No. 08-1371

IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,

v.

LEO P. MARTINEZ, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF GAYS & LESBIANS FOR INDIVIDUAL LIBERTY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Gays and Lesbians for Individual Liberty (GLIL) is a nonpartisan organization founded in 1991 to advance the principles of the free market, individual responsibility, and noninterference by government in the private lives of all citizens. GLIL seeks to educate members of the gay and lesbian community about these principles, while promoting tolerance and acceptance of homosexuals among members of the wider society. GLIL is based in Washington, D.C., with members across the United States and in several foreign countries. To achieve its goals, GLIL sponsors lectures, debates, panel discussions, fundraisers for charitable organizations, and social events. GLIL also publishes a newsletter and uses a website to express its views, while its members contribute articles to various publications. GLIL filed a brief as *amicus curiae* in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) ("*Dale* Amicus Br.").[1]

SUMMARY OF ARGUMENT

The Constitution protects the "right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181 (1972). That right

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[1] Pursuant to this Court's Rule 37, GLIL has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. GLIL states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than amicus, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

encompasses the freedom of a purely expressive association to limit its membership to those who share its guiding beliefs. Groups whose views reflect prevailing majority orthodoxies seldom need to invoke this freedom, but it has proven indispensable to disfavored and disenfranchised minority groups throughout our Nation's history.

Hastings College of Law (Hastings) has adopted a system of compulsory association. An expressive student group must either relinquish the right to exclude those who do not share its beliefs, or forfeit the right to participate on an equal footing with approved student organizations.

The oppressive and irrational impact of this policy is especially evident when applied to a pure expressive association like the Hastings Chapter of the Christian Legal Society (CLS), whose *raison d'etre* is to communicate its distinctive beliefs in a speech forum created for diverse student expression. By barring CLS from applying its belief-centered membership qualification, Hastings' policy threatens to turn a collective voice into a cacophony. However noble its educational or nondiscrimination goals, Hastings' policy is both self-defeating and unconstitutional.

I. Rigorous protection of minorities—including gays and lesbians—from invidious discrimination does not require sacrificing expressive associational freedom. To the contrary, these values should complement and reinforce each other. Throughout American history, gays and lesbians, like other disfavored minorities, have struggled to speak collectively without fear of government sanction, and the formation of expressive associations has often represented the first step toward equality. Wooden and inflexible application of nondiscrimination provisions

to expressive associations like CLS will erode the right to choose one's associates, thereby threatening the ability of disfavored minorities to associate to express their views free from majoritarian interference.

II. Hastings' forced-membership policy needlessly pits associational freedom against equality. Loss of associational freedom is the price of admission to Hastings' speech forum.

Hastings' policy significantly impairs CLS's ability to express its core beliefs, because the policy would require CLS to cede control over its message to those who reject its core beliefs as encapsulated in its Statement of Faith. That burden triggers the compelling-interest test. Hastings' policy strikes at the heart of CLS's protected expression by targeting its belief-based membership qualification. It does so using the same coercive means—a condition on access to an expressive forum—that this Court has strictly scrutinized as a significant burden on associational freedom. Hastings, however, has failed to establish any compelling interest advanced by the application of its policy to CLS. The balance—and the Constitution—decisively favors freedom of association.

Hastings' policy also infringes CLS's freedom of speech. The policy is viewpoint discriminatory because it systematically privileges majority viewpoints over minority viewpoints by allowing the former to overwhelm the latter. The policy is also unreasonable because its effect is to drown out minority viewpoints, thereby impeding rather than advancing the stated purpose of the forum, which is to encourage diverse expression.

ARGUMENT

I. FREEDOM OF ASSOCIATION PROVIDES VITAL PROTECTION FOR ALL MINORITY VOICES, INCLUDING GAY AND LESBIAN AMERICANS

A. Freedom of Association Has Long Been Instrumental In the Pursuit of Equal Rights and Genuine Pluralism

This Court has recognized that freedom of association is "an indispensable means of preserving other individual liberties." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). First Amendment liberties, in particular, depend on the freedom to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* at 622. The Constitution's guarantee of "the freedom to speak, to worship, and to petition the government for the redress of grievances" would be hollow if individuals were forced to exercise these rights alone. *Id.* Without the benefit of association, the lone dissenter or the advocate for minority rights is easily drowned out in the din of the public square. Association with like-minded citizens is often the sole means of challenging mass opinion or majoritarian injustices.

The history of disenfranchised and disadvantaged groups in the United States bears this out. The journey toward legal equality and social acceptance has often begun with the rise of private associations of individuals united in pursuit of a common cause. *See* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale: *A Tripartite Approach*, 85 MINN. L. REV. 1515, 1524–1534 (2001). Before there was a Nineteenth Amendment,

there was the National Woman's Party and the National American Woman Suffrage Association. INEZ H. IRWIN, THE STORY OF THE WOMAN'S PARTY 13, 26–27 (1921). Before there was a Civil Rights Act of 1964, there was the NAACP. *See NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958). And long before many states adopted protections against sexual orientation discrimination, there was an army of gay and lesbian advocacy groups in America. *See* WILLIAM N. ESKRIDGE, JR., GAYLAW 93–95, 112–116 (1999). Freedom of association remains, in many respects, the first freedom for minority groups.

The relationship between associational freedom and equality in the American experiment is as old as the Republic itself. The "necessary relation between associations and equality" in the United States left a deep impression on Alexis de Tocqueville. ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 490 (Harvey C. Mansfield & Delba Winthrop, trans. & ed., 2000) (1840). He marveled at the singular American genius for the art of association, which he traced to the condition of American equality. *See id*. at 490–93. "Everywhere that, at the head of a new undertaking, you see the government in France and a great lord in England, count on it that you will perceive an association in the United States." *Id.* at 489. Instead of statism or aristocracy, Americans turned to private associations to advance great causes and win over fellow citizens. *Id.* The freedom to join with like-minded neighbors, what Tocqueville called "the mother science" of American democracy, *id.* at 492, has long been the essential *democratic* means by which Americans have pursued political, moral, cultural, and intellectual goals.

Freedom of association protects the interests and advances the rights of minority groups in two fundamental ways, both recognized repeatedly by this Court. First, it enables disfavored groups to pursue their *distinctive ends*—including the goal of civil rights—by giving them a collective voice and equipping them for "[e]ffective advocacy of both public and private points of view." *NAACP v. Alabama*, 357 U.S. at 460; *see also Roberts*, 468 U.S. at 622 (noting that associational freedom "shield[s] dissident expression from suppression by the majority"). Second, associational freedom enables minority voices to cultivate and maintain their *distinctive identity*, thereby "preserving political and cultural diversity." *Roberts*, 468 U.S. at 622; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) (noting that freedom of association is "crucial in preventing the majority from imposing its view on groups that would rather express other, perhaps unpopular, ideas"). The Constitution's sturdy protections for freedom of association thus advance the pursuit of equality and the development of a genuinely pluralistic society.

For individuals relegated to a position of political powerlessness, the ability to pursue distinctive ends, including the goals of legal equality and social acceptance, requires the ability to associate freely with others committed to those ends. Such associations make possible the expression of a collective voice and allow—perhaps for the first time—the concerns of politically powerless individuals to be heard.

This has certainly been true for gay Americans, who have "have benefited politically and personally when they organize, and . . . suffered terribly when

the state impeded their ability to do so." Carpenter, *supra* at 1519. The earliest known gay-rights advocacy group, the Chicago Society for Human Rights, was a small group of gay men who organized in 1924. "One of our greatest handicaps was the knowledge that homosexuals don't organize," a leader of the group later wrote. *Id.* at 1528 (citation omitted). As one commentator has observed, "[t]he key to overcoming inequality, in the eyes of the earliest organizers of the gay civil rights movement, was to form groups devoted to that goal. It was, in short, to form expressive associations." *Id*. The Society for Human Rights selected its leaders, published a newsletter, and devised a plan to win new members. Importantly, the group found it necessary to limit its membership on the basis of sexual orientation: Only gay men could join. But the Society soon fell victim to state suppression. Within months, its leaders were prosecuted and financially ruined, and the group dissolved. It would be a quarter-century before another gay-rights association was formed. *Id.*

When gay-rights groups reappeared, they again met with state disapproval and hostility. The FBI and state authorities investigated and conducted surveillance of gay organizations. ESKRIDGE, *supra* at 75; Carpenter, *supra* at 1530. Congress attempted to revoke a fledging gay-rights group's license as an educational organization in Washington, D.C. Carpenter, *supra* at 1531. The IRS withheld tax-exempt status from non-profit organizations that promoted homosexuality. *Id.* And multiple states refused on public policy grounds to recognize articles of incorporation of gay-rights groups. ESKRIDGE, *supra* at 75.

Gay Americans first found some "breathing room" in the strengthened associational freedom protections born of the Civil Rights Era. ESKRIDGE, *supra* at 93. In *NAACP v. Alabama*, this Court held that freedom of association is an "indispensable libert[y]" that the Constitution guards against not only "direct action" but also subtler interference, 357 U.S. at 461, including state attempts to turn "community pressures" against minority associations. *Id.* at 463. And in *NAACP v. Button*, 371 U.S. 415 (1963), the Court recognized the protected "expressive" character of the NAACP's associational activities. *Id*. at 428–29. In the decades that followed, courts gradually began applying this and related First Amendment protections to gay organizations, overturning state denials of corporate status to gay groups, *see, e.g., Aztec Motel, Inc. v. Faircloth*, 251 So. 2d 849, 854 (Fla. 1971); *Gay Activists Alliance v. Lomenzo*, 293 N.E.2d 255 (N.Y. 1973) (per curiam); barring the IRS from discriminating against gay nonprofit organizations, *see Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980); ESKRIDGE, *supra* at 115; and shielding gay organizations' membership lists from disclosure, *see Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 207–10 (N.D. Cal. 1983).

But the importance of freedom of association to gay Americans is perhaps nowhere more visible than on this Nation's university campuses, where the First Amendment became a lifeline to gay student organizations. Carpenter, *supra* at 1531–33. After this Court's landmark student-expression decision in *Healy*, 408 U.S. 169, and the associational freedom cases from the Civil Rights Era, courts repeatedly used these precedents in the 1970s and 1980s to bar public universities from denying school recognition and funding to gay student groups. *See Gay Stu-*

dents Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 164–67 (4th Cir. 1976); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Gay Student Servs. v. Tex. A&M Univ.*, 737 F.2d 1317, 1319 (5th Cir. 1984); *see also Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972); *Student Coal. for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267 (M.D. Tenn. 1979); *Gay Activists Alliance v. Bd. of Regents of the Univ. of Okla.*, 638 P.2d 1116 (Okla. 1981); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988). And, more recently, speech protections applied in one case to protect the expressive freedom of a conservative Christian student group, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995), were later used to shelter a gay-student advocacy group. *See Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997).[2] The genius of the First Amendment is that it knows no bias. Protections for one minority voice extend to all. When the state tramples expressive associational freedom—whether through "'heavy-handed frontal attack'" or "'more subtle governmental interference,'"

[2] The expressive freedom claims of religious and gay student groups have long been mutually reinforcing. The plaintiffs in *Rosenberger* "rel[ied] heavily on *Gay & Lesbian Students Assn. v. Gohn* . . . ." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 795 F.Supp. 175, 178 (W.D. Va. 1992), *aff'd*, 18 F.3d 269 (4th Cir. 1994), *rev'd*, 515 U.S. 819 (1995). And many high school gay-rights groups have found refuge in the Equal Access Act, 20 U.S.C. § 4071 (1994), which was enacted in part at the behest of religious-liberty advocates. Carpenter, *supra* at 1532; *see, e.g., Straights & Gays for Equality v. Osseo Area Schs.-Dist. No. 279*, 540 F.3d 911 (8th Cir. 2008).

Healy, 408 U.S. at 183 (citation omitted)—all minority groups and disfavored causes are threatened.

B. An Association's Control of Its Membership Is Necessary to Preserve Its Distinctive Voice

The pursuit of distinctive ends through expressive association as reflected in these historical examples is impossible, however, if associations are unable to maintain their distinctive identity and voice. And maintaining that distinctiveness requires the freedom to exercise control over membership and leadership. *See Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). An expressive association's *input*—its members and their opinions—is often inextricably related to the association's *output*—its message and ideas. For that reason, "[f]orcing a group to accept certain members 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. Thus, restricting the ability of a pure expressive group to control its membership "ineluctably controls the group's viewpoint." *Truth v. Kent Sch. Dist.*, 551 F.3d 850, 857 (9th Cir. 2008) (Bea, J., dissenting from denial of rehearing en banc) (citation omitted).

The link between membership and viewpoint is demonstrated by the fact that expressive associations, especially those advocating a particular belief, routinely limit their membership to those who share a common bond or commitment. This is certainly true of many gay associations. "From the beginnings

of the gay civil rights movement, gay organizations have relied on exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy." Carpenter, *supra* at 1550. As GLIL has observed as *amicus curiae* in the past, there are many exclusively gay social and activity clubs, retreats, vacations, and professional organizations. *Dale* Amicus Br. 25; *see also* Carpenter, *supra* at 1550. Even gay groups that open membership to straight people almost invariably limit access to those who are committed to advancing the interests of gays and lesbians.[3] Gay organizations limit their membership for the same reason that countless expressive associations do so: a belief-centered group cannot maintain its distinctive voice and identity if its members reject its core beliefs.

This interdependence between message and membership also explains why associational freedom

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[3] *See*, *e.g.*, Harvard Gay and Lesbian Caucus Website, http://www.hglc.org/about/about.html) ("Any Harvard/Radcliffe affiliates who support our mission are welcome to join . . . ."); University of California, Santa Barbara, Center for Sexual & Gender Diversity Website, http://www.sa.ucsb.edu/sgd/Resources/OnCampus.aspx (describing a dormitory for "lesbian, gay, bisexual, transgender students and their allies"); Pet. App. 138a (noting that Hastings Outlaw reserves the right to remove any officer who "work[s] against the spirit of the organization's goals and objectives."); *see also* National Gay & Lesbian Chamber of Commerce Website, http://www.nglcc.org/membership/benefits ("Membership is open to LGBT-owned and LGBT-friendly small businesses, individuals and students."); Lesbian & Gay Lawyers Association of Los Angeles Website, http://www.lgla.net (members must "support the mission").

is essential to "preserving . . . diversity." *Roberts*, 468 U.S. at 622. The free exchange of diverse ideas is uniquely important "in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger*, 515 U.S. at 836 (citations omitted). Indeed, the Court has held that state universities have an interest of the highest order in exposing students to "widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *see also id.* at 308 (noting that diversity is particularly needed in America's law schools, "the training ground for a large number of the Nation's leaders"). To be more than a slogan, however, diversity must mean *distinctive* voices engaged in the "robust exchange of ideas." *Id.* at 324 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.)). The alternative is homogenized student speech, defined by majority orthodoxies. An expressive group's right to choose its members promotes genuine diversity, in the academic setting and elsewhere, because it is often the only way minority associations can preserve their *distinctive* viewpoints and identity. Freedom of association thus serves as a bulwark against not only overt suppression of ideas, but also against the soft tyranny of mass opinion.

II. HASTINGS' FORCED MEMBERSHIP POLICY VIOLATES THE FIRST AMENDMENT

This Court's freedom-of-association and free-speech precedents compel the conclusion that Hastings' policy of requiring all student groups to be open to all members is not merely ill-advised, but

also unconstitutional.[4] Where a government regulation significantly burdens an expressive association's ability to convey its desired message, that burden must be outweighed by a compelling interest that is advanced in a narrowly tailored fashion by that specific application of the regulation. Mere recitation of a generalized interest will not do. As this Court has made clear, the compelling-interest test applies regardless of whether the burden imposed by the government on associational freedom is direct or indirect, absolute or merely significant. Here, Hastings' forced membership policy significantly burdens the ability of CLS and all Hastings student groups to associate with like-minded individuals to spread their desired message; they must admit nonadherents or lose all the substantial benefits of recognition. The most striking aspect of this case, however, is the total absence of any permissible, much less compelling,

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[4] While Hastings' written policy on its face prohibits only discrimination on the basis of certain protected classes including sexual orientation, Hastings now takes the position that its policy actually requires all registered groups to allow "any interest student to participate, become a member or seek leadership positions in the group, regardless of the student's status or beliefs." *Compare* Br. of Appellees, *CLS v. Kane*, No. 06-15956 at 3 (9th Cir. Jan. 12, 2009) *with* J.A. 93, 220 ¶15. GLIL's analysis of the policy assumes the interpretation urged by Hastings. The policy *as written*, however, would also adversely affect gay organizations because it would clearly ban gay-only groups. And if the religious non-discrimination rule prohibits discrimination on the basis of particular religious tenets, it would bar gay groups from excluding students with faith-based opposition to homosexual conduct.

interest to be weighed against that substantial burden on associational freedom. Hastings has not identified, and cannot identify, any valid justification for its broad requirement that an expressive student group must admit those students who affirmatively disagree with its core message. In this case, the outcome of the expressive-association balancing analysis is clear, because there is no weight on the government's side of the scale.

Hastings' policy is likewise unlawful when considered under this Court's designated-forum framework, which permits incidental restrictions on speech only when reasonable and viewpoint neutral. Hastings' policy is neither. It is not reasonable for Hastings to create a forum for the express purpose of "promot[ing] a diversity of viewpoints among registered student organizations," J.A. 216 ¶8, and then undermine viewpoint diversity by compelling those organizations to admit students who affirmatively disavow the organizers' viewpoints. Nor is Hastings' policy viewpoint neutral, because it systematically privileges majority viewpoints over minority viewpoints.

A. Hastings' Policy Significantly Impairs CLS's Ability To Express Its Core Values

The fundamentally expressive character of both CLS and the registered student organizations forum at Hastings has never been seriously contested in this case. The CLS chapter at Hastings exists for the principal purpose of communicating its beliefs. Pet. App. 99a–100a. Those beliefs are summarized in the CLS Statement of Faith, which CLS requires all members to affirm. *Id.* Moreover, CLS seeks to

promulgate those beliefs in a forum created for the express purpose of promoting "a diversity of viewpoints . . . including viewpoints on religion and human sexuality." J.A. 216 ¶8. In short, "[i]t would be hard to argue—and no one does—that CLS is not an expressive association." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006).

But while the district court in this case recognized the fundamentally expressive nature of both CLS and the Hastings forum, it never acknowledged the obvious corollary mandated by this Court's precedents—that forced inclusion of students who refuse to affirm CLS's Statement of Faith would severely impair CLS's ability to express its chosen message in that forum. To the contrary, the district court erroneously divorced membership from message, stating that "[a]s long as the organization admitted all students who wanted to join, it was free to express any ideas or viewpoints." Pet. App. 23a. That reasoning has no more basis in reality than it does in the law. As this Court has recognized time and again, an expressive association is a collection of individuals, each of whom "affects the message conveyed" by the whole. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572–73 (1995). For that reason, "[t]here 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." *Roberts*, 468 U.S. at 623. The question is not whether a group forced to absorb unwanted associates remains nominally "free to express

any ideas," Pet. App. 23a, but rather whether such forced inclusion of unwanted members will "significantly affect" the association's ability to "express those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648, 650.

In past cases, this Court has approached that question by considering the relationship between an association's expressive purpose and the membership practices at issue. In *Roberts*, for example, the Court found that the forced inclusion of women would not impair the Jaycees' protected expression, because the organization's men-only rule was unrelated to its "preferred views" on civic and business issues. 468 U.S. at 627. By contrast, in *Dale*, the Court found that application of a New Jersey nondiscrimination law to require the Boy Scouts to retain an openly gay man as an assistant scoutmaster would "interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." 530 U.S. at 654. And in *Hurley*, the Court concluded that the "peculiar" application of a similar nondiscrimination law to force inclusion of a pro-gay float in Boston's St. Patrick's Day Parade would have interfered with the parade organizers' choice "not to propound a particular point of view." 515 U.S. at 575. In both *Dale* and *Hurley*, the message that each association preserved through its decision to exclude was seldom expressed and seemingly incidental to its core expressive purpose, yet the burden on those messages was sufficient to warrant First Amendment protection.

Here, the link between membership practices and expressive purpose is far more direct, and the burden on associational rights is correspondingly substantial. CLS's membership qualification—

affirmation of and adherence to its Statement of Faith—is *synonymous* with its core message. J.A. 226–27 ¶¶33–35; Pet. App. 100a–101a (CLS Chapter Constitution). Indeed, Hastings concedes that CLS has no method for assuring its members' fidelity to its message "[a]side from requiring that members or officers sign the Statement of Faith." Hastings Br. in Opp. 10. CLS seeks to exclude only those students who have affirmatively demonstrated, by refusing to affirm and abide by the Statement of Faith, that they disagree with the message CLS exists to promote. Through this modest requirement, CLS members preserve the integrity of the "views that brought them together." *Roberts*, 468 U.S. at 623. It is a membership practice entirely in service of protected expression.[5]

As applied to CLS, therefore, Hastings' policy does exactly what this Court has said a membership regulation may not do. In *Roberts*, the Court ex-

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[5] The close nexus between CLS's membership practices and preservation of its expressive purpose is further evidenced by the fact that only the four activities most closely linked to message definition—voting, serving as officers, amending the group's constitution, and *leading* religious study groups—are reserved for members. Pet. App. 101a–102a (CLS Chapter Constitution). Much as in *Dale*, the only appreciable effect of Hastings' forced membership policy would be to place nonadherents in control and leadership roles in CLS. *See Dale*, 530 U.S. at 654. For a student organization that in 2004-2005 had only four members, J.A. 230 ¶ 48, a single new member who does not share CLS's core beliefs could easily impair its message.

plained that application of Minnesota's nondiscrimination law to an expressive association was lawful because it "require[d] no change in the Jaycees' creed" and "impose[d] no restrictions on the organization's ability to exclude" members who reject the Jaycees' "ideologies or philosophies." *Id.* at 627; *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (concluding that New York City's nondiscrimination law did not burden a private club's freedom of association because it "erects no obstacle" to the club's ability "to exclude individuals who do not share the views that the club's members wish to promote"). In sharp contrast, Hastings' policy requires CLS to admit members who refuse to affirm its guiding philosophy and creed—its Statement of Faith.

Nonetheless, the district court concluded that CLS must "take[] the risk" that the forced admission of those who decline to affirm and adhere to its Statement of Faith will "impair CLS's ability to convey its beliefs." Pet. App. 59a. The Constitution tolerates no such gamble with First Amendment liberties. As this Court has recognized, "we must . . . give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653. Thus, an association need only show that its protected activity "*could* be impaired in order to be entitled to protection." *Id.* at 655 (emphasis added). Much like the open primary law invalidated by this Court in *California Democratic Party v. Jones*, Hastings' policy would compel CLS to grant membership and voting privileges to those who, "at best, have refused to affiliate with" CLS's message, and, at worst, espouse a contradictory message. 530 U.S. 567, 577 (2000). In

Jones, this Court had no trouble concluding that the "likely outcome" of such a policy would be to change the association's message. *Id.* at 581. CLS's predicament is no different.

B. The Burden On Associational Freedom Far Outweighs Any Permissible Interest Hastings May Have In Applying Its Policy To CLS

When, as here, a nondiscrimination rule significantly burdens expressive association, the First Amendment interests at stake can be overridden only "'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.'" *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623). As the *Dale* Court explained, "in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other." *Id.* at 658–59. Constitutional scrutiny of a membership regulation requires balancing the burden on the group's expression against the weight of any compelling governmental interests that are served in a narrowly tailored fashion by the specific application of the regulation at issue. Here, the balance decisively favors expressive association. The burden on CLS's associational freedom is plainly significant, and Hastings has no permissible, much less compelling, interest in forcing a purely expressive group to admit members who affirmatively reject its message.

1. The Significant Burden On CLS's Associational Freedom Triggers The Compelling-Interest Test

Hastings' policy puts CLS to a painful choice: jettison its commitment to its core message, or lose the status and benefits of a registered student organization. Even so, the district court in this case concluded that the compelling-interest test is "inapplicable" because "Hastings is not directly ordering CLS to admit certain students" by means of outright compulsion. Pet. App. 40a, 42a. This Court has never required, however, that a burden on expressive association be absolute or direct to trigger the compelling-interest test. To the contrary, the "Constitution's protection is not limited to direct interference with fundamental rights . . . . Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Healy*, 408 U.S. at 183 (citations omitted); *see also NAACP v. Alabama*, 357 U.S. at 461 (finding freedom-of-association violation even though the state had taken "no direct action . . . to restrict the rights of [petitioners] to associate freely"). State actions that impermissibly burden expressive association "can take a number of forms," including "impos[ing] penalties or withhold[ing] benefits." *Roberts*, 468 U.S. at 622. This Court has consistently applied the compelling-interest test to *all* "significant[]" burdens on associational interests. *Dale*, 530 U.S. at 659. That has been true whether the coercion involves the threat of immediate compulsion, *id.* at 646, or the denial of government benefits, *Healy*, 408 U.S. at 183, and whether the effect would directly hinder the

association's basic expressive function, *Jones*, 530 U.S. at 581, or incidentally detract from its message, *Hurley*, 515 U.S. at 574.

This Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006), confirms that *Dale*'s compelling-interest test applies to significant but indirect burdens on expressive association. In *FAIR*, a coalition of law schools brought, *inter alia*, a freedom-of-association challenge to the Solomon Amendment, a law that requires institutions of higher education to grant military recruiters access to on-campus recruiting or forfeit federal funding. Even though the alleged burden was only a condition on funding rather than an absolute mandate, the unanimous Court analyzed the schools' expressive association claim under the *Dale* framework, without suggesting that the indirect nature of the burden provided a basis for applying a less rigorous test instead. *Id.* at 68–69. While the Court concluded that the Solomon Amendment did not burden associational freedom and therefore did not trigger strict scrutiny, it did so because, in sharp contrast to Hastings' forced *membership* policy, the military recruiters in *FAIR* were deemed "outsiders who come onto campus for the limited purpose of trying to hire students—*not to become members* of the school's expressive association." *Id.* at 69 (emphasis added). The means of coercion—a funding condition—did not affect the Court's

method of analyzing the law schools' forced-association claim.[6]

The burden on CLS's associational freedom is unquestionably on par with those the Court has considered sufficient to warrant strict scrutiny. As a penalty for refusing to admit nonadherents, Hastings derecognized CLS, stripping it of the benefits enjoyed by registered student organizations. The disabilities imposed on CLS parallel those involved in *Healy*, where this Court had "no doubt that the denial of official recognition, without justification, to college organizations burdens or abridges that associational right." 408 U.S. at 181. By denying recognition, the college in *Healy* denied access to the "customary media for communicating with the administration, faculty members, and other students," and to campus meeting spaces. *Id.* at 181–82. The Court concluded that "the effect of the College's denial of recognition was *a form of prior restraint*," which attracts the strictest scrutiny under the First Amendment. *Id.* at 184 (noting that the College had a "heavy burden" of justification) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–16 (1931)) (emphasis added); *see Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979) ("Prior restraints have been accorded the most exacting scrutiny.").

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[6] The majority concurrence in *Truth v. Kent School Dist.*, 542 F.3d 634, 651 (9th Cir. 2008) (Fisher, J., concurring) (joined by Wardlaw, J.) therefore erred in concluding that the level of scrutiny applicable to a significant burden on expressive association varies with the type of speech forum.

CLS, too, has been shut out from channels of communication open to all registered student organizations. Pet. App. 7a. It can no longer reach the student body through student government mass emails or announcements in the school's weekly newsletter. *Id.* The chapter has been removed from the Student Guidebook and Hastings' website, and it is barred from the Student Information Center. *Id.* Even Hastings' annual student organizations fair is closed to CLS. *Id.* Hastings also cut off CLS's access to student activity funds available to registered organizations—a burden that goes beyond those at issue in *Healy*. 408 U.S. at 182 n.8; Pet. App. 7a–8a. Each of these disabilities significantly impedes CLS's ability to participate on an equal footing "in the intellectual give and take of campus debate." *Healy*, 408 U.S. at 181. As in *Healy*, the fact that Hastings allows CLS to exist as a derecognized student group "does not ameliorate significantly the disabilities imposed." *Id.* at 183. The "practical realit[y]" in this case, no less than *Healy*, is that a student expressive association has been cast out of a university speech forum. *Id.*

To be sure, the coercive method used by Hastings differs from the state public accommodations laws at issue in *Dale* and *Hurley*. But while Hastings' chosen instrument for regulating membership is perhaps a less blunt tool than the coercion in those cases, the threatened effect on CLS's message is more severe and direct. The protected viewpoints at stake in *Dale* and *Hurley* were peripheral to the associations' respective messages. The *Dale* majority acknowledged that it was not entirely clear whether all Boy Scout leaders are expected to share the

Scouts' seldom-expressed views on sexual morality, 530 U.S. at 655–56 & n.1, and four dissenting Justices found it "difficult to discern any shared goals or common moral stance on homosexuality" within the Boy Scouts, *id.* at 670 (Stevens, J., dissenting). In *Hurley*, the parade organizers wished simply to "remain[] silent" on the issue of homosexuality. 515 U.S. at 574. In stark contrast, the forced association in this case imperils CLS's cardinal beliefs and message. Indeed, a closer analogue to Hastings' policy in the *Dale* and *Hurley* contexts would be barring the Boy Scouts from excluding a scoutmaster who declined to affirm the Scout's Oath, or barring Boston's Irish St. Patrick's Day Parade organizers from asking a contingent of modern-day Orangemen to find their own parade.

In short, the burden in this case strikes at the heart of CLS's protected expression to a degree not approximated by the government burdens in *Hurley* or *Dale*. The mere fact that the burden comes not as a command but rather as a condition on access to an expressive forum does not excuse the intrusion. The substantial burden must be justified by a compelling and particularized governmental interest.

2. Hastings Has No Compelling Interest In Requiring an Expressive Student Group To Admit Members Who Reject The Group's Message

The significant burden that Hastings' policy imposes on CLS's associational interests can be justified only if outweighed by a "compelling state interest[], unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S.

at 648 (quoting *Roberts*, 468 U.S. at 623). In this as in other areas of constitutional scrutiny, "'context matters' in applying the compelling-interest test." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (citation omitted); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995) ("[S]trict scrutiny *does* take 'relevant differences' into account—indeed that is its fundamental purpose.") (emphasis in original). To justify burdening expressive associational freedom, the government cannot resort to airy generalities, but rather must show that the regulation *as applied* "'responds precisely to the substantive problem which legitimately concerns' the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Roberts*, 468 U.S. at 629 (citation omitted); *accord Jones*, 530 U.S. at 568.

Following that approach in *Hurley*, this Court, after acknowledging the important interests supporting Massachusetts' nondiscrimination law generally, focused on the particular way that law had been "applied" in that case. 515 U.S. at 572–73. It was not enough that laws prohibiting discrimination in public accommodations "are well within the State's usual power to enact." *Id.* at 572. The appropriate question was whether a compelling interest is served "[w]hen the law is applied to expressive activity *in the way it was done here*"—that is, to force parade organizers to embrace participants who would alter their message. *Id.* at 578 (emphasis added). The Court answered that, as applied to those particular circumstances, the rule's "apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law

choose to alter it with messages of their own." *Id.* Because application of the statute in that context "had the *effect* of declaring the sponsors' speech itself to be [a] public accommodation," it violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573 (emphasis added). Simply put, Massachusetts had no "legitimate" interest in that particular application of its nondiscrimination law. *Id.* at 578.

So too here. The relevant question in this case is whether Hastings has demonstrated a compelling interest in requiring a purely expressive group, as a condition of access to an expressive forum, to admit members who have refused to identify with the group's message. To ask that question is to answer it. Hastings has no valid—much less compelling—interest in forcing CLS (or any other expressive student group on campus) to leave the integrity of its message in the hands of nonadherents.

To justify the application of its policy to CLS, Hastings cannot appeal to an abstract interest in eliminating invidious discrimination generally. It must instead show how its policy "precisely" serves that interest in this particular context. *Roberts*, 468 U.S. at 628–29. Hastings falls far short of that target. The *sine qua non* of invidious discrimination is differential treatment on the basis of *irrelevant* characteristics. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion) ("In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."). The Court has

recognized that nondiscrimination laws legitimately target discrimination by private associations on the basis of characteristics *irrelevant* to the association's protected expressive activities—as in the private club cases. *See Roberts*, 468 U.S. at 625; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *New York State Club Ass'n*, 487 U.S. at 13. In *Roberts*, for example, this Court explained that Minnesota's public accommodations law reflected the state's longstanding interest in combating discrimination based on characteristics that "often bear no relationship" to the "actual abilities" of the excluded persons. 468 U.S. at 625. Importantly, the Court then confirmed that this important goal would be advanced by the law's specific application to an association like the Jaycees. *Id*. at 625–27. The government's interest was "strongly implicated with respect to gender discrimination in the allocation of publicly available goods and services," like the "leadership skills," "business contacts," and "employment promotions" provided by the Jaycees. *Id.* at 625 (alteration marks omitted). The Court emphasized that gender was in no way relevant to the ability to participate in the Jaycees' "commercial programs and benefits," *id*. at 626, nor was it relevant to the Jaycees' expressive purpose, *id.* at 627.

The private club cases support the proposition that antidiscrimination provisions "do their legitimate work only when applied to organizations whose exclusion of individuals is based on protected characteristics irrelevant to the organizations' core expressive purposes." Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118

HARV. L. REV. 2882, 2894 (2005); *see also* Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 923–25 (2009). That principle explains why Congress, the Court, and California (like every state in the Union) have recognized the rational distinction between invidious discrimination and a religious association's use of religious criteria to stay true to its mission. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987); 42 U.S.C. §§ 2000e-1 & 2000e-2(e)(1) (exempting religious organizations from the religious nondiscrimination provisions of Title VII); CAL. GOV. CODE § 12926(d) (exempting religious organizations from law prohibiting religious discrimination in employment); 22 CAL. ADMIN. CODE tit. 22, §§ 98100, 98222 (exempting religious organizations from prohibition on religious discrimination by state contractors and recipients of state funds).

To rely on its interest in preventing *invidious* discrimination, Hastings must show how that interest is directly advanced by applying its forced membership policy to CLS. It cannot do so. Obviously, beliefs and conduct that are inconsistent with an expressive student organization's core views are *centrally relevant* to the organization's expressive activity. When a belief-centered group excludes those who reject its beliefs, it is not using harmful or stereotypical "shorthand measures" of personal worth. *New York State Club Ass'n*, 487 U.S. at 13. Rather, it is preserving its identity and message. CLS's ability to advocate its message depends on the shared values of its membership.

In any event, the Court has made clear that the state cannot pursue generalized nondiscrimination goals by severely impairing an expressive association's ability to communicate its message. As applied to CLS, the only purpose of Hastings' policy is to give nonadherents the opportunity to participate in CLS's protected expression, which is to say the opportunity to "change, dilute or silence" that expression. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring). That goal is "merely to allow exactly what the general rule of speaker's autonomy forbids," *Hurley*, 515 U.S. at 578, and thus is unrelated to *any* legitimate purpose that concerns the school. *Id.*; *see Jones*, 530 U.S. at 582 ("We have recognized the inadmissibility of this sort of 'interest' before."). Forcing an expressive organization to accept members who reject its core beliefs in no way responds to any "substantive problem which legitimately concerns the State." *Roberts*, 468 U.S. at 629. Nor is it "an appropriately related and narrow response" to the genuine problem of invidious discrimination that legitimately concerns Hastings. *Healy*, 408 U.S. at 189 n.20. Hastings' interest in combating *invidious* discrimination therefore cannot justify its serious intrusion on CLS's membership integrity.

Hastings points also to a broader interest behind its forced membership policy: "encourag[ing] tolerance, cooperation, and learning among students . . . ." Hastings Br. in Opp. 3–4; *see also* J.A. 349 ¶5. To the extent Hastings is wielding its policy to conform students' *attitudes* to government-approved values like "tolerance" or "cooperation," however, that is "a decidedly fatal objective." *Hurley*, 515 U.S. at 579. This Court has unanimously condemned

such attempts to use antidiscrimination rules "to produce a society free of . . . biases" through forced association. *Id.* at 578. "The very idea that a non-commercial speech restriction be used to produce thoughts and statements acceptable to some groups"—for example, school administrators or the majority of students—"grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Id.* at 579. Such a policy is all the more odious in the public university setting, "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*, 515 U.S. at 835.

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When a private expressive organization "truly aims to foster a belief at odds with the purposes of a State's antidiscrimination laws," the "First Amendment . . . precludes forced compliance with those laws." *Dale*, 530 U.S. at 687 (Stevens, J., dissenting); *accord id.* at 659 (majority opinion). That is precisely the case here. The sincerity and centrality of CLS's belief-centered message are undisputed, and the threat to that message from Hastings' forced membership policy is manifest. GLIL of course regards Hastings' interest in ending invidious discrimination on the basis of religion and sexual orientation as important and bona fide, but that aim can doubtless "be achieved through means significantly less restrictive of associational freedoms" than Hastings has chosen. *Id*. at 648. On one side of the scale is the significant burden on CLS's freedom to define

its collective voice. On the other is a failure to identify any valid state interest in forcing an expressive association, as a condition of access to an expressive forum, to admit members who would impair its message. The balance—and the Constitution—favors freedom of association.

C. Hastings' Policy Violates CLS Members' Freedom Of Speech Because It Is Viewpoint Discriminatory And Unreasonable

While Hastings' forced membership policy is best evaluated under this Court's expressive-association doctrine, it also fails under a pure speech analysis. Even assuming that the registered student organizations at Hastings operate in a designated public forum, Hastings' restrictions on that forum must be both viewpoint neutral and "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829. Hastings' policy is neither.

Hastings' policy is viewpoint discriminatory because it systematically privileges majority viewpoints over minority viewpoints, leaving the latter at the mercy of the former. "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). By requiring all groups to admit all students, Hastings' policy empowers the majority of students to weaken disfavored expressive associations, simply by forcibly "participat[ing]" in, and thereby changing, those associations' speech. *Hurley*, 515 U.S. at 573. The continued viability and integrity of minority expressive associations in Hast-

ings' forum is thus made dependent on the goodwill of the majority.

In effect, Hastings has "substitute[d] majority determinations for viewpoint neutrality," an approach that this Court has already repudiated in *Southworth*, 529 U.S. at 235. There, the university's entire student body could vote by "student referendum" to fund or defund any student organization. *Id*. at 224. The Court found it "unclear . . . what protection, if any, there is for viewpoint neutrality" when student groups were subjected to the whims of a majority that might disagree with their message. *Id.* at 235. In this case, it is clear that if a majority of students took issue with CLS's message—or Outlaw's, for that matter—nothing would prevent them from becoming members of the organization and silencing that message.[7] No less than in *Southworth*, Hastings' policy surrenders the viewpoint of expressive groups to the tyranny of the majority, and eliminates any protection for viewpoint neutrality.

Hastings' policy is also unreasonable, because it actually impedes, rather than advances, the stated purpose of the forum. "The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of

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[7] It would not be the first time such a result has been seen in the university setting. *See, e.g.*, Note, *Leaving Religious Students Speechless*, 118 HARV. L. REV. at 2885 n.20 (recounting incident at the University of Nebraska where the College Republicans voted in its members as officers of the Young Democrats because of an open election).

the forum and all the surrounding circumstances." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985). One explicit purpose of Hastings' student organizations forum is to "promote a diversity of viewpoints . . . including viewpoints on religion and human sexuality." J.A. 216 ¶8. As this Court has explained, genuine diversity on campus requires not only a diverse student body, but also "expansive freedoms of speech and thought associated with the university environment." *Grutter*, 539 U.S. at 329 (citations omitted). That "open dialogue" is not limited to isolated student speech or instructor-led classroom discussion; it is fueled by extracurricular speech of diverse student associations, under the shelter of the First Amendment. *See Southworth*, 529 U.S. at 233.

University policies that manipulate the "marketplace of ideas," *Healy*, 408 U.S. at 180, or empower a majority of students to do so, *see Southworth*, 529 U.S. at 236, are the enemy of diverse expression. *See Rosenberger*, 515 U.S. at 834. Yet under Hastings' forced membership policy, only majority viewpoints (or those viewpoints too banal to interest the majority) are actually assured a voice in Hastings' forum. That is a patently unreasonable way to "promote a *diversity* of viewpoints." J.A. 216 ¶8 (emphasis added). Indeed, Hastings has acknowledged that under its policy, "the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." J.A. 221 ¶18. *But cf. Jones*, 530 U.S. at 581–82 ("Such forced association has the likely outcome . . . of changing the parties'

message."). That is not only unreasonable—it is unconstitutional.

CONCLUSION

It should come as no surprise that GLIL does not agree with CLS's views regarding homosexuality. But the constitutional remedy for speech with which one disagrees is "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). CLS's views—like those of GLIL and other expressive associations—are entitled to First Amendment protection, including protection of CLS's right to preserve the integrity of its message by excluding nonadherents. The wooden application of a forced membership policy like that enforced by Hastings puts minority and dissenting viewpoints in an especially precarious position. If the shared values of every expressive group are put up for a vote in the "committee of the whole," disfavored messages will be uniquely vulnerable. Speech that cannot be stifled from without can be undermined from within.

Our fears in this regard are not imagined. Today it is Hastings. Tomorrow it will be another university, with a different student body majority. Recall, for example, the Alabama state law ban on gay student organizations at state universities, which the Eleventh Circuit invalidated under *Rosenberger*. *See Gay Lesbian Bisexual Alliance*, 110 F.3d 1543. That ban did not originate with the state legislature or university administration. It was inspired by the student body of a state university. *See Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548, 1550 (M.D. Ala. 1996) (describing vote by Auburn

University student government to deny recognition to gay student group on the basis that the "group does not meet the idea[l]s entrusted to the Student Senate on behalf of the students at Auburn"). Student majorities are not immune from the temptation to silence views they dislike. Weakening associational freedom on our Nation's university campuses in the name of protecting disfavored minorities would be a self-defeating proposition.

This Court should not place freedom of association on a collision course with the interests of gay and lesbian Americans and other minority voices in this Nation. To do so would only sharpen the edges of distrust and factionalism in what some have called "the culture wars." Howarth, *supra* at 896; *cf.* JOHN LOCKE, A LETTER CONCERNING TOLERATION 52 (James H. Tully ed. 1983) (1689). It is not the role of the government of a free people to cleanse speech and thought of all actual or perceived biases by forcing expressive groups to relinquish control of their messages. *See Hurley*, 515 U.S. at 579. The First Amendment envisions a better way: A confident pluralism that conduces to civil peace and advances democratic consensus-building. The proper—and constitutionally compelled—solution in this case is to permit the marketplace of ideas to work, not pretermit debate through misapplication of nondiscrimination rules in an expressive forum.

Respectfully submitted.

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