that all students are welcome to attend and participate in CLS meetings, and asserting that denying CLS registration as an RSO violated the group's First Amendment rights. Hastings declined to register CLS as an RSO and informed the group 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." Pet. Br. at 11.

As a result of being denied RSO status, CLS has no right to meet on campus (although the group has been allowed to meet as a matter of forbearance), cannot communicate through the law school's newsletter, bulletin boards, mailboxes, or weekly e-mail announcements (although it is permitted to write messages on a designated chalk board), may not use the Hastings name, and is ineligible for school funding (a $200.00 allocation for CLS students to attend a national CLS meeting was revoked).

Petitioners maintain that Hastings allows other recognized student groups to "maintain their identity, cohesion, and message by limiting their leadership and membership to students who share their beliefs." For example, the student group Outlaw, which is an intervenor in this case, "reserves the right to remove any officer who 'work[s] against the spirit of the organization's goals and objectives.'" Pet. Br. at 12-13. The La Raza group's bylaws restrict "policy" membership to students "of Raza background" (meaning persons of Latino or Mexican descent), who pay their dues and attend meetings, and has a different category of member, "associate" members, reserved to Hastings students of Raza background. Petitioners note that even though La Raza's bylaws "restrict voting rights to persons of La Raza background," the law school certified that their bylaws were in compliance with the Hastings nondiscrimination policy. Pet. Br. at 14.

According to petitioners, "Hastings officials changed their description of the College's Nondiscrimination Policy" during litigation. Whereas Hastings initially took the position that its nondiscrimination policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs," later in this litigation, a law school official stated in his deposition 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." Petitioners describe this "all-comers" policy as a reinterpretation of the nondiscrimination policy adopted by Hastings as a litigation tactic and a significant departure from the prior policy, which CLS describes as the "written policy."

Respondents, in contrast, maintain that there has been no change in the law school's open-membership policy. According to Hastings, there is only one policy, the all-comers policy. Hastings argues that its policy is viewpoint-neutral, reasonable, and noncoercive. Hastings points out that in their joint stipulations the parties assert that "Hastings imposes an open membership rule on all [RSOs]—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." Resp. Br. at 7 (quoting JA-221 §§ 17-18). This means, for example, the law school's Democratic Caucus cannot exclude Republicans as members or officers of the organization. Id.

In response to petitioners' argument that the nondiscrimination policy has not been implemented by Hastings in an evenhanded manner, respondents argue that every other student group has agreed to abide by the Law School's nondiscrimination policy, and that no other group has ever received an exemption from the policy. Tellingly, however, Hastings stops short of asserting that it has actually implemented its policy is a nondiscriminatory manner.

CLS filed suit claiming that Hastings had violated the group's First Amendment rights of association, free speech, and free exercise. Before the federal district court, both parties made motions for summary judgment, and the court ruled in favor of respondents. The district court held that the policy was viewpoint neutral and thus did not violate CLS's free speech rights. It rejected the freedom of association argument on the grounds that Hastings had not ordered CLS to admit certain students but rather had simply placed limits on using its campus as a forum and providing subsidies to student organizations. The court rejected the free exercise argument on the grounds that the policy does not "target or single out religious belief." The district court reasoned that denying RSO status to CLS had "no significant impact" on the ability of the CLS students to express themselves, since the students continued to meet on campus without recognition, and because CLS had failed to prove that its ability to express its views would be significantly impaired by being required to admit gay, lesbian, and non-Christian students.

The Ninth Circuit affirmed in a two-sentence opinion, which focused on the joint stipulation that the school's all-comers policy requires all student groups to admit "any student … regardless of their status or beliefs." The Court of Appeals relied upon *Truth v. Kent School District,* 542 F.3d 634 (9th Cir. 2008), a case where the Ninth Circuit held that a public high school could deny recognition to a religious group that imposed religious requirements on everyone who attended the group's meetings, including nonvoting students.

Petitioners complain that "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." The Ninth Circuit concluded that the law school's policy that "all groups must accept all comers as voting members even if those individuals disagree with the mission of the group" was "viewpoint neutral and reasonable."

Courts in other circuits, both district and appeals, have ruled in favor of religious student groups in cases with similar facts as this one, or the universities have settled or mooted the cases by revoking the policies that resulted in nonrecognition.

CASE ANALYSIS

The parties differ significantly in how they characterize the issue before the Court. From the petitioner's point of view, the issue is whether Hastings can constitutionally impose restrictions on CLS's

rights of free speech and expressive association. From the respondents' point of view, the question is whether Hastings will be allowed to apply its nondiscrimination policy in an even-handed manner. Disagreement of this sort is quite common.

Less common in a case before the Supreme Court, the parties are in significant disagreement about the underlying facts of the case. The majority of the petitioners' brief is dedicated to describing and repudiating Hastings' inconsistent, discriminatory, and inequitable application of its nondiscrimination policy. Petitioners argue that Hastings has applied a double standard. Numerous student groups limit membership, leadership, and voting, but none of those groups has been denied recognition as an RSO. Indeed, as Hastings acknowledged in its answer to CLS's complaint in an earlier stage of the litigation, "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." Pet Br. At 13 (citing J.A. 93). In its recitation of the facts, petitioners' description climaxes with the declaration, "Only one group has ever been denied the right to participate in the forum: Petitioner Christian Legal Society." Pet. Br. At 4. In sum, Hastings stands accused of applying its non-discrimination policy in a manner that is blatantly discriminatory.

The problem with this argument is that it almost completely disregards the joint stipulations of fact in the case. The parties jointly stipulate that Hastings has an all-comers policy, and that RSOs must accept all law students as voting members regardless of status or belief. Respondents begin their brief by complaining that "petitioner and its amici apparently have little interest in litigating the case that came to this Court." Resp. Br. at 1.

The respondents, in contrast, want to rely almost completely upon the stipulated facts in the case, and ignore the way in which Hastings has actually applied its nondiscrimination policy. Rather than defending the actual record of enforcing its nondiscrimination policy, Hastings argues that its all-comers policy—a policy that arguably was never applied by the law school prior to the litigation in this case—comprises the factual basis for this appeal. According to respondents, "Every student group at Hastings has a reasonable choice: it may either abide by the open-membership policy and qualify for the modest funding and benefits that go along with school recognition, or forgo recognition and do as it wishes." Resp. Br. at 1.

It is more difficult than usual to predict how the Supreme Court will view the case: it is as if the petitioners are urging the Court to disregard the stipulated facts, and the respondents are urging the Court to disregard the law school's actual application of its nondiscrimination policy.

One thing that does seem likely is that the oral arguments will produce pyrotechnics. One suspects that some justices will have little patience for the petitioners' retreat from the jointly stipulated facts, and that other justices (or perhaps the same ones) will have little patience for the respondents' retreat from the actual record in the case.

Petitioners also argue that the all-comers policy is not a rational way to promote freedom of speech and association, since any small group could be hijacked or sabotaged by a group of unsympathetic students who could attend the meetings and vote themselves into office. The concern is that, for example, a group of militant atheists or gay-rights advocates could overwhelm a small group like the Christian Legal Society.

Respondents respond that such wild hypotheticals have never played out in practice. According to respondents, there is no history of groups being hijacked or sabotaged by students hostile to a particular group.

On the other hand, there is no evidence that prior to this litigation Hastings actually enforced an all-comers policy, so it is difficult to draw any conclusions about what might or might not happen pursuant to such a policy.

In any event, CLS's concern does not seem entirely fanciful. For example, during the 2003–04 academic year, CLS's small membership of six or seven students included one who was a lesbian and two whose Christian beliefs were viewed as unorthodox by other CLS members. The record is unclear, but this may be what motivated the Christian students to affiliate with the national CLS group and to adopt the national organization's Statement of Faith as prerequisites for voting members and officers.

Petitioners make three primary arguments: free speech, freedom of expressive association, and free exercise of religion.

Freedom of Speech

Petitioners argue that Hastings has created a classic public university free speech forum, entitling all viewpoints to participate. CLS argues that denying recognition to their group imposes a severe burden on CLS's speech. They cite *Healy v. James,* 408 U.S. 169, a 1972 Supreme Court case, which held that refusing to recognize a student group is a form of prior restraint that is presumptively unconstitutional, and that universities face a heavy burden in justifying restricting speech by denying those groups recognition.

Even if speech were being excluded on a neutral basis, this would be a violation of free speech rights, CLS argues; but here, the "exclusion is not imposed neutrally." Rather, "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." Pet. Br. at 19. Petitioners argue that this is plainly viewpoint discriminatory.

Hastings responds by arguing that the School's open-membership policy is constitutional under well-established principles governing access to public funding programs and limited forums. Hastings maintains that its nondiscrimination policy "reasonably ensures that all students enjoy equal access to all student-funded and school-recognized activities." Resp. Br. at 16.

Freedom of Expressive Association

Petitioners also argue that private expressive associations have a right to exclude those who do not share the group's beliefs. This right, it argues, is especially critical to small or unpopular groups such as CLS. Hastings' nondiscrimination policy, petitioners argues, severely burdens CLS's ability to control and present its message.

Hastings responds that petitioners' concerns about sabotage or hijacking of groups "is not supported by one piece of record evidence and is utterly belied by the 20-year experience with the policy at Hastings." Resp. Br. at 17. Hastings reiterates its objection that petitioner "does not want to litigate the stipulated facts of this case." Id. Hastings complains that CLS devotes most of its brief to "attacking a straw man: a policy under which only religious groups are selectively denied the freedom to discriminate on the basis of 'ideology.'" Hastings insists that it does not have two policies—a written policy vs. a litigation policy—but rather only one policy: the all-comers policy stipulated by the parties.

Hastings argues that a public institution such as Hastings may condition the receipt of funds and participation in a limited forum on compliance with reasonable, viewpoint-neutral rules that are noncoercive. Hastings argues that it has important pedagogical reasons behind its nondiscrimination policy, and that its all-comers rule is viewpoint neutral not only in form but in practice. The rule ensures that "the leadership, education, and social opportunities afforded by registered student organizations are available to all students." Resp. Br. at 32. Furthermore, Hastings argues, the rule is viewpoint neutral. "Hastings' policy applies equally to every RSO. It does not target any particular viewpoint or make any distinction between religious and non-religious speech." Resp. Br. at 28. Finally, Hastings maintains, the policy is noncoercive. Students who wish to gather in exclusive groups are free to do so, they are just not eligible to be recognized as RSOs. The denial of participation in a subsidy scheme, Hastings argues, does not have a significant coercive effect. Resp. Br. at 40.

Hastings argues that its all-comers policy does not discriminate against minority viewpoints. To the contrary, it seeks to promote minority viewpoints by ensuring that a minority speaker cannot be expelled from a group for expressing a minority viewpoint. This, Hastings argues, creates an enhanced environment for "debate *within* groups as well as *among* them." Resp. Br. at 36. Hastings argues that it "has enjoyed the best of both worlds: a broad and diverse universe of RSOs and an environment in which any student can join any RSO regardless of their status or belief." Resp. Br. at 38.

Free Exercise Rights

Finally, CLS argues that as applied to religious groups, Hastings' policy violates the free exercise clause. Because Hastings' policy discriminates against religious groups, it violates basic free exercise principles, petitioners argue; furthermore, even if the policy were nondiscriminatory, it still violates CLS's rights of religious association.

Hastings calls CLS's free exercise argument "half hearted," noting that petitioners do not even raise it until page 40 of its brief. The reason, Hastings asserts, is obvious—and they cite a law review article by petitioners' counsel Michael McConnell to make their point: "Under *[Employment Division v.] Smith,* neutral, generally applicable laws are not subject to First Amendment challenge no matter how severe an impediment they may be to the free exercise of religion." Here the policy is general and neutral, Hastings argues, so a free exercise argument is simply unavailing.

SIGNIFICANCE

Although the case is about whether a Christian group can be refused recognition on the basis of its alleged noncompliance with a public law school's nondiscrimination rules, there are deeper underlying implications of the Court's handling of the case, including whether religious groups, as well as other types of expressive association, have the right to discriminate in the selection of their voting members and officers. The principles articulated in this context could have significant implications on so-called charitable choice programs, where religiously affiliated groups that provide social services are able to receive federal funding and are also allowed (at least for the time being; President Obama is considering changing the policy) to discriminate on the basis of religious preference in their hiring of personnel. It could even have implications for entities that receive tax exemptions and discriminate in the selection of their employees or leaders (something every church and most religious groups do).

Respondents characterize petitioners' claim as an effort by a religious group to require a public institution to grant an exemption from general and neutral nondiscrimination norms, but the rule defended by petitioners is actually much broader—that all noncommercial expressive associations have a constitutional right to discriminate against those who do not abide by the group's core beliefs. This assertion goes well beyond a claim for a religious exemption from a general and neutral law.

The case also has significant implications for institutional autonomy—institutions such as CLS on the one hand and for public universities on the other. The Association of American Law Schools (AALS), for example, submitted a brief on behalf of Hastings, emphasizing the importance of institutional autonomy and urging that law schools should have wide latitude in determining how to develop strong and effective educational programs. The AALS asks the Court to resist constitutionalizing a policy issue involving an area of sensitive educational judgment. The AALS argues that a state university should have the "ability to decide whether to spend scarce funds on, and dispense other benefits to, organizations that engage in illicit discrimination." AALS Amicus Br. at 3.

On the other hand, some religious groups and other expressive associations have submitted amicus briefs on behalf of CLS, arguing that a holding in favor of Hastings would have significant negative implications for their rights of association and free speech. For example, a brief of Gays and Lesbians for Individual Liberty characterizes Hastings' policy as a "system of compulsory association," in which an expressive student group "must either relinquish the right to exclude those who do not share its beliefs, or forfeit the right to participate on an equal footing with approved student organizations." An expressive association, they argue, must not be forced to "cede control over its message to those who reject its core beliefs." They urge that Hastings' policy is viewpoint discriminatory, "because it systematically privileges majority viewpoints over minority viewpoints by allowing the former to overwhelm the latter."

Another amicus brief, prepared by Michigan law professor Douglas Laycock and the Beckett Fund on behalf of a broad group of religious organizations from a variety of religious traditions, emphasizes the "right of an expressive association to exclude from membership those who disagree with the association's core values," and in particular the

right of religious associations to "control its internal affairs, regardless of whether the group engages in expression."

The case is also significant in that it illustrates the sorry state of free exercise doctrine and jurisprudence. The minimal place of argument about the free exercise clause is somewhat surprising, because there has been considerable speculation that with Justices Alito and Roberts ascension to the Court, as well as Justice Sotomayor's arrival, the Court might be poised to reconsider its free exercise jurisprudence. Nonetheless, petitioners devote only about a page of their brief to arguing that Hastings' policy violates the free exercise rights of the Christian Legal Society. Indeed, in a section heading respondents dismiss petitioners' free exercise argument as "half-hearted."

Hasting's all-comers policy, the nondiscrimination policy it defends during the course of this litigation, would appear to be a prototypical "general and neutral" policy. But even *Employment Division v. Smith* seemed to carve out special free exercise protections when the autonomy of religious groups is called into question and also introduced the quasi-concept of hybrid rights, the idea that the compelling state interest test might still apply when free exercise rights were implicated in conjunction with other important Constitutional rights such as free speech and rights of association. One might have thought that this case would have been a good place to test the concept of hybrid rights or to test the limits of autonomy of religious groups. Perhaps petitioners just concluded that the idea of hybrid rights is just too kooky to take seriously—after all, what exactly would free exercise add to the analysis if there is a violation of another fundamental right?

The key to the case probably lies in the facts the Court embraces as the basis for its analysis. If the Court follows the lead of CLS and focuses on Hastings' application of its nondiscrimination policy in a way that seems targeted exclusively at a religious group, it seems likely that the policy will be found to violate the First Amendment's protections of free speech or association. If, on the other hand, the Court accepts at face value the stipulated facts, that Hastings applies the all-comers policy equally to all student groups, then it seems likely that the Court will give the University sufficient latitude to adopt such a policy, even in the face of the possibility of groups being sabotaged or hijacked by unsympathetic student participants.

The case does raise an important question that the record does not really address—whether an all-comers policy is a good way to run a public forum. Hastings insists that its policy requires the Democratic Party RSO to admit Republicans. By the same token, the Muslim student RSO must welcome atheists, the pro-choice group has to make its membership equally available to pro-life students, the gay rights RSO must not discriminate against homophobes, the golf club is required to welcome students who hate golf, and the CLS must admit as members and leaders those who it views as heretical and sinful. This policy gives new meaning to Groucho Marx's quip that he wouldn't want to belong to any club that would have him as a member. Since at Hastings every student RSO is required to welcome every student, perhaps the wonder is that anyone wants to participate at all.

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PREVIEW of United States Supreme Court Cases, pages 300–305.

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