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 of Amici Curiae States of Michigan, Alabama, Colorado, Florida, Idaho, Louisiana, Nebraska, New Mexico, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, and West Virginia 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 of 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

The protection of First Amendment freedoms is critical in the university setting. "The [college] classroom [with its surrounding environs] is peculiarly the 'marketplace of ideas.'" *Keyishian v. Bd. of Regents of University of State of New York,* 385 U.S. 589, 603 (1967). A free society depends upon individuals trained in a setting where there is wide exposure to a robust exchange of ideas that is free from any government selection or modification. The marketplace of ideas is not served by the homogenization of thought.

Many faith-based student groups seek to preserve their identity and the expression of their identity by establishing standards of belief for their membership. While this case specifically involves the faith-based student group's interest in controlling its message, the impact of this case is not limited to faith-based student groups. Its impact will be felt by any student association that is centered on a core set of values, thoughts, or beliefs. A decision by this Court that authorizes universities to force student associations to alter their identity in order to gain access to a public forum would devalue the marketplace by diminishing the free exchange of ideas. Its effect would be to restrict – rather than promote – diversity.

The amici states have a strong interest in preserving the vigorous exchange of ideas in their public universities, and ensuring that public universities establish policies that respect the rights of

free speech and expressive association under the First Amendment.[1]

[1] The West Virginia Attorney General Darrell McGraw wishes to disclose that his daughter, Elliotte Catherine McGraw, is a student at Hastings College of Law and the President of the Hastings Democrats. The Hastings Democrats were recently notified by the school that in order to maintain the Club's standing as a student organization, it was required to open its membership to all students, irrespective of party affiliation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's First Amendment decisions make two things clear. First, the Constitution recognizes the right of expressive association, and it prohibits the government from unconstitutionally infringing upon that right by forcing a group to accept members it does not desire. Second, the Constitution prohibits discriminatory exclusion from a public forum based on the religious content of a group's intended speech. The imposition by the University of California at Hastings ("Hastings") of its non-discrimination policy to the Christian Legal Society ("CLS") here undermines both principles.

Hastings has no obligation to underwrite the cost of a student association in enabling it to hold meetings or express its ideas. But once Hastings establishes a process by which it provides funding and allows access to its facilities to student groups, this process must comply with the First Amendment. Hastings has conditioned a student association's access to these benefits on complying with a non-discrimination policy, which prohibits the association from requiring its members to adhere to certain beliefs. In doing so, Hastings has discriminated against CLS based on its core set of beliefs, excluding it from access to funding and its facilities, thereby inhibiting its ability to express its identity. The First Amendment's rights to free association and free expression are paramount in this setting.

Implicit in the First Amendment "freedom to speak, worship, and petition the government" is the "correlative [right] to engage in group effort toward

those ends." *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984). The freedom to associate with others for this purpose "plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale,* 530 U.S. 640, 648 (2000)(quoting *Roberts*, 468 U.S. at 623). Similarly, freedom of speech presupposes the right of individuals or groups to decide what not to say. *Hurley and South Boston Allied War Veterans Council v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995).

Student groups, like CLS, are engaged in constitutionally-protected expressive activity and are contributing to the exchange of ideas on campuses. The government unconstitutionally infringes upon a student group's right of expressive association by the forced inclusion of members who hold beliefs that are contrary to or inconsistent with the group. When a group is formed around a core set of values, beliefs, or thoughts, the forced inclusion of individuals who proclaim a different set of values, beliefs, or thoughts compromises the group's ability to control and disseminate its ideological message.

The right to control one's speech is a right that can only be infringed upon when the government has a compelling interest to do so. While the policy of prohibiting discrimination underpinning Hastings' nondiscrimination policy is laudable, it nonetheless violates the First Amendment, when imposed on a student association like CLS. Hastings' current nondiscrimination policy effectively forces groups to include those individuals who do not share the beliefs or views of the group. CLS, however, wishes to preserve its ideological message by establishing

criteria for its membership. And it is the message of a group that is the core of its expressive activity. Therefore, as applied to CLS and other similar groups, Hastings' policy modifies the expressive activity of the group, an interference that is prohibited by the First Amendment.

"While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. Because the only interest served by Hastings' nondiscrimination policy is an interest this Court has already held must bow to the right of expressive association, it is not sufficient to uphold the infringement of the First Amendment.

There is no difference here between requiring inclusion and conditioning access to a public forum on the inclusion. Either way, the government is forcing an expressive association to abandon its right of self-definition and to alter its message in order to disseminate that message in a public forum. This Court has made it clear that the First Amendment prohibits that type of interference.

Further, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 828 (1995)(citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). In *Widmar*, this Court struck down a university's regulation prohibiting the use of

university facilities "for purposes of religious worship or religious teaching." *Widmar v. Vincent*, 454 U.S. 263, 265 (1981)(citations omitted). This Court held that the First Amendment precluded a university from "discriminatory exclusion from a public forum based on the religious content of a group's intended speech." *Widmar*, 454 U.S. at 269-70.

Similarly, in *Rosenberger*, this Court held that a university violated the free speech rights of a Christian publication when it denied student activity funds because of the publication's religious viewpoint. *Rosenberger*, 515 U.S. at 834-37. Here, whether Hastings directly denies access to CLS based on its religious viewpoint, which this Court condemned in *Rosenberger*, or conditions access to a public forum on CLS' modification of its religious viewpoint, the effect is the same: the government has violated the First Amendment rights of CLS.

In limiting recognition to student groups that do not establish eligibility criteria based on beliefs, Hastings has limited the ability of student associations predicated on beliefs to access the benefits the university provides. Thus, the ability of student associations that are predicated on ideas to thrive in the university setting is placed in jeopardy. The religious student groups must either abandon any requirements or forgo recognition. The same is true for political or philosophical societies. The student association here implicated by these policies was CLS, but could have been an Orthodox Jewish student association or an Islamic student association, or the College Republicans or College Democrats. The safeguard for diversity of thought is to allow the robust

exchange of ideas and to allow students to establish their own associations. The First Amendment requires no less once a public university provides access to its facilities for student associations.

ARGUMENT

I. The University's policy violated the First Amendment by compromising the right of expressive association – requiring CLS to accept members inconsistent with its identity – in order to gain access to the public forum.

The Constitution protects the right to express a particular viewpoint, be it religious, political, or other. Nowhere is the protection of the First Amendment more critical than in the university setting. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us." *Keyishian*, 385 U.S. at 603. This right to express a particular viewpoint necessarily includes the right to associate with others who share that view.

A. It is well established that the First Amendment freedoms of speech, assembly, and petition include the freedom of expressive association.

"[T]he freedom of association is not explicitly set out in the [First] Amendment [but] it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James,* 408 U.S. 169, 181 (1972). "An individual's freedom to speak, to worship, and to petition the government could not be guaranteed unless a correlative freedom to engage in group effort

toward those ends were not also guaranteed." *Roberts*, 468 U.S. at 622.

The freedom to associate assures that neither a majority nor powerful minority can force its views on groups who choose to express a different or unpopular viewpoint. *Dale*, 530 U.S. at 647-48. A "collective effort on behalf of shared goals" must be protected in order to preserve "political and cultural diversity" and to shield "dissident expression from suppression." *Roberts*, 468 U.S. at 622. Consequently, this Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding 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. This Court has also understood that the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623).

Similarly, "'[s]ince all speech inherently involves choices of what to say and what to leave unsaid', one important . . . principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.,* 475 U.S. 1, 11, 16 (1986)). Thus, the state may not compel a speaker to affirm a belief that the speaker does not agree with. The principle "applies not only to expressions of value[s] [or] opinion[s] but equally to statements of fact that the speaker [does not want to endorse]." *Hurley*, 515 U.S. at 573-74.

There is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar*, 454 U.S. at 268-69 (1981). In *Healy*, this Court declared:

> The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of destruction thus becomes immaterial. The College, acting here as the instrumentality of the States, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent. [*Healy*, 408 U.S. at 187-88.]

There is also no doubt that the government is capable of unconstitutionally infringing upon the right of expressive association. As noted in *Roberts*, the government may unconstitutionally infringe on the freedom of association in a number of ways:

> Among other things, government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group, *e.g., Healy v. James,* 408 U.S. 169, 180-184 (1972); it may attempt to require disclosure of the fact of membership in a

> group seeking anonymity, *e.g., Brown v. Socialist Workers '74 Campaign Committee,* 459 U.S. 87, 91-92 (1982); and it may try to interfere with the internal organization or affairs of the group, *e.g., Cousins v. Wigoda,* 419 U.S. 477, 487-488 (1975). [*Roberts*, 468 U.S. at 622-23.]

This Court specifically noted that the government "may unconstitutionally burden [the] freedom of association" through a "'regulation that forces the group to accept members it does not desire.'" *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623).

B. The Christian Legal Society is an organization that is engaged in expressive activity that is entitled to First Amendment protection.

In order to be protected by the First Amendment's expressive association right, a group must engage in expressive association. The protection is not limited to advocacy groups. See *Dale*, 530 U.S. at 648. In *Dale*, this Court concluded that the Boy Scouts was an association that engaged in expressive activity. This Court determined that the general mission of the Boy Scouts was "to instill values in young people" and stated that "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Dale*, 530 U.S. at 649, 650 (citations omitted). Similarly, in *Hurley*, this Court held that the organizers of a St. Patrick's Day parade in Boston constituted expressive activity because the organization was making a "collective point, not just to

each other, but to bystanders along the way." *Hurley*, 515 U.S. at 56.

In the present case, CLS engages in expressive activity. CLS is a nationwide association of lawyers, law students, law professors, and judges who profess faith in Jesus Christ. According to the CLS constitution, its purposes include providing a means of society, fellowship, and nurture among Christian lawyers. The stated mission of the Hastings' chapter is to maintain a vibrant Christian law fellowship that enables its members, individually and as a group, to fulfill Christ's mandate as that mandate is defined by the organization.

Thus, like the Boy Scouts, the mission of CLS is to instill certain values in its membership and – like the organizers of the St. Patrick's Day parade – CLS wishes to express a certain collective point, to its members and others. Therefore, CLS is engaged in expressive association and it falls within the ambit of First Amendment protection.

CLS is not the only student organization that falls within the ambit of First Amendment protection. Hastings has no fewer than 60 recognized student groups in the 2009-2010 academic year. They include the Law Students for Reproductive Justice, the Clara Foltz Feminist Society, the Hastings Catholic Law Students Association, Hastings OUTLAW, the American Constitution Society, and the Hastings International Human Rights Organization.[2] The

[2]http://www.uchastings.edu/student-services/student-org/index.html(follow "current students" hyperlink; then follow "student organizations" hyperlink).

individuals comprising these groups represent a variety of different thoughts regarding the United States Constitution, politics, religion, and social values. The ability and opportunity of these individuals "to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals against the government." *N.Y. State Club Ass'n, Inc. v. City of N.Y.,* 487 U.S. 1, 13 (1988).

Not only is it important to protect the right of expression for the individual groups, it is critical to protect the diversity of thought and robust debate that is essential to the marketplace of ideas. The marketplace of ideas is not served by the homogenization of thought.

Requiring student groups formed for the purpose of expressing a particular message to accept members who do not share that viewpoint diminishes their expressive activity. The forced inclusion of those who do not accept CLS's statement of faith significantly affects its ability to advocate its viewpoint or engage in its stated expressive mission. CLS's policy of limiting its membership to persons who share Christian beliefs stands at the core of its expressive identity. CLS's membership is solely related to its expressive message. It does not exclude anyone on the basis of anything other than the individual's refusal to adopt its statement of faith. Moreover, those who do not accept CLS's statement of faith are free to form their own ideologically-based student group and participate in the intellectual debate on campus with their own message. When any group is formed around a core set of beliefs, values, or thoughts, the forced inclusion of

individuals who proclaim a different set of values, beliefs, or thoughts significantly diminishes the group's ability to control its ideological message. The group controls its ideological message by establishing its membership criteria. Controlling the ideological message of a group is expressive activity.

The ability of students to join together under a common mission, or identity, is central to promoting ideas on campus. The policy of requiring inclusion regardless of belief hinders any student association that defines itself based on belief. The university will ultimately undermine the diversity of belief-based student associations if such students cannot join together and be recognized.

Thus, prohibiting CLS from exercising its right to expressive association in this case authorizes public universities to limit the message of any ideologically-based student group. The limiting of a group's ideological message undermines the state's interest in maintaining a diverse range of thought on its public campuses. A government that suppresses the free exchange of ideas on campus runs the risk of undermining the intellectual development of its students. The First Amendment requires this conclusion once the university decides to designate a public forum and to provide benefits to different student associations. The students in associations based on belief should not be second-class citizens.

As noted by the Seventh Circuit in *Christian Legal Society v. Walker,* 453 F.3d 853, 862 (2006), to ask the question – i.e., whether the forced inclusion of individuals with contrary beliefs significantly affects

the ability of a belief-centered group to advocate its position – "is very nearly to answer it." CLS is a faith-based organization. Among its beliefs are a faith in Jesus Christ and an affirmance of traditional marriage and a traditional moral code. It would be difficult for CLS to convey its specific message of devotion to Christ to its members or others if it must accept members and officers who do not share its beliefs in Christ and who advocate conduct that the organization contends contradicts Christian teaching. CLS maintains that to require such membership would effectively impair its ability to convey its message to members and nonmembers. An organization's view of what would impair its expression is given deference by this Court. *Dale*, 530 U.S. at 653 (citation omitted).

Moreover, as this Court noted in *Dale*, "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with the Boy Scouts policy." *Dale*, 530 U.S. at 655-56. The same is true in this case. The presence of an avowed atheist or other activist with a contrary message sends a distinct message of endorsement that CLS has the right not to send.

This case is not like *Roberts* in which this Court determined that requiring the organization to admit women did not violate its member's associational rights. In *Roberts*, the Jaycees threatened to revoke the charters of two of its chapters because they were admitting women as regular members in violation of the organization's bylaws. *Roberts*, 468 U.S. at 614. The chapters filed charges of discrimination with the

Minnesota Department of Human Rights, alleging that the exclusion of women from full membership violated the Minnesota Human Rights Act. *Roberts*, 648 U.S. at 614-15. This Court held that the Minnesota Human Rights Act outweighed the organizations' interest in excluding women. The Court concluded that the enforcement of the antidiscrimination law would not materially interfere with the ideas that the organization sought to express. This Court based that conclusion on the fact that the law "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts*, 648 U.S. at 627.

Unlike the Jaycees, CLS excludes members only because their ideologies or philosophies are different from those of its statement of faith. It is CLS's ideology that defines the organization, and, thus, the enforcement of the nondiscrimination policy in this case would materially interfere with the ideas that the organization seeks to express.

There is no merit to the argument that the nondiscrimination policy does not significantly affect CLS's ability to advocate its viewpoints because CLS may exist and advocate outside of the campus community. This Court has rejected the argument that withdrawal of recognized-status privileges is too insubstantial to infringe on an organization's First Amendment rights. In *Healy*, this Court stated:

> There can be no doubt that denial of official recognition, without justification, to college organizations burdens or

> abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. . . . If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organizations' ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial. [*Healy*, 408 U.S. at 181-82.]

The withdrawal of recognized status not only significantly affects the ability of the individual student group to express its message, the infringement on that ability affects the overall intellectual debate on university campuses. As stated by this Court in *Rosenberger*, "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger*, 515 U.S. at 836.

C. The right of expressive association in a designated public forum, such as in this case, can only be infringed upon by the government when it possesses a compelling state interest.

The level of state interest required to overcome a group's expressive association right is determined by the type of forum at issue. "The government can exclude a speaker from a traditional public forum 'only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.'" *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998)(quoting *Cornelius v. NAACP,* 473 U.S. 788, 800 (1985)). The same standard applies to a "designated public forum," which is created when the government opens a nontraditional public forum for public discourse. See *Forbes*, 523 U.S. at 682; see also *Rosenberger*, 515 U.S. at 829 ("These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation.").

Hastings has created a designated public forum for its student groups. Hence, it can only exclude a student group when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. The apparent purpose underpinning Hastings' nondiscrimination policy is to prohibit discrimination on campus. The policy, while laudable, must yield here in the context of the First Amendment. Hastings' current nondiscrimination policy forces groups to include those individuals who do not share the beliefs or views of the

group. No one disputes a university's interest in prohibiting discrimination when the discrimination is unrelated to the expressive activity. But here, CLS is not discriminating nor is it excluding any individual for reasons other than the refusal to adopt its statement of faith. In fact, CLS welcomes any member of the student body that adopts its statement of faith. It, however, wishes to control its ideological message by establishing criteria for membership. As noted above, establishing standards for one's own message of a group is expressive activity. Therefore, as applied to CLS and other similar groups, Hastings' interest lies solely in modifying the expressive activity of CLS, an interest prohibited by the First Amendment.

"The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, [offends] the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U.S. at 579. Furthermore, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. Hastings' nondiscrimination policy clearly favors a viewpoint of openness and acceptance over CLS's expression of orthodoxy in belief. This Court has rejected this use of state power. "Disapproval of a private speaker's statement does not legitimatize use of the [state]'s power to compel the speaker to alter the message by including one more acceptable to others." *Hurley*, 515 U.S. at 581.

Because the only interest served by the nondiscrimination policy is an interest that this Court has already held must bow to the right of expressive association, the interests of the First Amendment must prevail.

What the above cases of *Dale* and *Hurley* make clear is that the government may not, without a compelling interest, force a group to include individuals when the forced inclusion would significantly affect the expressive activity of the group. While Hastings has not directly forced CLS to include individuals that do not embrace its core set of beliefs, there is no difference between requiring inclusion, as in *Dale* and *Hurley*, and conditioning access to a public forum on the inclusion, as in this case. Either way, the government has required an expressive association to abandon its right of self-definition and to alter its message in order to disseminate that message in a public forum. This Court has made it clear that the First Amendment prohibits that type of intrusion.

II. The University's policy violated the First Amendment by excluding CLS from a public forum based on the religious content of its intended speech.

Hastings has no obligation to provide a public forum or underwrite the cost of a student association. But once Hastings established a process by which it allowed access to its facilities to student groups, the process must comply with the First Amendment. "It is axiomatic that the government may not regulate speech based on its substantive content or the message

it conveys." *Rosenberger*, 515 U.S. at 828 (citing *Mosley*, 408 U.S. at 96. The government must abstain from regulating speech when the specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

In *Widmar*, this Court addressed the question whether a state university which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use them for religious worship and religious discussion. The case involved an organization of evangelical Christians who wanted to hold on-campus meetings in the student center. *Widmar*, 454 U.S. at 265-66. The university prohibited the meetings based upon a regulation that prohibited the use of university buildings or grounds "for purposes of religious worship or religious teaching." *Widmar*, 454 U.S. at 265 (citation omitted).

This Court first reaffirmed the principle that a university, by opening up their facilities for student meetings, can create a public forum generally open for use by student groups. *Widmar*, 454 U.S. at 267. This Court then struck down the university's regulation because it had discriminated against the student group based on its desire to engage in religious worship and discussion, i.e., the religious content of its intended speech, and the university could not justify the discriminatory exclusion with a compelling interest. *Widmar*, 454 U.S. at 277.

In *Rosenberger*, a Christian organization requested funds to pay the organization's outside

printer for its newspaper printing costs. The request was made pursuant to guidelines set by the University of Virginia, which authorized student groups to request funds to pay outside contractors for the printing costs of publications issued by the group. *Rosenberger*, 515 U.S. at 823. The university denied the request on the ground that the publication "promoted or manifested a particular belief in or about a deity or an ultimate reality." *Rosenberger*, 515 U.S. at 827. The university claimed that the exclusion was constitutional because it was viewpoint neutral in that the regulation drew lines based on content, not viewpoint. *Rosenberger*, 515 U.S. at 830. This Court noted, however, that the distinction between viewpoint discrimination and content discrimination is not a precise one noting that "[r]eligion may be a vast area of inquiry, but it also provides. . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831. This Court then determined:

> The Guideline invoked by the University to deny third-party contractor payments on behalf of WAP [Wide Awake Productions] effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications. The prohibition on funding on behalf of publications that "primarily promote or manifest a particular belief in or about a deity or an ultimate reality," is in its ordinary and common-sense meaning, has a vast potential reach. . . . Based on the principles we have discussed, we hold

> that the regulation involved to deny SAF [Student Activity Fund] support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment. [*Rosenberger*, 515 U.S. at 836-37.]

What *Widmar* and *Rosenberger* make clear is that a university may not discriminate against a student group based on the religious viewpoint of a group's speech. These cases, of course, apply with equal force to speech regarding politics, sexual orientation, or other subjects. Government regulation may not favor one viewpoint over another.

What *Rosenberger* makes clear is that even ostensibly content-neutral regulation can, in fact, discriminate based on viewpoint. The case at bar is a perfect example. Hastings' nondiscrimination policy, while attempting to prohibit discrimination of religious, political, and other expression, actually singles out religious, political, and other belief-centered groups and discriminates against them by forcing them to modify their expression if they want access to the public forum. The policies are not viewpoint neutral because they single out those student groups whose chosen expression depends upon maintaining core belief through their membership criteria.

Viewpoint discrimination by the government is at the core of what the First Amendment prohibits. Here, whether Hastings directly denies access to CLS based on its religious viewpoint, which this Court condemned in *Rosenberger*, or conditions access to a

public forum on CLS's modification of its religious viewpoint, the effect is the same: the government has favored one viewpoint over another. To hold otherwise would undermine this Court's decisions in *Widmar* and *Rosenberger*.

While Hastings in this case did not directly deny access based upon CLS's religious speech, it conditioned its access to the public forum on the group's abandonment of its distinctive message. There is no meaningful difference between directly denying access based on the content of a group's message and conditioning access on a group's abandonment of its distinctive message, and this Court's precedent forbids it. The amici states have an interest in ensuring that public universities comply with the First Amendment. As aptly stated by Dean Joan Howarth, of Michigan State University College of Law:

> The First Amendment protects expressive associations because they are identity-forming, idea-forming entities. This is why encouraging a variety of autonomous student groups is a central aspect of many school's missions of preparing students to participate effectively in democracy. . . . Expressive associations create opportunities for self-expression, advocacy, tolerance, and autonomy. Schools may teach those values best by facilitating public forums for student organizations. [Joan Howarth, Teaching Freedom: Exclusionary Rights of Student Groups, 41 U.C. Davis L. Rev. 889, 894 (2009)].

The freedom of the students to determine the basis of their association is at the core of the First Amendment – the university cannot render such an association as secondary and then deny it access to the benefits the university provides. Student groups based on belief play a vital role in the university setting. The First Amendment requires that the government cannot discriminate against them. States are strengthened when their public campuses are allowed to reflect the diverse beliefs of their students. This is true diversity.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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