

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 *AMICI CURIAE* OF CHRISTIAN MEDICAL
AND DENTAL ASSOCIATIONS, BETA UPSILON
CHI, AND OFFICERS OF VARIOUS CHRISTIAN
LEGAL SOCIETY STUDENT CHAPTERS
IN SUPPORT OF PETITIONER**

KELLY J. SHACKELFORD
HIRAM S. SASSER, III
JEFFREY C. MATEER
ROGER L. BYRON
ERIN LEU
LIBERTY LEGAL INSTITUTE
2001 Plano Parkway
Suite 1600
Plano, Texas 75075
(972) 941-4444

THOMAS C. BERG
Counsel of Record
UNIVERSITY OF
ST. THOMAS SCHOOL OF LAW
MSL 400, 1000 LaSalle Avenue
Minneapolis, MN 55403-2015
(651) 962-4918

RICHARD W. GARNETT
PROFESSOR OF LAW &
ASSOCIATE DEAN
NOTRE DAME LAW SCHOOL
P.O. Box 780
Notre Dame, IN 46556-0780
(574) 631-6981

Counsel for *Amicus Curiae*

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici include Present and Former Christian Legal Society (“CLS”) officers at the University of Montana, the University of Idaho, Florida State University, the University of Iowa, Ohio State University, Arizona State University, the University of Toledo, Washburn University, and Southern Illinois University; Beta Upsilon Chi (“BYX”), an all-male Christian fraternity on college campuses throughout the nation; and the Christian Medical and Dental Associations (“CMDA”), which has student chapters on college campuses throughout the nation. *Amici* are concerned that identifiably Christian student groups are increasingly facing opposition from college administrations, despite this Court’s best efforts to curtail such animus. See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Anti-discrimination requirements for student organizations have been used to restrict the religious activity of Christian student groups; CLS chapters have been facing this problem since

¹ This brief was authored by *Amici* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *Amici* or its counsel has made any monetary contribution to the preparation or submission of this brief. *Amici* has the consent of the parties to file this brief. Letters indicating their consent are being submitted with this brief.

1994.² Such requirements, when applied as Hastings applied its policies in the instant case, effectively regulate what organizations, and the students comprising them, may profess to believe. *Amici* have been struggling to maintain their beliefs while complying with the demands of their respective universities. In most cases, *Amici* have been able to maintain their doctrinal identity and continue to exist as a legitimate student group on campus, based in large part on the precedents already forged by this Court. In a few cases, resolution of the conflict has proven elusive. *Amici* file this brief to explain their struggle for recognition and legitimacy without compromising religious views that require adherence to some basic principles of professed faith for voting membership and office in a Christian organization.

(1.) In 2006, students at the University of Montana (“UM”) formed a CLS chapter and sought official recognition.³ The Student Bar Association (“SBA”), which held the authority to recognize student groups, objected to the formation of a CLS chapter and sought

² Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369-70 (1994); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on “Equal Access” for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 669-70 (1996).

³ The facts from the following cases are all drawn from the Record materials in each case.

an opinion from UM's General Counsel on whether it could deny the group formal recognition. The General Counsel stated in an email to the chapter advisor: "[i]n attending [sic] two national conferences on this my university colleagues and I conclude that free exercise and freedom of association considerations override any contrary anti-discrimination [sic] considerations [sic] in this area and UM intends to follow this direction." The SBA recognized CLS and allocated funds to CLS from student fees. Per its bylaws, the SBA sent its budget, which included funds to CLS, to the student body, a step that has always been a formality. But, amid outrage by both students and faculty over the recognition of CLS, the ratification failed. The SBA then took up CLS's recognition again and decided to derecognize the organization on the basis of sexual-orientation discrimination, although it determined CLS did not engage in religious discrimination. The SBA presented a new budget to the student body, which did not include CLS, and the budget was ratified.

UM stipulated that it considers a group's "popularity" and other viewpoint-discriminatory factors in assessing funding. CLS asserted associational standing for its members, who pay student fees to challenge this system; the court, however, rejected CLS's argument, stating that since CLS was not recognized, it could not challenge the viewpoint-discriminatory funding system. *Christian Legal Soc'y v. Eck*, 625 F. Supp. 2d 1026 (D. Mont. 2009), appeal docketed, No. 09-35581 (9th Cir. June 18, 2009).

UM officials conceded that the voting members and officers of a student organization control the group's voice, that a change in the views of the leaders would change the group's expression, and that organizations they were involved in would have been different if they had been leaders. Some Defendants additionally stated that they would view a group promoting abstinence whose members were not abstinent as hypocritical.

CLS obtained official recognition from the main campus, since its nondiscrimination policy only prohibited "illegal" discrimination. During CLS's application for recognition by the main campus, a UM official applauded CLS's clear membership and officer policies, stating that at least one UM student group's lax membership and leadership policies led to its takeover by outsiders.

(2.) Southern Illinois University ("SIU") derecognized CLS after a student who neither attended a meeting nor expressed an interest in becoming a member of the organization complained to the administration. Although SIU derecognized CLS, it did not derecognize other student organizations that restricted membership to those who affirm the group's ideology. For example, the Muslim Student Association's constitution stated that membership was open to "all Muslims." CLS sought relief in federal court and won a favorable outcome. *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006). After the Seventh Circuit's decision, SIU revised its nondiscrimination policy to state that "[student organizations] founded to promote sincerely held religious

beliefs will not be denied registration solely because they limit membership or leadership positions solely to students who share and conduct themselves according to the same sincerely held religious beliefs.”

(3.) Arizona State University (“ASU”) denied CLS formal recognition because the CLS student officer could not sign the form, under penalty of perjury and risk of expulsion for a false statement, agreeing that “[m]embership and all privileges, including voting and officer positions, must be extended to all students without regard to,” *inter alia*, “creed” and “sexual orientation.” CLS explained its Statement of Faith requirements, but ASU insisted that it must sign the form. ASU, however, was replete with groups that “discriminated” on some basis, including Progression, a gay rights group, that stated a strong preference for a gay or lesbian advisor; the Baha’i Campus Association, which limited officer positions to members of the Baha’i faith; the Muslim Students’ Association, which limited membership to Muslims and required one officer to be female; the Ms. Indian ASU Pageant Committee, which required participants to be at least one-quarter Native American; and numerous other Christian student groups with policies like CLS. ASU argued that the non-discrimination policy it was applying to CLS, and seemingly no one else, furthered the University’s “mission” to communicate disapproval of discrimination.

CLS filed suit, and the last business day before the trial was to begin, ASU expressed an interest in settling the case. *Christian Legal Soc’y v. Crow*, No.

04-2572 (D. Ariz. Nov. 17, 2004). The settlement agreement provided that “religious organizations will not be denied registration solely because they limit membership or leadership positions to students who share the same religious beliefs” and that “[t]he beliefs and practices of the Christian Legal Society at ASU that any sexual conduct, whether heterosexual or homosexual, outside of a traditional marriage is morally wrong, do not violate the sexual orientation provision in the non-discrimination policies of the University as they relate to registration of student organizations.”

(4.) Washburn University (“WU”) derecognized CLS after a Mormon student complained that he was not allowed to lead the CLS Bible studies. The student admitted that he could not sign CLS’s Statement of Faith in good conscience due to theological differences. After several months of litigation, WU decided to exempt religious groups from the religion portion of the nondiscrimination policy. *Christian Legal Soc’y v. Farley*, No. 04-4120 (D. Kan. Sept. 16, 2004).

(5.) At Ohio State University (“OSU”), individuals associated with Outlaw, a student group advocating for gay and lesbian rights, approached the CLS chapter president to inquire whether non-Christians or homosexuals could be members or officers of CLS. He responded that CLS did not exclude anyone on the basis of sexual orientation, but that all voting members and leaders had to affirm the Statement of Faith, which prohibited sexual conduct outside of marriage. Outlaw challenged CLS’s recognition,

claiming that CLS discriminated on the basis of sexual orientation and religion. As a result of the complaint, OSU derecognized CLS; the resulting suit was *Christian Legal Society v. Holbrook*, No. 04-197 (S.D. Ohio 2004). After several months of consideration of the constitutional issues, OSU amended its non-discrimination policy to include the following: “A student organization formed to foster or affirm the sincerely held religious beliefs of its members may adopt a nondiscrimination statement that is consistent with those beliefs.”

(6.) At the University of Toledo, CLS was derecognized because its constitution contained Bible verses and allegedly violated the nondiscrimination rule. CLS had to sue before Toledo would apply its already existing exemption, previously applied to CLS, providing that “organizations whose aims are primarily sectarian” could require “religious qualifications.” *Christian Legal Soc’y v. Johnson*, No. 05-7126 (N.D. Ohio Jun. 16, 2005).

(7.) At the University of Minnesota (“UMN”), CLS was told that its Statement of Faith violated the school’s nondiscrimination policy. After seven months, UMN agreed to let CLS operate on campus, and its General Counsel stated in a letter to CLS that “[r]egistered student group status will not be withheld from any student group on the ground that the group’s constitution contains a statement of faith or religious principles to which officers and voting

members of the group are expected or required to subscribe.”⁴

(8.) At the University of Idaho, CLS was denied student activity funding by the SBA on the ground that it “discriminated” on the basis of religion. On appeal, the SBA Judiciary held in a ten-page opinion that CLS’s policies were not “invidious” and therefore not “discrimination” within the commonly understood meaning of the term.

Many other CLS chapters have faced similar issues obtaining or maintaining official recognition, although each ended with the University ultimately affirming the groups’ rights. The list includes, but is not limited to, the University of Michigan, Florida State University, the University of Oklahoma, the University of Illinois, the University of Wisconsin, and the University of Iowa.

Beta Upsilon Chi (“BYX”), also known as Brothers Under Christ, is a national Christian fraternity founded in 1985. It is the largest Christian fraternity in the United States, existing at twenty-four universities across twelve states.

(1.) In 2007, the University of Florida (“UF”) refused to recognize BYX on the basis that the fraternity did not allow women to join and was not

⁴ Paulsen, *supra* n.2, at 672 n.41.

affiliated with the interfraternity council where it could claim an exemption. BYX wished to register as a student organization, and not as a fraternity, since it wanted to separate itself from the fraternity social scene, which often includes conduct that is counter to Christian teachings. BYX decided to formally affiliate its chapter with a Christian sorority, Theta Alpha, which satisfied the University's concern over sex discrimination. However, UF still refused to officially recognize BYX, now arguing that the group engaged in religious discrimination. BYX filed suit in October 2007; in May 2008, the Eleventh Circuit issued a preliminary injunction against UF, pending appeal. *Beta Upsilon Chi v. Machen*, No. 08-13332 (11th Cir. Jul. 30, 2008). In 2009, one month after oral argument, UF modified its non-discrimination policy by exempting student organizations "whose primary purpose is religious," mooting the case. *Beta Upsilon Chi v. Machen*, 586 F.3d 908 (11th Cir. 2009).

(2.) The University of Georgia ("UGA") claimed that BYX engaged in religious discrimination since it required its members and officers to affirm the Christian faith. After BYX filed suit, UGA amended its policies to exempt "religious student organizations." *Beta Upsilon Chi v. Adams*, No. 06-104 (M.D. Ga. 2006). UGA's decision was in compliance with a Georgia Attorney General Opinion determining that it would violate the First Amendment for Georgia Tech to deny recognition to another religious student group because it limits its voting members and

officers to those who share its religious beliefs. Ga. Op. Att'y Gen. 97-32 (1997).

BYX has had similar problems with Auburn University, Louisiana State University, and several other schools.

The Christian Medical & Dental Associations (“CMDA”), founded in 1931, provides a public voice for Christian healthcare professionals and students. With a current membership of more than 15,000, CMDA promotes positions and addresses policies on healthcare issues, conducts overseas medical evangelism projects, provides Third World missionary doctors with continuing educational resources, and sponsors student ministries in medical and dental schools.

At the University of Wisconsin (“UW”), CMDA was not allowed to lead Bible studies in campus dorms or participate in the full range of campus activities because of the group’s religious identity. After six months of debate, the Board of Regents at UW voted to protect the religious liberty of students, enabling CMDA to enjoy the same rights as other campus organizations.

CMDA has also had to lobby the governing bodies at the University of Michigan, Ohio State University, Virginia Tech, and Southern Illinois University to protect its right to require the group’s voting members and leaders to affirm Christian beliefs and conduct. Each university ultimately agreed to a resolution favorable to CMDA.

If the Court affirms the decision below, litigation on these important religious liberty issues will increase sharply, and many student led ministries such as *Amici*, which are safe havens for many students of faith, will disappear.



INTRODUCTION AND SUMMARY OF ARGUMENT

This case poses the question whether a student group organized around religious beliefs will be able to ensure these beliefs are shared by its leaders and voting members, and still be able to participate in a program at a public educational institution designed to encourage speech from a wide range of student groups.

The University of California-Hastings Law School (“Hastings”) denied official recognition to the school’s Christian Legal Society chapter (“CLS”) on the ground that CLS committed religious discrimination and sexual-orientation discrimination, respectively, by requiring that officers and voting members (a) subscribe to a statement of Christian faith and (b) refrain from engaging in or advocating sexual conduct outside of marriage between one man and one woman. The denial of official recognition excluded CLS from various access available to all other student organizations—including numerous channels for communicating with Hastings students, and funds provided from student-activity fees—and even left

CLS's right to meet on campus subject to the sufferance of Hastings administrators.

CLS claims, and we agree, that these disabilities violated its First Amendment rights: (1) the right to free speech and to freedom from viewpoint discrimination in a forum for speech activities, (2) the right to make associational decisions concerning leaders and members to preserve its ability to express its beliefs, and (3) the right under the Free Exercise Clause not to suffer a disability because its beliefs, actions, or nature are religious.

In this brief we focus on two key points in this case. On both issues we expand on petitioner's arguments and respond to errors by the district court. But in addition, this Court may be urged to uphold the exclusion of CLS on the basis of the analysis by a prominent constitutional scholar, Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919 (2006) (hereinafter "Volokh"). Professor Volokh's article also addresses the two points we discuss, and so we answer his arguments.

The first point concerns a group's right under the doctrine of expressive association to preserve its ability to maintain and express its beliefs. There can be little doubt that CLS exercised this right in requiring statements of faith, and standards of conduct directly tied to its beliefs, from prospective leaders and voting members, and that holding CLS civilly liable for its action would be unconstitutional.

The point we emphasize is that this right also applies when an expressive student group seeks access to a forum designed to encourage expression by student groups. If a group should be able to express its beliefs in such a forum, it must also be able to exercise the crucial right of ensuring that those who lead it share those beliefs.

The second point concerns the requirement of government neutrality among organizations' viewpoints. This requirement unquestionably governs a university's rules in a forum for expression among student groups. The point we emphasize is that the exclusion of CLS for religious "discrimination" singled out religious viewpoints alone among all the viewpoints that animate idea-oriented groups. Because "religion" is the only prohibited basis for action, under Hastings' policy, that is itself a belief, religious views are the only animating beliefs that a group cannot set as criteria for members and leaders—and religious groups are the only ones that cannot preserve their animating views in this way. This discrimination against religious viewpoints appears both on the face of Hastings' written policy and in its use to exclude CLS. It is not, we will show, merely the incidental impact of a neutral rule.

For essentially the same reasons that the exclusion of CLS was viewpoint discriminatory under the Free Speech Clause, it also singled out religious

beliefs, activity, and organizations for exclusion and thus violated the Free Exercise Clause.

◆

ARGUMENT

To set the context for our constitutional arguments, we first want to emphasize two points about CLS’s actions in this case.

First, CLS’s actions are tightly tied to its clearly-articulated beliefs and to its ability to maintain and express those beliefs. It is undisputed that CLS opens its meetings and activities to all students, Pet. App. 12a, and applies limits only to those who can affect the organization’s beliefs and actions: officers and voting members (who elect officers, vote on policies, and lead the Bible studies that are the group’s “signature” expression of belief). Pet. Br. 5. That CLS’s Statement of Faith is crucial to its identity as a religious organization should go without saying. But its standard concerning sexual conduct also ties closely to the belief, clearly articulated by the national CLS organization, that Scripture condemns intimate sexual conduct outside of marriage between a man and woman. CLS’s standards are directed at “unrepentant” extramarital conduct and the “advocacy” of extramarital conduct, both of which involve belief.

Second, because the term “discrimination” has negative connotations, it should be emphasized that the “discrimination” in which CLS engaged is simply

the natural, ordinary means by which a bona fide religious group gathers members around shared beliefs. As Justice Brennan recognized, “[d]etermining that certain activities are in furtherance of an organization’s religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself.” *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). And religious groups share this feature with other organizations that express shared beliefs and require that leaders and members share those beliefs. Thus, when a group exists to engage in religious worship and expression, as CLS unquestionably does, its use of religious criteria is not invidious. Instead, it is frequently protected by statutes that exempt religious organizations—in their religious activities, at least—from both religious-nondiscrimination and sexual-orientation-nondiscrimination laws. See Pet. Br. 46-47.

I. CLS’s Expressive-Association Rights to Choose Its Leaders and Voting Members May Not Be Violated by Excluding It from Access to a Public University Forum for Student Group Speech.

CLS was told in this case that it cannot set the criteria that its officers and its voting members share its religious beliefs and abide by standards of sexual conduct derived from those beliefs. Such a restriction on CLS, if imposed as a coercive regulation, unquestionably violates the right to associate for expressive

purposes protected by the First Amendment. See Pet. Br. 26-36; *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (right to dismiss scoutmaster whose conduct and advocacy conflicted with organization’s moral beliefs); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 575 (1995) (right of private parade organizers to exclude group that would express a point of view the organizers “cho[se] . . . not to propound”); see also, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.”)

Indeed, the underlying right is even more unquestionable here than in *Dale* and *Hurley*. See Pet. Br. 45-46. Those cases raised questions whether the organizations had articulated any moral stance on sexuality and whether their programs (scouting activities, a parade) operated mostly independently of such stances. Here the question is whether a bona fide religious organization with clearly-articulated faith statements concerning doctrinal beliefs and proper sexual conduct would be significantly burdened if it had to accept leaders and voting members who do not adhere to the beliefs or the standards of conduct. As the Seventh Circuit noted, “[t]o ask this question is very nearly to answer it.” *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006).

Nevertheless, the district court held the right of expressive association inapplicable because “Hastings is not directly ordering CLS to admit certain students” but is merely denying CLS the forms of access permitted to recognized student groups. Pet. App. 42a. In the court’s view, *Dale*, *Roberts*, and *Hurley* apply only to coercive regulation, not to exclusion from facilities generally opened for student expression. *Id.*

Professor Volokh’s article, on which respondents may also rely, takes the same position. He begins with the general principle that the government “need not subsidize the exercise of constitutional rights, even when it subsidizes other analogous behavior.” Volokh at 1924. He then proceeds to treat access to a forum for student speech—whether access to classrooms, communication channels, or funding—as a “subsidy” equivalent to every other government subsidy from tax exemptions to public-school funding to funding of medical care or public-advocacy campaigns. *Id.* at 1924-1926. Professor Volokh acknowledges two exceptions to the general rule: the government may not discriminate by viewpoint in a program of benefits to speech, and it generally may not discriminate against religion in benefits programs. *Id.* at 1928, 1929. But he rejects any exception for the expressive-association right to choose leaders and members: government can refuse to “subsidize” it.

As a result, under this analysis there is no difference between a university excluding a Baptist student group from generally-available meeting rooms

because the group limits leadership to Baptists, and a state deciding to fund public schools but not private schools (see *id.* at 1926, 1925). Because a speech forum is just another subsidy, both decisions are equally applications of the principle that the government may generally refuse to subsidize constitutionally protected behavior even when it subsidizes alternatives. And no matter how central a religious group's selection of religious leaders is to its identity, this remains an associational choice that a university can refuse to "subsidize" even to the point of withholding meeting rooms or access to bulletin boards and e-mail lists.

These arguments are fundamentally mistaken. A group's First Amendment associational right to choose leaders and members who adhere to its beliefs should be protected not just from coercive regulation, but also from infringement through exclusion from a forum for speech. It should be protected because of the importance to the First Amendment of both (1) forums for speech by private groups and (2) associational choices by private groups concerning leaders and members.

A. Denial of Equal Access to a Forum for Speech Is a Serious Imposition.

First, one cannot dismiss as a "subsidy" a student organization's right of equal access to channels for student speech at a public university. Exclusion from such channels imposes a "prior restraint" on speech,

Widmar v. Vincent, 454 U.S. 263, 270 n.7 (1981); *Healy v. James*, 408 U.S. 169, 184 (1972); and it does so in an institution that is “peculiarly the ‘marketplace of ideas.’” *Id.* at 180; *Widmar*, 454 U.S. at 267 n.5. Accordingly, when the government has opened a forum for expression, to exclude a particular expressive student organization imposes a significant burden on it. “A fundamental tenet of our Constitution is that the government is subject to constraints which private persons are not. The public forum doctrine vindicates that principle by recognizing limits on the government’s control over speech activities on property suitable for free expression.” *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring in the judgment).

Thus, this Court held in *Healy* that a university presumptively violated the First Amendment freedom of association when it refused to recognize a chapter of Students for a Democratic Society (SDS). “There can be no doubt,” the Court said, “that denial of official recognition, without justification, to college organizations burdens or abridges that associational right.” *Id.* at 181. *Healy* cited the same burdens on the SDS chapter that Hastings’ denial of recognition has imposed on CLS. It was not just that the SDS chapter could not meet on campus; its “associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper,” from which CLS has also been excluded. 408 U.S. at 181 (such restrictions hamper a group’s ability to “remain a viable entity in a campus community” by

“communicating with [new] students” and its “ability to participate in the intellectual give and take of campus debate”). The district court here downplayed the restrictions that CLS suffered (see Pet. App. 47a-49a); but we agree with petitioner that the burdens were severe. See Pet. Br. 23-25.

The importance of expressive rights in forums for student organizations is shown not only in *Healy*, but in the long line of this Court’s decisions requiring equal access for student groups’ expression of religious viewpoints. *Widmar, supra*; *Lamb’s Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

This Court has many times explained the difference between government-created forums for private speech and other kinds of government benefits. When government adopts and subsidizes messages as its own, it necessarily favors some viewpoints over others. But speech principles apply far more strictly “when the University [or other government agency] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.” *Rosenberger*, 515 U.S. at 834; *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (same). In the latter category, “the University may not discriminate based on the viewpoint of private persons whose speech it facilitates.” *Rosenberger*, 515 U.S. at 834.

There is no doubt that Hastings created such a forum here.

When the government opens a forum to encourage expression by student groups, freedom of expression extends to protecting associational choices that a student group makes in order to preserve and express its views. We discuss this point in the next two sections.

B. Denial of a Group’s Expressive-Association Right to Ensure Its Leaders and Members Share Its Beliefs Is a Serious Imposition.

It is an especially serious imposition to deny an expressive group its ability to ensure that its leaders and voting members share its beliefs. The Court has recognized that “[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association” and that the intrusion may seriously hamper the group’s ability to continue to express its views. *Roberts*, 468 U.S. at 623; see also *Dale*, *supra*. Such interference with a key aspect of expression should not serve as the basis for exclusion from the benefits of a forum for expression.

This argument stands on its own, but it finds further support in *Velazquez*, *supra*, where the Court held that a denial of governmental benefits violates the First Amendment when the government “seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual

functioning.” 531 U.S. at 543. *Velazquez* invalidated conditions on federal legal-services funding that “alter[ed] the traditional role of [subsidized] attorneys” by prohibiting them from raising certain arguments on their clients’ behalf. *Id.* at 544. As *Velazquez* explained, similar reasoning appears in several other cases. For example,

[i]n *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 [(1984)], the Court was instructed by its understanding of the dynamics of the broadcast industry in holding that prohibitions against editorializing by public radio networks were an impermissible restriction, even though the Government enacted the restriction to control the use of public funds. The First Amendment forbade the government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium.

531 U.S. at 543 (citing *League of Women Voters*, 468 U.S. at 396-397). Likewise, “in *Rosenberger*, the fact that student newspapers expressed many different points of view was an important foundation for the Court’s decision to invalidate viewpoint-based restrictions.” 531 U.S. at 543 (citing *Rosenberger*, 515 U.S. at 836).

Similarly, to include a student organization in the benefits of a forum meant to encourage diversity of expression, but only on the condition that it be willing to accept leaders and voting members who disagree with its beliefs, is unquestionably to “distort

its usual functioning.” 531 U.S. at 543. As *Roberts* put it, there can be “no clearer example of an intrusion” on a group’s internal autonomy. 468 U.S. at 623. It is a travesty to require an atheist group to allow Christians to take over its presidency or lead its meetings—and the same is true for a Christian group allowing atheists. Such a requirement is certainly “unconventional,” restricting decisions “inherent in the nature” of an expressive group. *Velazquez*, 531 U.S. at 543. It should not be the basis for denying access to the benefits of a forum designed to encourage student expression.

C. There is No Justification for Permitting the Exclusion of a Group from a Speech Forum Based on Its Efforts to Ensure that Leaders and Members Share Its Beliefs.

Faced with *Healy*’s holding that denying access to a student group violates its right of expressive association, the district court tried to evade it by resorting to a distinction between speech and conduct. *Healy*, the court said, only forbids a university to exclude a group based on disagreement with its philosophy, whereas CLS was excluded based on its “conduct” of violating Hastings’ nondiscrimination policy. Pet. App. 43a-44a. Likewise, Professor Volokh, whose article did not address *Healy*, has since explained it as “a case in which a group was excluded

largely because of its viewpoint.”⁵ The district court, like Professor Volokh, pointed to *Healy*’s statement that a university may require “that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law” governing conduct. 408 U.S. at 193; Pet. App. 44a.

But a student group’s right to select leaders who share its views cannot be defeated by distinguishing between viewpoint and conduct. For one thing, *Healy* in no way endorses campus rules that bar a group from making associational choices necessary to maintain and express its views. The Court said that “[j]ust as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected,” and that such rules do not affect a group’s “freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed.” 408 U.S. at 192-193. But if a rule significantly burdens expressive association—as Hastings’ policy does by barring CLS from selecting members based on their adherence to its beliefs—then the rule is more than a time, place, or manner regulation, and the Court’s premise that rights of speech and assembly will be preserved does not apply. By endorsing time-place-manner regulation “[j]ust as

⁵ Eugene Volokh, *Christian Legal Society v. Martinez and the Court’s University Speech Decisions*, <http://volokh.com/2009/12/11/christian-legal-society-v-martinez-and-the-courts-university-speech-decisions> (Dec. 11, 2009, 13:20 EST).

in the community at large,” *Healy* belied any suggestion that campus rules could place dramatically greater burdens on speech than other laws, or escape scrutiny by the mere invocation of the terms “reasonable” or “conduct.”

Both the *Healy* case and the Court’s statements about reasonable regulations arose in the context of campus violence and disruption. The suggestion that the SDS group might be unwilling to abide by rules stemmed from its members’ “equivocation” in answering inquiries “whether they would resort to violence and disruption on the CCSC campus.” 408 U.S. at 191 & n.22 (quotation omitted). The Court’s opinion concluded by emphasizing the need to maintain “civility and an ordered society.” *Id.* at 194. CLS, of course, has in no way interfered with order or the activities of others. It simply wants to be able to express its beliefs and preserve its identity.

More fundamentally, it is simply incongruous to recognize expressive-association rights under *Dale*, *Hurley*, and *Roberts* and then, when the issue involves restriction of access to a speech forum, turn around and distinguish between (impermissible) restrictions of viewpoints and (permissible) restrictions of conduct. The premise of expressive-association doctrine is that sometimes an organization’s “discriminatory” conduct is inextricable from its ability to preserve and express its viewpoints. In those cases, “[f]orcing a group to accept certain members”—that is, forbidding it to discriminate—“may impair the ability of the group to express those

views, and only those views, that it intends to express.” *Dale*, 530 U.S. at 648. In petitioner’s words, “where one of the central purposes of a noncommercial expressive association is the communication of a moral teaching, its choice of who will formulate and articulate that message is treated as the functional equivalent of speech itself.” Pet. Br. 35. The rights of expression and association “overlap and blend; to limit the right of association places an impermissible restraint on the right of expression.” *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 300 (1981).⁶

Accordingly, if a student group may not be excluded from an expressive forum because of the viewpoint of its expression, it equally may not be excluded because of the associational choices it makes that preserve that expression.

⁶ It is ironic for the district court to divorce CLS’s expressive conduct from its other constitutional interests. When the question was whether students’ homosexual conduct can be divorced from their orientation, Hastings interpreted its no-orientation-discrimination rule to equate the two, and the district court summarily agreed that “this is a distinction without a difference.” Pet. App. 22a n.2. But when the question was whether CLS’s conduct of choosing leaders can be divorced from its protected expression of viewpoints, the district court labored to distinguish the two and held that CLS could be disfavored for its conduct as long as it was not driven from the campus. If both gay students and traditional religious believers are to be able to live out their beliefs on university campuses, university officials and courts will have to treat the two sides more consistently and give meaningful protection to each.

Professor Volokh offers two reasons for holding expressive-association rights inapplicable to claims of access to a forum for speech. But neither reason is convincing.

First, he argues that “discrimination against certain associational decisions is present in the quintessential, and largely uncontroversial, example of a permissible designation for a public forum: university programs that are open to student groups.” Volokh at 1940. Limiting access to students might conflict with some associational choices, for example if a homeless-advocacy student group wanted a homeless person to join its board, or a “town-and-gown” group wanted non-student residents to join. *Id.* Since a university clearly may disfavor these associational choices, the logic goes, it may disfavor essentially any such choice.

The argument, however, misconceives the nature of CLS’s interest, which is simply to ensure that its leaders and voting members share its fundamental beliefs and act according to them. CLS “discriminates” on the basis of belief and belief-related conduct, not on the basis of categories of status such as race, sex, or (purely) sexual orientation. But being a student or a non-student is a matter of status. The analogy to this case is not a school prohibiting a homeless-advocacy group from including a homeless person as board member, but a school requiring the group to accept a board member who rejects helping homeless people (belief) or who has evicted them from property he owns (conduct). For a town-and-gown

group, the interest analogous to CLS's is not in having town residents on the group's board, but rather in excluding students who have written op-ed articles attacking the townspeople (belief) or have had altercations with them (conduct). A student group can still work with non-students to advance its goals, but not if its own leaders and members do not share the goals. What CLS wants to ensure is that its leaders and members share its goals.

Second, Professor Volokh points to *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), which upheld a restriction on lobbying by tax-exempt organizations together with an exemption for lobbying by veterans' groups. This shows, he says, that the government may "subsidize a certain set of expressive associations (veterans' organizations) as a means of promoting private speech on a wide range of issues," while not subsidizing other expressive associations. Volokh at 1941. But tax exemptions are unlike expressive forums for student groups: they are not designed "to encourage a diversity of views from private speakers" (*Rosenberger*, 515 U.S. at 834). As *Velazquez* makes clear, a government benefit may be designed "to facilitate private speech," as opposed to government's own message, and still not have a speech forum's distinctive purpose of encouraging a diversity of expression. 531 U.S. at 542. Professor

Volokh’s argument exemplifies the mistake of equating a forum for expression with other “subsidies.”⁷

Regan is also easily distinguishable because the lobbying restrictions imposed only a modest burden on a tax-exempt organization, which can incorporate a separate entity to conduct lobbying and simply keep tax-deductible contributions from paying for lobbying. 461 U.S. at 544 n.6; *id.* at 552-53 (Blackmun, J., concurring). The burden on CLS from nonrecognition is far greater. As an expressive organization aimed at reaching fellow students, CLS may lose its ability “to remain a viable entity” if it loses access to campus communication channels (*Healy*, 408 U.S. at 181). And as Professor Volokh himself emphasizes, when leadership criteria are at issue, a group cannot “set up a nondiscriminating affiliate” that participates in the forum, for a true affiliate would have to “be controlled by the parent group’s discriminatorily selected decisionmakers.” Volokh at 1942-43. If the group can be excluded because of its leadership criteria, it

⁷ We emphasize that when the government creates an expressive forum, it must provide the range of benefits without unconstitutional exclusions. Hastings may not deny CLS generally available student-organization funding because of its associational criteria for leaders’ beliefs, any more than it may deny generally-available access to classrooms or communication channels. *Rosenberger* teaches that equality under the First Amendment in an expressive forum extends to funding as well as other benefits. 515 U.S. at 832-35. There is no need in this case to address the scope of permissible refusals of funding outside the context of an expressive forum.

cannot create a dual structure to mitigate the effect it suffers.

II. The Exclusion of CLS Discriminated Against Its Religious Viewpoint and Religious Activities, in Violation of the Free Speech and Free Exercise Clauses.

The expressive-association right to select members and leaders is one shared by CLS with other expressive student groups. But the exclusion of CLS under Hastings' written nondiscrimination policy also singled out CLS for its religious viewpoint and its religious activity, in violation of the Free Speech Clause and the Free Exercise Clause respectively.⁸

⁸ CLS's expressive-association rights were violated under either reason that Hastings has given for its exclusion: the written nondiscrimination policy, under which CLS was excluded for engaging in religious and sexual-orientation discrimination; and the "all-comers" interpretation of the policy that Hastings officials later articulated, under which all groups must accept leaders and members without regard to their beliefs. The singling out of CLS for its religious viewpoints and activity occurred only under the written policy singling out religious discrimination for prohibition. We agree with petitioner that the "all comers" explanation is unconvincing, post hoc, and in any event unconstitutional. Pet. Br. 47-53. In this part we assume that Hastings' action was based on the specific nondiscrimination grounds from the written policy.

Under the written policy, Hastings excluded CLS not just for religious discrimination but for sexual-orientation discrimination (interpreting the policy to refer to conduct as well as orientation). We agree that this also singled out CLS for exclusion based on its moral viewpoint concerning homosexual

(Continued on following page)

A. Discrimination Against Religious Viewpoints in Violation of the Free Speech Clause.

The long line of cases already cited make clear that viewpoint discrimination against religious organizations in a forum for student speech is judged by the strictest standards. *Good News Club*; *Rosenberger*; *Lamb's Chapel*; *Widmar*. Time after time, this Court has rejected efforts to argue that a certain exclusion was not really viewpoint discriminatory. It should do so again here.

As petitioner states, a provision that student organizations make membership open to students of all religious views is uncontroversial concerning most organizations. “But when applied to groups that are organized around shared religious beliefs, this prohibition is unfair, counterproductive, disabling, and unconstitutional.” Pet. Br. 36-37.

Religions are themselves beliefs and viewpoints, as we have already emphasized. The prohibition on religious discrimination singles out religious beliefs and viewpoints as the only kind that a student organization may not enforce through standards for leadership or membership. Correspondingly, only groups whose animating beliefs are religious are denied the ability to preserve their beliefs by requiring

conduct, since any other moral view concerning conduct could be applied by a student group without violating the written policy. See Pet. Br. 39-40.

leaders and voting members to adhere to them. “Hastings’ written Policy does not tell the environmentalist club to let climate change skeptics conduct its discussion groups.” Pet. Br. 37. As Hastings once conceded, the policy “permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs” (J.A. 93). Religious groups alone are denied that freedom.

To allow a public institution to exclude religious groups because of their religious criteria for leaders and members would eviscerate this Court’s decisions from *Widmar* through *Good News Club*. See Pet. Br. 38. Schools could once again single out religious organizations for exclusion by the simple expedient of requiring them to turn their meetings and publications over to students with opposing beliefs—while all other organizations remained free to condition membership so as to protect their (nonreligious) points of view. Therefore, just as much as in the cases from *Widmar* through *Good News Club*, the exclusion of CLS threatens the evil posed by viewpoint discrimination: “the specter that the government may effectively drive certain ideas or viewpoints from the marketplace,” in this case the quintessential marketplace of a university’s forum for student speech. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (citation omitted).

Despite this patent discrimination against organizations espousing religious beliefs and viewpoints,

the district court upheld Hastings' policy on the grounds that it regulated conduct, not speech or belief, and was viewpoint-neutral. See, e.g., Pet. App. 21a, 32a. Likewise, Professor Volokh argues that excluding a religious group because of its religious criterion for leaders and members is not viewpoint-discriminatory, because it rests on the group's conduct and has only a disparate impact on its ideas. Volokh at 1931. But these arguments cannot evade the reality of viewpoint discrimination.

First, a regulation can govern conduct and still be viewpoint discriminatory. The government could not forbid racial discrimination only when groups espousing religious beliefs engage in it. See Volokh at 1931 ("If a government agency were to apply its anti-discrimination rules only to groups that express certain viewpoints, this viewpoint discrimination would be unconstitutional."). As the Court stated in *R.A.V. v. City of St. Paul*, even categories of unprotected activity may not "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." 505 U.S. 377, 383-84 (1992).

When this case is viewed in the relevant perspective—an expressive group's selection of the leaders and members who express its beliefs and determine its course—Hastings' exclusion of CLS is exactly the kind of selective restriction that *R.A.V.* condemns. Even if discrimination is generally unprotected conduct, Hastings' policy prohibits an expressive group from discriminating based on its

belief in one case only: where the belief is religious. Applying this rule to bona fide religious organizations also bears little relation—indeed, it undercuts—the rationale for proscribing religious discrimination in the first place.

A religious nondiscrimination provision has the general purpose of assuring opportunity to people of varying faiths. See *Estate of Thornton v. Caldor*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring); *Volokh* at 1926 (a university may wish to ensure that the “influence or credentials” that student-organization offices can provide are “distributed without regard to the students’ race, religion, and the like”). But applying the nondiscrimination rule to religious organizations constricts opportunities for students of varying faiths by threatening the existence of groups through which they can live their religious commitments. Because “[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community” (*Amos*, 483 U.S. at 342 (Brennan, J., concurring)), students who take their beliefs seriously have an interest in forming and maintaining groups that do the same. Attacks on such groups’ identities and existence therefore reduce religious students’ opportunities both to live out their faith and to develop experience and credentials through groups that interest them.

In short, the inclusion of religion in nondiscrimination rules is meant “to protect religious faith,” but applying the rule to religious groups “singles out religion as belief for uniquely unfavorable treatment.”

Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 916 (2009). Applying the rule to religious groups therefore undercuts its very purpose and should be recognized as viewpoint discrimination. *Id.*⁹

Contrary to the district court and Professor Volokh, this case involves much more than a disparate impact on religious organizations. Hastings' policy on its face refers to religious beliefs and viewpoints in stating that a student organization may not discriminate based on them. By its terms and in its structure, it singles out religion as the one category of beliefs an organization may not apply in choosing members and leaders. The policy therefore is non-neutral between religious and other viewpoints

⁹ Professor Volokh also cites President Kennedy's defense of Title VI of the Civil Rights Act, which as paraphrased to apply to religion would state that "public funds, to which all taxpayers of all [religions] contribute, [should] not be spent in any fashion which . . . subsidizes . . . [religious] discrimination.'" Volokh at 1927 (quoting Special Message to the Congress on Civil Rights and Job Opportunities, 1 Pub. Papers 483, 492 (June 19, 1963)). Of course, Title VI, like many other statutes, does allow public support of some kind to go to religious institutions that apply religion-based criteria. In any event, the general civil-rights rationale has little or no application to this context, where the government facilitates a wide diversity of private speech, where every aspect of access could be labeled a "subsidy" (including basic means such as meeting rooms and communication channels), and where the religious "discrimination" in question is simply a religious group's effort to define itself as other idea-based groups do.

by its very nature, not just its impact. It follows that the policy discriminates by its nature against religious organizations, since they are the ones that use religious belief and viewpoint as the criterion for their identity—that is the definition of a religious organization.

Professor Volokh acknowledges that this selective regulation of religious viewpoints is “closer to facial content discrimination” (Volokh at 1932). But it fails to qualify, he claims, because a no-religious-discrimination rule “focuses on the prospective members’ beliefs, not on the regulated groups’ speech or beliefs.” *Id.* at 1933 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). But when “the regulated group” is a bona fide religious group, these are just two sides of the same coin. The group sets its own beliefs as criteria for prospective members, and then it declines to accept students with different beliefs as members or leaders.

Even if Hastings’ policy does not discriminate against religious viewpoints on its face, it clearly does so when applied to religious groups. In previous cases from *Lamb’s Chapel* through *Good News Club*, this Court has looked beyond a policy’s face and a school’s characterization and found that its application to a religious group was viewpoint-discriminatory. In *Lamb’s Chapel*, the school district described its rule as forbidding any group to use facilities “for religious purposes” (which arguably does not single out speech on its face). 508 U.S. at 387. But the Court determined that the policy was being used to exclude a

film on child-rearing, an otherwise allowable subject, because of its religious perspective; the policy thus “was unconstitutionally applied in this case.” *Id.* at 393-94. Similarly, in *Good News Club* the district described its rule as barring any group from conducting “quintessentially religious” activities such as Bible studies, hymns, and prayer; but the Court concluded that the group in question addressed “moral and character development,” as other groups did, from a religious perspective. The Court again found viewpoint discrimination in the circumstances of the case, without discussing whether the school policy forbidding uses for religious purposes would be unconstitutional in all cases. *Good News Club*, 533 U.S. at 107 n.2, 112 n.4; see *id.* at 137-38 (Souter, J., dissenting).

Here, again, this Court should recognize that applying the policy to religious organizations singles them out among all belief-based groups and is unconstitutional.

The artificiality of denying the viewpoint discrimination here is especially apparent in the argument that “the ban on religious discrimination applies to all groups, whatever their ideologies may be.” Volokh at 1933; *accord* D. Ct. Op., Pet. App. 32a (calling the religious-nondiscrimination rule neutral because it is “imposed on all student organizations”). The same could have been said in *Widmar*, *Lamb’s Chapel*, *Rosenberger*, and *Good News Club*: all organizations were prohibited from explicit religious language and activity, and one might argue that a religious group

could speak on issues from a religious motivation but using nonreligious language (as some religiously motivated social-service or humanitarian groups do). This Court of course would have rejected the argument out of hand as discriminatory against religious viewpoints. But the notion that a religious group should ignore religion in choosing leaders, because nonreligious groups must also, is just as incongruous as the notion that a religious group should use non-religious language because nonreligious groups do so.

B. Discrimination Against Religion in Violation of the Free Exercise Clause.

Similar analysis supports CLS's claim that its exclusion violated the Free Exercise Clause. See Pet. Br. 40-41. Because religion is the one set of animating beliefs that an organization may not enforce concerning its leaders and members, Hastings' action is neither neutral toward religion nor generally applicable. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Again, Professor Volokh argues that the no-religious-discrimination policy is neutral because it "applies, both facially and in practice, to all groups, religious or otherwise." Volokh at 1936-1937. But this Court made clear in *Lukumi* that "[f]acial neutrality is not determinative"; the Free Exercise Clause "forbids subtle departures from neutrality" too. 508 U.S. at 534 (quotation omitted). *Lukumi* held that

ordinances prohibiting the ritual sacrifice of animals were neither neutral nor generally applicable, not just because of their text but because of their “real operation” in conjunction with other laws: they prohibited Santeria sacrifices while leaving unpunished “killings that are no more necessary or humane in almost all other circumstances.” *Id.* at 535-36. Similarly, in its “real operation” Hastings’ policy bars a religious student group from limiting leadership to those who share its beliefs, but allows “almost all other” groups to do so. As we argued above (pp. 35-36), this involves more than a disparate impact on religious groups; the very text of the policy singles out “religion” as the one belief on which a group may not discriminate.

As we also showed in discussing free speech, it makes no difference that “religion” in the policy could be said to refer to the beliefs of the prospective leader or member rather than the group (see *Volokh* at 1937): the policy still singles out religion as the one animating belief system a group may not enforce. Again, if the government has actually singled out religion, it does not matter whether its motive was hostility or not. See *Lukumi*, 508 U.S. at 540-42 (section on legislative motive reflecting only plurality); *id.* at 559 (Scalia, J., concurring in part and concurring in the judgment).



CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

KELLY J. SHACKELFORD
HIRAM S. SASSER, III
JEFFREY C. MATEER
ROGER L. BYRON
ERIN LEU
LIBERTY LEGAL INSTITUTE
2001 Plano Parkway
Suite 1600
Plano, Texas 75075
(972) 941-4444

THOMAS C. BERG
Counsel of Record
UNIVERSITY OF
ST. THOMAS SCHOOL OF LAW
MSL 400, 1000 LaSalle Avenue
Minneapolis, MN 55403-2015
(651) 962-4918

RICHARD W. GARNETT
PROFESSOR OF LAW &
ASSOCIATE DEAN
NOTRE DAME LAW SCHOOL
P.O. Box 780
Notre Dame, IN 46556-0780
(574) 631-6981

Counsel for *Amici Curiae*