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 *AMICUS CURIAE* BOY SCOUTS OF AMERICA IN SUPPORT OF PETITIONER

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Boy Scouts of America, as *amicus curiae*, supports reversal of the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case, *Christian Legal Society Chapter of University of California, Hastings College of Law v. Kane*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009).[1]

INTEREST OF THE AMICUS CURIAE

Boy Scouts of America ("Boy Scouts") is a nonprofit membership organization with the mission of instilling in young people the values of the Scout Oath and Law. In furtherance of that mission, all members agree to live by the Scout Oath and Law, which include both theistic and moral values.

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court affirmed the rule that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648 (citation omitted). In such circumstances, the freedom to associate may be overridden only if regulation serves '"compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and such consents are being lodged herewith.

associational freedoms.'" *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). The Court in *Dale* applied these principles to hold that the First Amendment protects Boy Scouts' selection of adult volunteers who observe the Scout Oath and Law. The state may not use nondiscrimination statutes to regulate membership choices which are sincerely related to an association's expression. Such choices constitute the group's "method of expression." *Id.* at 655.

For the state to tell a Christian group that it cannot be included in a forum intended to further speech if the Christian speech depends on an all-Christian membership is patently unconstitutional. Boy Scouts participates as *amicus* here for two reasons:

First, the principle stated in *Dale* that the state may not invoke nondiscrimination rules to force unwanted members on an expressive association is crucial to Boy Scouts.

Second, the principle stated in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), that the state cannot exclude an expressive association from a forum for speech on the basis of the association's speech is crucial to Boy Scouts. The same violation of associational rights occurs if the state forces an unwanted member on the association by direct regulation or by threatened exclusion from a forum for speech. In the case of threatened exclusion from a forum, the state accomplishes its censorship either by requiring a change in the associational speech before including the association in the forum, or by excluding the associational speech from the forum altogether.

The notion that a state agency facilitating a forum for speech may misapply nondiscrimination rules governing the state agency itself to regulate the speech of expressive associations in the forum is constitutionally infirm. State agencies have excluded Boy Scouts from public fora by arguing that the agencies themselves would be violating nondiscrimination rules that apply to the agencies if they included Boy Scouts in the fora. Yet the same agencies disavowed endorsement of any entity in the fora and indeed, for other entities, ignored their lack of inclusiveness.

A state agency that facilitates a forum for private speech does not seek to voice anything in the forum, and therefore does not voice support for the theistic or moral values of the Scout Oath and Law by including Boy Scouts in the forum. Nevertheless, Boy Scouts has been excluded. *See Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1288 (S.D. Cal. 2003) (court ordered Boy Scouts excluded from the City of San Diego's leasing program open to all nonprofit lessees suitable for City properties, and currently including over 100 leases to nonprofit gender-, ethnic-, and religious-based groups and indeed churches, on the theory that the City's leases to Boy Scouts constituted an endorsement of religion because of the theistic component of the Scout Oath and Law), *aff'd in part and certifying questions*, 530 F.3d 776 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1222); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (affirming exclusion of Boy Scouts from the Connecticut employee charitable campaign forum involving no State expenditure and open to hundreds of ethnic-, gender-, age- and religious-based charities, on the argument that State statutes forbid Connecticut from supporting discrimination and Boy Scouts has to "pay a

price" for its speech), *cert. denied*, 541 U.S. 903 (2004); *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002) (court ordered Sea Scouts excluded from a Berkeley program providing free berthing to nonprofits at the City marina, including several gender- and age-based nonprofits, on the rationale that the marina's nondiscrimination ordinance applied to Boy Scouts' internal membership policies), *aff'd*, 129 P.3d 394 (Cal.), *cert. denied*, 549 U.S. 987 (2006).

The Christian expressive association here finds itself in the same situation as Boy Scouts.

ARGUMENT

I. THE TESTS FOR DETERMINING CONSTITUTIONAL PROTECTION OF EXPRESSIVE ASSOCIATION

The *Dale* tests for what constitutes an expressive association and what constitutes interference with expressive rights are deferential to the organization asserting those rights.

Following on *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the Court in *Dale* set forth a framework for constitutional protection of expressive association. The membership decisions of an association are constitutionally-protected if:

(1) the association is expressive, and

(2) the state's forced inclusion of an unwanted person in the association affects in a significant way the association's ability to express itself;

unless

(3) the state's interference in the membership decision serves compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms.

See Dale, 530 U.S. at 648-50; *Rotary*, 481 U.S. at 548-49; *Roberts*, 468 U.S. at 622-23.

A. Defining an Expressive Association

The right of expressive association is the "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.

A Christian student organization clearly warrants treatment as an expressive association. "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Dale*, 530 U.S. at 650. Students may come together for any of the purposes identified in *Roberts*, including "religious"; and no type of student organization warrants greater protection than one involving expression afforded distinct constitutional rights.

Furthermore, there is no basis in this Court's precedent for dividing an expressive association into

leadership and membership categories, the former being entitled to more constitutional protection and the latter to less constitutional protection. The Court in *Dale* dealt with one adult volunteer leader from a total of approximately 1.2 million adult leaders, and adult leadership is the only membership category for adults who join the Boy Scouts. While there are certainly different levels of adult leadership, *e.g.*, a member of a Troop committee versus a Scoutmaster, this Court did not suggest that one type of adult leadership might be afforded greater protection than another. Similarly, the Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995), did not suggest that parade groups marching in the front of the parade might be afforded greater protection than those marching at the back.

By determining the criteria for those who join as well as those who lead, an expressive association is trying to make the same sort of "collective point" the Court identified the parade in *Hurley* as making. 515 U.S. at 568. The expressive point made by membership criteria is obvious where the expressive association desires to have the same criteria for both members and leaders. In this way, *Hurley* presented a more difficult case than the instant one, because the Court had to find constitutional protection in expression which combined "multifarious voices." *Id.* at 569. Here, however, in the basic, orthodox Christian tenets which constitute the membership criteria at issue, the association does send the "narrow, succinctly articulable message" which eluded the Court in *Hurley. Id*. There can be no doubt that each individual participant who joins by affirming those tenets contributes to the association's "overall

message." *Id.* at 577. *See Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981). The whole purpose of an expressive association is to associate with like-minded individuals.

B. The Interference Test

1. Interference by Requiring the Inclusion of Unwanted Members

In *Dale*, as in *Hurley* before it, this Court adopted a deferential view of what constitutes interference with associational rights when the state forces the inclusion of unwanted members. A group's right of expressive association is infringed if the presence of the unwanted person "affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648.

In *Dale*, the Court held that once sincere belief is found, "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Id.* at 651 (citing *Democratic Party*, 450 U.S. at 124 (courts may not interfere in First Amendment freedoms "on the ground that they view a particular expression as unwise or irrational"), and *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection")).

Because the Court will "give deference to an association's assertions regarding the nature of its

expression," the Court also will "give deference to an association's view of what would impair its expression." *Id.* at 653. Therefore, the Court held that the inclusion of James Dale "as an assistant scoutmaster would . . . surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," even if the Boy Scouts' purpose was not to affirmatively disseminate that point of view. *Id.* at 654. "[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655.

Similarly, in *Hurley* the Court held unanimously that the parade organizers for the St. Patrick's Day Parade, the veterans' Council, had the right to exclude the gay, lesbian and bisexual group as a parade contingent marching behind a banner. *See* 515 U.S. at 566. Despite the fact that "the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation," the Court held that "the parade organizers had a right to exclude certain participants nonetheless." *Dale*, 530 U.S. at 655 (stating holding in *Hurley*).

In both *Dale* and *Hurley*, as here, the proposed inclusion of persons unwanted by the group would change the message sent by the association to one preferred by the government. In *Dale*, the government would "*force the organization to send a message, both to the youth members and the world*," that the

organization did not want to send. *Id.* at 653 (emphasis added). Similarly, in *Hurley*,

> *a contingent marching behind the organization's banner would at least bear witness* to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would *suggest their view* that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals . . . .

515 U.S. at 574 (emphasis added).

In light of *Dale* and *Hurley*, there can be no doubt that a state regulation that would prohibit a Christian student group from using as membership criteria basic tenets of orthodox Christianity would interfere "in a significant way" with the group's expressive rights. *Compare* 99a-100a *with* 11a-12a, 100a-101a. The interference would be clear, even without the proposed membership of the Outlaw members apparent on this record.

2. Interference by Threatened Exclusion From a Forum

The question then becomes whether interference with expressive rights through prohibition is treated similarly under the Constitution than interference through exclusion from benefits which would otherwise be freely available, as in a forum. The answer is clearly yes.

The Court in *Dale* stated that interference with rights of expressive association may "take many forms." 530 U.S. at 648. *Dale* nowhere suggested that the freedom of expressive association is limited only to cases of direct state regulation of group membership. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (required disclosure of the organization's membership lists was an unconstitutional burden on association even though the state had "taken no direct action . . . to restrict the right of . . . members to associate freely"); *Roberts*, 468 U.S. at 622 ("Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may seek to *impose penalties or withhold benefits* from individuals because of their membership in a disfavored group." (Emphasis added.)).

The state may not censor expressive association, even if accomplished through a forum for speech rather than through direct prohibition. In *Healy v. James*, 408 U.S. 169, 181-82 (1972), this Court held that a state college in Connecticut had unconstitutionally interfered with a student political organization's First Amendment freedom of association by denying official recognition and access to university facilities because of the organization's affiliation with the national Students for a Democratic Society. Noting that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs," the Court held that "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right." 408 U.S. at 181. The Court squarely rejected the

notion that only direct state interference with membership decisions falls within the scope of the First Amendment's prohibition:

> *[T]he Constitution's protection is not limited to direct interference with fundamental rights.* The requirement in *Patterson* that the NAACP disclose its membership list was found to be an impermissible, though indirect, infringement of the members' associational rights. Likewise, in this case, *the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [State's] action.* We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'

Id. at 183 (emphasis added; citations omitted); *see id.* at 185-86 ("[T]he Court has consistently disapproved governmental action imposing criminal sanctions *or denying rights and privileges* solely because of a citizen's association with an unpopular organization." (Emphasis added.)).

Hurley is also instructive on this point. In one sense, the state court order requiring the contingent's participation in the Council's parade was a direct regulation of the Council's expression in the parade. However, *Hurley* was a case of conditioned inclusion:

the price of the Council's parade permit was state control over the Council's decisions concerning who could participate. This Court held that the state could not leverage permission to hold a parade in downtown Boston into control of the content of the Council's parade. *See Hurley*, 515 U.S. at 578-81.

Here, the state cannot leverage participation in a forum into control over the internal membership policies (and thus the "method of expression" and identity) of a Christian student group. *Dale*, 530 U.S. at 655. Preservation of the group's speech cannot come at the price of loss of funding and absence from a forum for speech, two results which would "significantly burden" the Christian student group's expression of orthodox Christian belief. *See id.* at 653; *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 799 (1985) ("without the funds obtained from solicitation in various fora, the organization's continuing ability to communicate its ideas and goals may be jeopardized").

C. Compelling State Interests Which Are Unrelated to Suppression of Ideas

The state may not override First Amendment rights unless the public purpose sought to be achieved is not only facially legitimate, but "compelling" and unrelated to the suppression of speech. *See*, *e.g.*, *United States v. Lee*, 455 U.S. 252, 256-61 (1982); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Healy v. James*, 408 U.S. 169, 184 (1972); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958). In *Roberts*, the Court stated:

> The right to associate for expressive purposes is not, however, absolute. Infringements on

> that right may be justified by regulations adopted to serve *compelling state interests*, *unrelated to the suppression of ideas*, that cannot be achieved through means significantly less restrictive of associational freedoms.

468 U.S. at 623 (emphasis added); *see Dale*, 530 U.S. at 648.

Compelling state interest clearly requires more than benign legislative purpose. States routinely argue that there is a compelling reason for a regulation to trump Free Speech if the goal is, in the state's view, "beneficent." *See Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.").

In *Dale*, the Court held that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." 530 U.S. at 659. The Court distinguished *Roberts* and *Rotary* on the fact that the application of the statutes in those cases did not "materially interfere with the ideas that the organization sought to express." *Id.* at 657. However, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world," contrary to the preferred message of the organization. *Id.* at 653. Thus, under *Dale*, a statute invalidated on the basis of the interference test would seem to fail the compelling state interest test automatically because application of the

statute had been deemed "'[]related to the suppression of ideas.'" *Id*. at 648 (quoting *Roberts*, 468 U.S. at 623).

Similarly, in *Hurley*, the Court noted the "venerable history" of the Massachusetts public accommodations law, but ruled that the law had been applied in that case "in a peculiar way," in that it was not being applied to require participation in the parade as such, but to require expressive participation in the parade as a parade contingent marching under a banner. 515 U.S. at 571-72.

In the instant case, the state cannot claim a compelling state interest in including persons who are covered by the nondiscrimination rule because those persons, in fact, are allowed by the Christian student group to attend meetings and participate. App. 13a. The state seeks to apply the nondiscrimination rule "in a peculiar way," *i.e*. to require the Christian student group to include contrary expressive participation through voting membership and leadership. In requiring a Christian group to forego the obvious expressive value of limiting voting membership and leadership to those with shared Christian values, the state's application of the nondiscrimination rule here, as in *Hurley*, requires the Petitioner to "alter the expressive content" of the association in order to participate in the forum. 515 U.S. at 572.

It is difficult to imagine any compelling state interest in removing Christian membership criteria from a Christian membership organization. That is, given sincere belief and an obvious relationship between the membership criteria and the belief, there is no

compelling state interest in regulating private associational activity which furthers religious speech.

Finally, there is no compelling interest in application of a nondiscrimination rule to a private group in a forum explicitly intended *for speech*. First, the state has already effectively disavowed any compelling state interest in regulating each private group within a forum for speech. When the state requires each private group to make clear that the state is not sponsoring or condoning its speech and activities, as here, the state has already admitted that it has no compelling interest in getting involved in internal issues of any group. App. 83a, 85a-86a.

Second, it is also difficult to see the compelling state interest in applying rules which govern itself as a state entity to obviously private groups in a forum intended to encourage free expression, including ethnic and gender groups formed along the very protected categories covered by the nondiscrimination rules.

Third, there is no compelling state interest where there is selective or at least singular enforcement of the nondiscrimination rule that is supposedly compelling. A state which includes all manner of expressive associations, on all sorts of topics and with all sorts of advocacy and membership criteria, has no compelling state interest in singling out one of them for exclusion on the asserted rule of nondiscrimination. The state's behavior in these circumstances, far from compelling, becomes entirely arbitrary and viewpoint discrimination. *See*, *e.g.*, *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 384-89 (4th Cir. 2006) ("viewpoint neutrality requires not just that a government

refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints") (citing *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000)).

II. PUBLIC FORUM DOCTRINE

Once the state establishes a public forum for speech, the First Amendment does not permit the state to disfavor one group's speech.

A. The Application of *Rosenberger*

The state in this case created an open forum for student organizations to engage in speech, then chose to censor one disfavored group. Yet facilitators of fora do not intend to speak through the individual participants in fora and, therefore, do not have a right to censor the speech of individual participants. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995) (citing *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 806 (1985)).

In *Rosenberger*, the University of Virginia had set up a Student Activities Fund ("SAF"), paid for by students, to support a broad range of extracurricular student activities that were "related to the educational purpose of the University" and that "tend[ed] to enhance the University environment." *Id.* at 824. Eleven categories of student groups qualified for SAF funds, including "student news, information, [and] opinion." *Id.* However, religious and political activities were specifically excluded. In the 1990-1991 academic year,

135 student groups applied for SAF funds, and 118 received those funds. Of the 118, 15 were funded as student news organizations. *Id.* at 825. When the student publisher of a Christian magazine, Wide Awake Productions, attempted to use the SAF to pay its printing costs as a student news organization, it was excluded as a "religious activity." *Id.* at 827.

This Court invalidated the exclusion of Wide Awake Productions from the forum, noting that once the University opened a forum dealing with certain subject matter, it "must respect the lawful boundaries it has itself set" with respect to that subject matter. *Id.* at 829. The University may regulate content if it preserves the purposes of the forum, but it may not engage in viewpoint discrimination against perspectives on subject matter otherwise "within the forum's limitations." *Id.* at 830. The Court quoted *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), which held that a school district violated the First Amendment when it permitted school property "'to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint.'" *Id.* (quoting 508 U.S. at 393). The Court also relied on *Widmar v. Vincent*, 454 U.S. 263 (1981), in which the Court struck down a public university's exclusion of religious groups from use of school facilities made available to all other student groups:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted [it] to regulate the content of what is or is not

> expressed when it is the speaker or when it enlists private entities to convey its own message. . . .
>
> *It does not follow, however, and we did not suggest in* Widmar, *that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.* A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech. . . .
>
> . . . Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, *the University may not silence the expression of selected viewpoints.*

Rosenberger, 515 U.S. at 833-35 (emphasis added).

The state here has similarly disavowed any sponsorship of the organizations participating in the forum or endorsement of their speech. The state does not wish to engage in its own speech through the forum, but instead affirmatively claims only to "expend[] funds to encourage a diversity of views from private speakers," as in *Rosenberger*. *Id*. at 834. Rather than being a speaker itself, the state is merely a facilitator of private speech and, as such, may not become an advocate for the conflicting claims of politically-correct efforts to silence orthodox Christian viewpoints within the forum.

B. Viewpoint Discrimination

The decision below conflicts with this Court's decisions forbidding viewpoint-based deprivations. Exclusion from a forum, denial of a benefit, or imposition of a financial penalty on the basis of viewpoint violates the First Amendment. *E.g.*, *Rosenberger*, 515 U.S. at 831-32 (viewpoint discrimination to "select[] for disfavored treatment" a student religious publication by excluding it on the basis of its religious character from a forum available to speech from publications); *Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (viewpoint discrimination to exclude club from use of school facilities "based on its religious nature"); *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 542, 548 (2001) (conditioning grants to lawyers for indigent persons on their refusal to challenge validity of welfare laws was unconstitutional); *Lamb's Chapel*, 508 U.S. at 393-94 (viewpoint discrimination to exclude religious group because of its perspective from use of school facilities open to social and other groups, even on assumption that forum is nonpublic); *FCC v. League of Women Voters of California*, 468 U.S. 364, 402 (1984) (conditioning grants to public broadcasters on their agreement to refrain from editorializing was impermissible).

Here, it is undisputed that the Christian student organization was excluded from the forum because of orthodox Christian membership criteria reflecting the organization's views on religion and homosexual conduct. However, on the basis that the law's *purpose* was not to punish viewpoints, but only to punish conduct reflecting those viewpoints, the court below concluded

that the nondiscrimination law could be applied to exclude the organization from the forum.

Such an approach cannot be reconciled with this Court's decision in *Good News*. In *Good News*, the school board argued that it was permitted (or required) by state law to exclude groups using school premises for religious purposes. *See* 533 U.S. at 107 n.2. Without inquiring into the purpose of the state law, the Court rejected this contention: "Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law." *Id.*

That is what occurred here. The membership criteria at issue are bound up with the Christian student organization's expression. *See Dale*, 530 U.S. at 649-52. Courts may not divorce membership criteria from viewpoint, because to penalize the former is to penalize both. *See id.* at 648 (framing the issue as whether interference with membership policies "would significantly affect the Boy Scouts' ability to advocate public or private viewpoints"). To exclude religious groups from a forum based on the values they hold and the constitutionally-protected membership criteria they establish on the basis of those values is to exclude based on viewpoint and identity. That *is* viewpoint discrimination. To apply a lower standard of First Amendment analysis to an exclusion from a forum based on constitutionally-protected membership policies presents a direct conflict with this Court's forum cases.

Here, it is clear from the text of the state's nondiscrimination rules themselves that the Christian student organization has been subjected to viewpoint discrimination. The prohibition of discrimination covers only "legally impermissible, arbitrary or unreasonable discriminatory practices." App. 8a-9a, 88a. Christian membership criteria for a Christian student organization are clearly not unlawful, nor are they arbitrary, since they bear an obvious relationship to the purpose of the organization. It follows that the state has excluded the Christian student organization because it finds the membership criteria "unreasonable," a classic value judgment.

In the First Amendment context, a "nondiscrimination" restriction which extends farther than what can be prohibited as unlawful discrimination is impermissible.[2] If the University of Virginia's excuse for excluding Wide Awake Productions had been the forum's "nondiscrimination" requirement, rather than the Establishment Clause, the result of *Rosenberger* would have been the same. Wide Awake Productions published Wide Awake magazine as a form of "philosophical and religious expression" to foster a "tolerance of Christian viewpoints" and to unify Christians of multicultural backgrounds. *Rosenberger*, 515 U.S. at 825-26. Undoubtedly, Wide Awake Productions also had the right to select Christian editors and writers, to the exclusion of atheists and Wiccans. *See Corporation of the Presiding*

2. When applied to *lawful* employment criteria or constitutionally-protected membership criteria, the term "discrimination" is merely name-calling, a moral judgment without legal import. Similarly, in rulings against Boy Scouts, courts have used the term to denigrate Boy Scouts' constitutionally-protected views in order to justify violating its rights.

Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987). Wide Awake Productions had an associational right to the selection of like-minded Christians to achieve its expressive purposes, just as a La Raza student group would have a right to the selection of Hispanic members and leaders. No "nondiscrimination" requirement can interfere with that right. *Dale* at least stands for this proposition, if not *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), before it.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Dated: February 4, 2010

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