No. 08-1371

In the
Supreme Court of the United States

Christian Legal Society Chapter of University of California, Hastings College of Law, *Petitioner,*
v.
Leo P. Martinez, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Amici Curiae Students for Life America, College Republican National Committee, and Republican National Lawyers Association in Support of Petitioner

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Questions Presented

1. Whether Hastings' policy unconstitutionally infringes upon student groups' expressive associational rights protected by the First Amendment.

2. Whether Hastings' policy creates an unconstitutional condition, forcing student groups to choose between exercising one of two constitutional rights.

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Statement of Interest[1]

Students for Life America (SFL), the College Republican National Committee (CRNC), and the Republican National Lawyers Association (RNLA) are organizations with student chapters on state college and university campuses nationwide. Each organization operates under a policy that maintains the respective ideological or political integrity of its local student chapters.

SFL is comprised of students seeking to communicate a pro-life message. It provides administrative and informational resources to local chapters whose mission includes "educat[ing] pro-life college students about the issues of abortion, euthanasia, and infanticide"[2] and whose official membership includes those who believe, inter alia, that "life is a promising choice."[3]

CRNC "help[s] elect Republican candidates, support the Republican agenda, and [helps College Repub-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] Students for Life of America, Mission, http://www.studentsforlife.org/index.php/about/mission/ (last visited February 1, 2010).

[3] Students for Life of America, Sample Constitution, *available at* http://www.studentsforlife.org/index.php/resources/start-a-group/ (last visited February 1, 2010).

licans] become the future leaders of the conservative movement," as well as "campaign[ ] for Republican candidates, and mobiliz[e] the youth vote."[4] The CRNC requires student chapters to include in their organizing documents prohibitions on members endorsing or supporting non-Republican candidates.

The RNLA preserves its Republican message and ideology by mandating that "[e]ach member . . . and every local chapter . . . ascribe to the accomplishment of the[ ] missions" of RNLA, which include, among others, "[a]dvancing Republican [i]deals" by establishing "a nationwide network of supportive lawyers who understand and directly support Republican policy, agendas and candidates."[5]

Without the ability to maintain ideological or political consistency, the organizations' respective missions and messages would be compromised. These organizations bring to the attention of this Court a relevant matter not already brought by the parties—the effect Hastings' policy, and those like it, would have on the First Amendment rights of politically and ideologically minded student groups.

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[4] College Republican National Committee, http://www.crnc.org ("About," "Students," and "Supporters") (last visited February 1, 2010).

[5] Republican National Lawyers Association, About RNLA, http://www.rnla.org/AboutRNLA.asp (last visited February 1, 2010).

Summary of Argument

An "all comers" policy like Hastings' infringes upon the First Amendment rights of all student groups. Such policies require student groups to accept as members those who reject the groups' beliefs, thereby altering the message of the groups in violation of their right of expressive association. The policy also conditions the exercise of one constitutional right—participation in a forum—on the relinquishment of another—expressive association, placing student groups in the untenable position of being forced to choose to exercise only one of two constitutionally protected rights.

Individuals who come together for the purpose of speaking engage in expressive association, and their right to do so is protected by the Free Speech Clause of the First Amendment. The right to expressively associate includes the right to develop and disseminate a message. If a group determines that inclusion of an individual would alter its message, the group has the right to exclude that individual. As a corollary, the government cannot force groups to accept members that the group believes would alter its message.

Hastings' nondiscrimination policy requires student groups to agree to accept all students as members and potential leaders, even if doing so would alter the groups' message. Such a policy violates student groups' expressive association rights. If the policy is upheld, Hastings, as well as colleges and universities nationwide, will be able to change the message of groups they disagree with—a result antithetical to the First Amendment.

The policy also creates an unconstitutional condition. The doctrine of unconstitutional conditions recognizes that conditioning access to a benefit on the relinquishment of a constitutional right, such as the freedom of speech, is prohibited. Such conditions, which are indirect limitations on the exercise of a right, are unconstitutional if government could not directly limit the same right. The most egregious and malignant form of unconstitutional conditions is present when persons are forced to choose between exercising one of two fundamental rights—a situation to which this Court "has always been particularly sensitive." The protection under the doctrine of unconstitutional conditions is at its apex in such situations.

Under Hastings' policy, student groups are required to surrender the First Amendment speech and expressive association rights in order to exercise their First Amendment speech and equal access rights. Hastings has conditioned access to the limited public forum on student groups' acceptance of all students as members, even if the new members would alter the groups' message. Hastings' condition commands indirectly what it cannot require directly—the alteration of the membership and leadership, and therefore the message, of an expressive association—to exercise the constitutional right of access to a forum. Hastings' policy if therefore unconstitutional.

Argument

In its decision below, the Ninth Circuit failed to address the protection of expressive association afforded by the First Amendment and to consider the doctrine of unconstitutional conditions.[6] This brief will focus on these failures, particularly as related to political and ideological student groups.

I. Hastings' Policy Unconstitutionally Infringes Expressive Association.

The Ninth Circuit should have addressed the expressive associational right of CLS and considered whether Hastings' policy infringed on it; and, if so, whether the State could meet its burden to justify the infringement.[7] Had it done so, the appeals court would have found that (1) student groups have expressive associational rights; (2) compelling groups to accept as members and officers those whose message they do not wish to convey infringes those rights; and (3) the denial of recognition as a student group to associations that will not admit everyone as members and officers, regardless of message, likewise infringes those rights. Because infringement of CLS's expressive association

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[6] In its three-sentence opinion, the Ninth Circuit reasoned that Hastings' policy is "viewpoint neutral and reasonable," and thereby constitutional. *Christian Legal Society v. Kane*, 2009 WL 693391, Pet. App. 1a, 2a (9th Cir.) (memorandum).

[7] The Ninth Circuit found that Hastings' policy requires "all groups [to] accept all comers as voting members even if those individuals disagree with the mission of the group." Pet. App. 2a.

cannot be constitutionally justified, the court below should have found Hastings' policy unconstitutional.

A. Expressive Association Is Constitutionally Protected.

When individuals come together for the purpose of speaking, they engage in "expressive association" protected by the First Amendment. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 68 (2006). As with other First Amendment freedoms, the right to engage in such expressive association is incorporated against the states by the Fourteenth Amendment. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This protection reaches the student members of organizations such as CLS, SFL, CRNC, and RNLA who do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969). Rather, "[t]he First Amendment rights of speech and association extend to the campuses of state universities." *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981); *see also Healy v. James*, 408 U.S. 169, 180 (1972) (noting that the First Amendment does not apply "with less force on college campuses than in the community at large").

In *Buckley v. Valeo*, this Court recognized that political association is a manifestation of expressive association: "[t]he First Amendment protects political association as well as political expression." 424 U.S. 1, 15 (1976). In so concluding, the Court relied upon *Patterson* and explained that "[e]ffective advocacy of both public and private points of view, particularly

controversial ones, is undeniably enhanced by group association." *Id*. (*quoting Patterson*, 357 U.S. at 460).

Decisions prior to *Buckley* "made clear that the First and Fourteenth Amendments guarantee the freedom to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses the right to associate with the political party of one's choice." *Buckley*, 424 U.S. at 15 (internal citations and quotations omitted). In *Kusper v. Pontikes*, this Court explained that "freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments." 414 U.S. 51, 56 (1973) (internal quotations and citations omitted). Likewise, in *Bates v. City of Little Rock*, this Court stated that "freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States." 361 U.S. 516, 523 (1968). And, in the context of state infringement upon a national political party's right to political association, this Court indicated that "'freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981) (*quoting* Laurence H. Tribe, *American Constitutional Law* 791 (1978)).

Political association is but one type of expressive association. This Court recognized this, noting that there are a "wide variety of political, social, economic, educational, religious, and cultural ends" for which

expressive association may take place. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Such expressive associational rights are entitled to "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

Student organizations like CLS, SFL, CRNC, and RNLA have exercised a fundamental First Amendment right by engaging in expressive association. CLS has a religious message. Amicus SFL has an ideological message and amici CRNC and RNLA have political messages. The First Amendment protects their right to speak and their right to determine their message.

B. Regulating Associations Based On Their Message Is Unconstitutional.

Included within the right to associate for expressive purposes is a corresponding right to *not* associate. An expressive group has a First Amendment right to exclude those with whom it does not wish to associate. *Jaycees*, 468 U.S. at 623; *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). Since the government is prohibited from dictating what people may say, *FAIR*, 547 U.S. at 61, the government is also prohibited from telling an expressive group that it must accept those who might compromise its chosen message. "[T]he fundamental rule of protection under the First Amendment" is that individuals and groups have "the autonomy to choose their own message." *Hurley*, 515 U.S. at 573. If a group did not have the ability to exclude those who would offer a message counter to theirs, the group would risk losing control of its message.

This freedom to not associate with those who would compromise a group's message ensures that the majority cannot force its views on groups that choose to express messages with which the majority disagrees. *Dale*, 530 U.S. at 647–48. It also allows groups to both choose and preserve their message—a protection that is vital for expressive association. If groups could not exclude those who disagree with them, they would lose the ability to control their message. *See, id.* at 648 (explaining that "[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"); *Jaycees*, 468 U.S. at 623 (observing that regulations that force groups to accept members they do not want "may impair the ability of the original members to express only those views that brought them together").

1. Regulations Compelling Association Cannot Infringe A Group's Control Of Its Message.

On five prior occasions this Court has been asked to determine whether anti-discrimination regulations that compel groups to associate with those they would rather not are constitutional.[8] In evaluating these regulations, the Court has employed a heightened form of strict scrutiny, as first explained in *Jaycees*, 468 U.S. at 623 (to be constitutional, regulations compelling association must "serve compelling state interests, *unrelated to the suppression of ideas*, that cannot be

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[8] *Jaycees*, 468 U.S. 609; *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *New York State Club Assoc. v. City of New York*, 487 U.S. 1 (1988); *Hurley*, 515 U.S. 557; and *Dale*, 530 U.S. 640.

achieved through means significantly less restrictive of associational freedoms") (emphasis added). When confronted with laws compelling association, the primary question is whether the forced association infringes the ability of groups to control their message. If it does, the regulation is unconstitutional, and no further analysis is required. *Hurley*, 515 U.S. at 578–79 (finding compelled association unconstitutional when it altered a group's message, without undertaking strict scrutiny analysis); *Dale*, 530 U.S. at 657–59 (same). Only if the compelled association does not infringe groups' control over their message does the Court need to consider whether the regulation passes strict scrutiny.

In three of the cases—*Jaycees*, *Rotary Club*, and *Club Association*—this Court upheld anti-discrimination laws compelling association. Each time, the determinative factor was that the compelled association did not interfere with the group's message. Compelling the Jaycees and Rotarians to admit women as members would not impede their "ability to engage in [their] protected activities or disseminate their preferred views," *Jaycees*, 468 U.S. at 626–27, nor require them to "abandon or alter" their message or activities. *Rotary Club*, 481 U.S. at 548. And compelling various private clubs to accept as members all those who agreed with their message, while allowing them to exclude those who disagreed with their message, did not infringe their expressive associational freedoms, because the message of the clubs would remain the same. *Club Ass'n*, 487 U.S. at 13.

The *Jaycees* Court found it significant that the anti-discrimination law "impose[d] no restrictions on

the organization's ability to exclude individuals with ideologies or philosophies different from its existing members." *Jaycees*, 468 U.S. 627. The *Club Association* Court similarly emphasized that compelled association would be unconstitutional when a group demonstrated that it is "organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion." *Club Ass'n*, 487 U.S. at 13. And the *Rotary Club* Court indicated that if the evidence had shown that compelled association would "affect in any significant way the existing members' ability to carry out their various purposes," the outcome would have been different. *Rotary Club*, 481 U.S. at 548.

Thus, in each of the three cases in which this Court upheld anti-discrimination regulations compelling association, the crucial factor was that the compelled association did not infringe the group's ability to determine and control its message. Because the challenged regulations also passed strict scrutiny, they were constitutional. *Jaycees*, 468 U.S. at 623; *Rotary Club*, 481 U.S. at 549; *Club Ass'n*, 487 U.S. at 13–14, 14 n.5.

The Court reached the opposite result in *Hurley* and *Dale*. Once again, the crucial factor for the Court was whether the compelled association would infringe the groups' ability to express their chosen message. Because it would, the Court held the regulations unconstitutional without undertaking strict scrutiny analysis.

In *Hurley*, parade organizers sought to exclude from their parade certain marchers who intended to communicate a message that the parade organizers did not wish to convey. *Hurley*, 515 U.S. at 559. The Court noted that freedom of speech includes the right to determine both what one will say, and also what one will not say. *Id.* at 573. Otherwise, "[t]he government could require speakers to affirm in one breath that which they deny in the next." *Id.* at 576 (quotation marks and citation omitted). Because the parade organizers did not want to "include among the marchers a group imparting a message the organizers do not wish to convey," a unanimous Court held that they could not be forced to include them. *Id.* at 559. The Court never undertook a scrutiny evaluation. The fact that the anti-discrimination regulation would force the parade organizers to include a message they did not want to convey was sufficient to render the regulation unconstitutional.

In *Dale*, this Court concluded that anti-discrimination laws that directly impair a group's ability to espouse its own message cannot constitutionally be applied to that group. 530 U.S. at 659. The issue in *Dale* was whether an anti-discrimination law could be applied to the Boy Scouts to force them to accept a scoutmaster who openly advocated for homosexual behavior. *Id.* at 644. The Court explained that deference should be shown to the group's assertions regarding "the nature of its expression" as well as its "view of what would impair its expression." *Id.* at 653 (*citing La Follette*, 450 U.S. at 123–124). The Court found that forcing the Boy Scouts to accept the scoutmaster would impair their ability to express their chosen message

regarding morals and lifestyles, holding that the anti-discrimination law could not constitutionally be applied against them. *Dale*, 530 U.S. at 659. Just as in *Hurley*, there was no need for scrutiny analysis. The fact that the compelled association would threaten the group's ability to express its message was sufficient to render the compelled association unconstitutional.

In this Court's compelled association jurisprudence, the crucial question is thus whether compelled association threatens a group's ability to express its message. If not, the Court considers whether the compelled association satisfies strict scrutiny. *Jaycees*, 468 U.S. at 623; *Rotary Club*, 481 U.S. at 549; *Club Ass'n*, 487 U.S. at 13–14 and 14 n.5. If compelled association infringes a group's message, the Court does not conduct a scrutiny analysis: the regulation is unconstitutional. *Hurley*, 515 U.S. at 559; *Dale*, 530 U.S. at 659.

2. Hastings' Policy Suppresses Speech.

CLS's chapter at Hastings is in the same position as the Boy Scouts in *Dale* and the parade organizers in *Hurley*—the forced inclusion of those with a contrary message threatens its ability to communicate its chosen message. CLS cannot effectively espouse its Christian message if its members and officers do not subscribe to it. Nor can it express with credibility its chosen message concerning moral issues if it is forced to accept as members and officers those whose actions subvert that message. The district court below held that this was a "risk" that CLS must bear. *Christian Legal Society v. Kane*, 2006 WL 997217, Pet. App. 4a, 59a (N.D. Cal.). Forcing this risk upon expressive associations, however, goes beyond what the First Amendment will tolerate. Under this Court's prece-

dent, compelled association that threatens a group's ability to control its own message is unconstitutional.

CLS, SFL, CRNC, and RNLA face that threat as a result of the Ninth Circuit's decision upholding Hastings' requirement that groups accept as members and officers those who disagree with the groups' message. Hastings explained 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." App. 221. But if political and ideological groups are not free to exclude those who disagree with their message, they may be forced to have conflicting messages. Or, they might be overrun by students opposing their message, and thus altogether lose the ability to expressively associate as a student group.

Students for Life America, for example, is comprised of pro-life students seeking to communicate a pro-life message. If SFL is forced to admit those who reject the pro-life position, there is a strong probability that it will be unable to maintain a unified voice, but instead will have conflicting messages—one pro-life, the other pro-choice. On many campuses, pro-choice students outnumber pro-life students. On those campuses, SFL might be taken over by students opposing the pro-life position. They could then outvote the pro-life members and cause the group to espouse a pro-choice message. The original members of SFL on those campuses, who started their group in order to express a pro-life message, would lose their ability to do so. Their message would be silenced, and the "marketplace

of ideas," so foundational to our American democracy, would suffer.[9]

Because the Ninth Circuit failed to fully consider the impact of compelled association on CLS's members' expressive associational rights, it reached the wrong result. This Court should therefore reverse the Ninth Circuit's decision, and hold unconstitutional the requirement that expressive associations admit as members and officers even those who threaten their ability to control their message.

C. Derecognizing An Expressive Association Because Of Its Message Is Unconstitutional.

Just as compelling expressive associations to accept as members those who disagree with them impermissibly burdens their expressive associational rights, so does derecognizing them for refusing to comply with "all comers" policies.

There can "be no doubt that denial of official recognition, without justification, to college organiza-

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[9] In one instance, the University of Virginia initially refused recognition to the Edmund Burke Society, an ideologically conservative student organization; a decision that was reversed only after counsel for the Burke Society intervened. Luke Sheahan, *University of Virginia Officially Recognizes Conservative Group*, Foundation for Individual Rights in Education, 2008, *available at https://thefire.org/article/8912.html* (last visited January 25, 2010). For numerous additional examples of the various harms that befall unpopular student groups *see* Brief of *Amicus Curiae* Foundation for Individual Rights in Education in Support of Petitioner, Part I, *Christian Legal Society v. Martinez*, No. 08-1371 (U.S. 2009).

tions burdens or abridges [their] associational right." *Healy*, 408 U.S. at 181. Denial of official recognition may bring with it "denial of use of campus facilities for meetings and other appropriate purposes." *Id*. It also limits the association's ability "to participate in the intellectual give and take of campus debate" and "to pursue its stated purposes." *Id*. at 181–82. Consequently, "[s]uch impediments cannot be viewed as insubstantial." *Id*. at 182. Rather, denial of recognition is an "indirect" and "subtle governmental interference" that "stifle[s]" First Amendment freedoms. *Id*. at 183. As such, denial of recognition is a prior restraint on speech, which the college must justify. *Id*. at 184.

1. Derecognition Is Unconstitutional Unless Groups Break The Law Or Disrupt The Educational Process.

Once colleges decide to recognize student groups, the First Amendment permits denial of recognition to particular groups in only two circumstances. First, colleges may deny recognition to groups that advocate "inciting or producing imminent lawless action" and are "likely to incite or produce such action." *Healy*, 408 U.S. at 188 (*quoting Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). Second, they may deny recognition to groups that "materially and substantially disrupt the work and discipline of the school[ ]," *Healy*, 408 U.S. at 189 (*quoting Tinker*, 393 U.S. at 513), which occurs when groups "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Healy*, 408 U.S. at 189.

Those are the only reasons identified by this Court that schools may deny recognition to student groups.

Disagreement with the group's philosophy or viewpoint is not sufficient to deny it recognition and attendant benefits. *Id*. at 187; *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 840 (1995). Nor can schools derecognize student groups because they are affiliated with unpopular organizations, *Healy*, 408 U.S. at 185–87, advocate changing or discarding school policies, *id*. at 192, have philosophies that are "antithetical to the school's policies," *id*. at 175, or hold views that are "repugnant" or otherwise unacceptable to the school's administration. *Id*. at 187. Instead, "the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and [unlawful or disruptive] action, which is not." *Id*. at 192.

The Courts of Appeal have followed this Court by consistently holding it is unconstitutional to deny recognition to student groups, unless they engage in unlawful or disruptive action. *See Gay Students Organization of the Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Gay Student Services v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984); and *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In fact, the only Court of Appeals to hold otherwise was the Ninth Circuit in the underlying case, after more than twenty-five years of consistently applied precedent. Pet. App. 2a, 4a.

Walker is a case that is nearly identical to the one before this Court but was decided on expressive association grounds—grounds the Ninth Circuit ignored. At issue was whether the local chapter of the CLS at

Southern Illinois University (SIU-CLS) could be derecognized as a student group because it excluded from its voting membership and officers students who did not subscribe to its principles and beliefs. SIU-CLS welcomed all students to its meetings and events but it only let those students who agreed to "subscribe to certain basic principles and beliefs contained in CLS's statement of faith, including the Bible's prohibition of sexual conduct between persons of the same sex" be voting members or officers. *Walker*, 453 F.3d at 858. SIU claimed that requirement violated various university anti-discrimination policies. *Id*. As a result, SIU derecognized SIU-CLS and SIU-CLS sued. *Id*.

The *Walker* court found that SIU-CLS is an association that seeks to communicate a religious message, *id*. at 862, and that forced inclusion of persons who reject CLS's beliefs and standards of conduct would significantly affect SIU-CLS's ability to express its message. *Id*. at 863. The Seventh Circuit stated that "[i]t would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id*. Because the Supreme Court made clear in *Dale* and *Hurley* that anti-discrimination regulations cannot be applied to expressive associations "with the purpose of either suppressing or promoting a particular viewpoint," the *Walker* court said that SIU had no acceptable interest "in forcing CLS to accept members whose activities violate its creed."[10] *Id*.

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[10] The Seventh Circuit explained that SIU-CLS's expressive association claim turned on "three questions: (1) Is CLS an

The *Walker* court then addressed SIU's claim that it was not forcing CLS to accept members, but rather was only withdrawing its status as a recognized student group. The appeals court said, "[t]he Supreme Court rejected this argument in *Healy*, a case that parallels this one in all material respects." *Id*. at 864. The *Healy* Court "drew a distinction between rules directed at a student organization's actions and rules directed at its advocacy or philosophy; the former might provide permissible justification for nonrecognition, but the latter do not." *Id*. Because CLS was derecognized for its advocacy, and not for its action, the derecognition was constitutionally impermissible. *Id*.

2. Hastings Derecognized CLS For A Constitutionally Impermissible Reason.

CLS is in the same position as was Students for a Democratic Society in *Healy* and SIU-CLS in *Walker*. Its expressive association rights have been infringed because it has been denied recognition. The facts in this case are nearly identical to those in *Walker*. In both cases, the CLS student group was derecognized

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expressive association? (2) Would the forced inclusion of active homosexuals significantly affect CLS's ability to express its disapproval of homosexual activity? and (3) Does CLS's interest in expressive association outweigh the university's interest in eradicating discrimination against homosexuals?" *Walker*, 453 F.3d at 862. Amici respectfully assert that the *Walker* court should not have reached the final question. Under *Dale* and *Hurley*, once the appeals court determined that CLS had a message, and that forced inclusion of others would threaten that message, the analysis should have ended. *See*, supra, Part I. B. 1. at 9–13.

because it refused to admit as members and officers those whose inclusion would alter its message. Neither SIU-CLS nor CLS has barred any student from attending its meetings and events. Just like SIU-CLS, CLS wants to restrict its voting membership and officers to only those students who agree with its message, and whose actions do not conflict with its message. Because of its refusal to comply with Hastings' "let everybody be members and officers, regardless of what it does to your message" policy, it was derecognized.

Yet, as this Court held in *Healy*, only two constitutionally permissible reasons exist for infringing the right to expressive association by denying recognition: unlawful activity, or materially and substantially disrupting the work and discipline of the school by infringing reasonable rules, interrupting classes, or substantially interfering with the opportunity of other students to obtain an education. *Healy*, 408 U.S. at 189–89. Otherwise, derecognition is not permissible.

No one has alleged that CLS engages in unlawful activity, or incites others to engage in such activity. Nor has anyone alleged that CLS is interrupting classes, or interfering with the opportunities of other students to receive an education. Rather, this case turns on whether CLS, by seeking to restrict its membership to those who agree with its statement of faith, infringes campus rules related to the work and discipline of the school.

Hastings asserts that CLS's membership policy violates its campus non-discrimination policy. Opp'n Pet. 4. Yet, this Court's compelled association jurisprudence teaches that anti-discrimination laws cannot be enforced against expressive associations when such

enforcement would imperil the association's message or cause the association to communicate what it does not want to.[11] CLS asserts that is what this rule does. Under *Dale*, deference is shown to CLS's reasonable assertion regarding both its message and the threat to it from compelled association. *Dale,* 530 U.S. at 653.

If CLS is forced to accept as members and officers those who hold a different set of beliefs, its particular Christian message will be compromised. The same result will happen to its message about non-marital sexual activity if CLS is forced to admit as members and officers those engaging in and advocating such activity. Hastings may find CLS's message "antithetical to the school's policies," but, under this Court's holding in *Healy*, that is not sufficient to justify derecognition. *Healy*, 408 U.S. at 175.

Hastings claims it can derecognize CLS because it wants to promote "tolerance, cooperation, and learning among students of different viewpoints." Opp'n Pet. 3–4. But, as this Court has emphatically explained, rules designed to ensure homogeneity on campuses are "repugnant" if they do so at the expense of First Amendment freedoms. *Healy*, 408 U.S. at 187; *Tinker*, 393 U.S. at 511 (*citing Meyer v. State of Nebraska*, 262 U.S. 390, 401 (1923)). That is exactly what Hastings' rule does: it sacrifices First Amendment freedoms in its attempt to create a more homogenous, tolerant society. Even if that were a worthy goal, it cannot be accomplished through unconstitutional means. *Meyer*, 262 U.S. at 402. Hastings' rule cannot therefore be a

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[11] *See supra* at 9–13.

"reasonable campus rule" regarding the "work and discipline of the school[ ]" when applied to religious, ideological, and political expressive associations. *Healy*, 408 U.S. at 189. CLS thus cannot constitutionally be derecognized for failing to follow it.

No constitutionally permissible justification exists for Hastings' derecognition of CLS. The Ninth Circuit should have found the requirement that CLS admit everyone, regardless of their beliefs and message, as members and officers or face derecognition as a student group, an unconstitutional infringement on CLS's members' expressive associational rights. This Court should find Hastings' policy unconstitutional and reverse the Ninth Circuit's decision.

II. Hastings' Policy Creates An Unconstitutional Condition.

A. Demanding Forfeiture Of One Fundamental Right To Exercise Another Is Unconstitutional.

Forcing groups into the "Hobson's choice" of exercising one constitutional right at the expense of another is impermissible. *Simmons v. United States*, 390 U.S. 377, 391 (1968). The basic doctrine of unconstitutional conditions prohibits government from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Rumsfeld v. FAIR*, 547 U.S. at 59 (internal citations omitted). Further, conditions, which are indirect limitations on the exercise of a right, are unconstitutional if government could not directly limit the same right. *See FAIR*, 547 U.S. at 59–60 (*citing Speiser v. Randall*, 357 U.S. 513, 526 (1958)). If a condition commands indirectly

what government cannot require directly—the alteration of membership and leadership, and therefore the message of an expressive association—the condition infringes upon the First Amendment rights of student groups.

Even where the benefit conferred by the government is discretionary and the beneficiary has no entitlement to the benefit, conditioning access to the benefit on the relinquishment of a constitutional right such as the freedom of speech is prohibited. *See, e.g.*, *Citizens United v. Federal Election Commission*, 2010 WL 183856, *26, 558 U.S. ____, No. 08-205, slip op. at 35 (explaining "[i]t is rudimentary that the State cannot exact as the price" of the "special advantages" of the corporate form "the forfeiture of First Amendment rights"); *FAIR*, 547 U.S. at 59 (noting that "'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit'") (*quoting United States v. American Library Association*, 539 U.S. 194, 210 (2003) (internal citations omitted)); *Speiser*, 357 U.S at 518 (finding unconstitutional the denial of a tax exemption where the exemption was conditioned on a signed statement that the beneficiary would not advocate the overthrow of government by force or violent means).

The most egregious form of unconstitutional conditions is the "intolerable" situation in which persons are required to choose between exercising one of two fundamental constitutional rights—a situation to which this Court "has always been particularly sensitive." *Simmons*, 390 U.S. at 393. One court has called it an "especially malignant" form of the unconsti-

tutional conditions doctrine. *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004).

This Court first recognized this especially problematic form of unconstitutional conditions in *Simmons*, 390 U.S. 377. Simmons was forced to choose between his Fifth Amendment right against self-incrimination and his right to assert a claim under the Fourth Amendment's protection against warrantless search and seizure. *Id*. at 394. The Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another" and struck down the "choice" as an unconstitutional condition. *Id*.

This Court reached a similar conclusion in *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). In that case a prominent political figure was required to "forfeit one constitutionally protected right as the price for exercising another." *Id*, 431 U.S. at 807–808 (*citing Simmons*, 390 U.S. at 394).[12] Lefkowitz was deprived of a political office under a New York statute in violation of "his [First Amendment] right to participate in private,

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[12] These are the only two cases in which this Court has applied this most egregious form of unconstitutional conditions. Later cases distinguished *Simmons* without diluting the absolute rule that it is impermissible to compel a person to forgo some constitutional right in order to assert another. *See, e.g.*, *United States v. Kahan*, 415 U.S. 239, 242-243 (1974) (holding the doctrine of unconstitutional conditions inapplicable where no valid Sixth Amendment claim for appointment of counsel existed and defendant "was not, therefore, faced with the type of intolerable choice *Simmons* sought to relieve"); *Bordenkircher v. Hayes*, 434 U.S. 357, 363-364 (1978) (indicating that limiting a constitutional right is different from foreclosing the exercise of that right while asserting of another).

voluntary political associations" when he exercised his Fifth Amendment right and "refused to . . . give self-incriminating testimony." *Id*. This, the Court held, was an unduly coercive and unconstitutional condition. *Id*.

Simmons and *Lefkowitz* together show that the protection under the doctrine of unconstitutional conditions is at its apex when an individual is forced to choose between exercising one of two or more constitutional rights. Unlike conditions on the receipt of some generally available statutory or monetary benefit,[13] the constitution cannot tolerate one of its protections being conditioned on the relinquishment of another. Both *Simmons* and *Lefkowitz* involved conditions requiring individuals to relinquish their constitutional right (against self-incrimination protected by the Fifth Amendment) in order to exercise another (claim under the Fourth Amendment and the ability to associate under the First Amendment, respectively). *Simmons*, 390 U.S. at 393–394; *Lefkowitz*, 431 U.S. at 807–808. Such conditions are unconstitutional.[14]

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[13] *See, e.g.*, *FAIR*, 547 U.S. at 59, (holding that a condition on the availability of federal funding that requires universities to provide equal treatment to military recruiters as provided to other recruiters did not violate law schools' associational rights); and *Rust v. Sullivan*, 500 U.S. 173, 198 (1991) (holding that a condition on the receipt of federal funds requiring a funding recipient to engage in abortion-related activity separately from activities subsidized by federal funding did not violate its First Amendment right to educate and counsel about family planning).

[14] This Court identified two cases involving the rights of organizations to exist on college and public school campuses as

Characterizing the decision between exercising only one of two constitutional rights as a "choice . . . to give up [a] benefit" is improper because "situations in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights [pose] an ['intolerable' and] undeniable tension." *Simmons*, 390 U.S. at 394. This most egregious form of unconstitutional conditions often involves an involuntary relinquishment of a constitutional right. The Fourth Circuit helpfully noted the difference between voluntary and involuntary surrender of a constitutional right in *Tomai-Minogue v. State Farm Mut. Auto. Ins. Co.* 770 F.3d 1228, 1232 n.6 (1985). Voluntary surrender occurs when the right is relinquished, "not to assert another constitutional right, but to secure an obvious collateral benefit,"[15] the latter of which was the case before it. *Id*.

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being in the "spectrum" of unconstitutional conditions cases. *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996) (*citing Healy*, 408 U.S. at 192–193, and *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 390–394 (1993)). In *Healy*, SDS was forced to choose between exercising its "associational right" and access to "campus facilities for meetings and other appropriate purposes" to "participate in the intellectual give and take of campus debate" and "to pursue its stated purposes." 408 U.S. at 181. In *Lamb's Chapel*, the petitioner was forced to choose between access to a forum and sharing a religious message. *Lamb's Chapel*, 508 U.S. at 388. In both cases, the unanimous Court held the constitutional rights of petitioners were violated. *Id*. at 394; *Healy*, 408 U.S. at 194.

[15] This Court made a similar point in a case involving the constitutionality of criminal plea bargains, *Bordenkircher*, in which the Court indicated that limiting a constitutional right

Thus, involuntary surrender of a constitutional right—a surrender that indicates the existence of an unconstitutional condition—occurs when the "choice" of exercising one right comes at the expense of exercising another.

B. Hastings Conditions Equal Access On The Surrender Of Expressive Association.

Hastings is doing indirectly what it cannot do directly—forcing student groups to surrender the First Amendment speech and expressive association rights by redefining their very essence, identity, and message—as a condition of equal access to a student forum that Hastings had the discretion to open in the first place. Hastings has conditioned access to the limited public forum upon relinquishment of expressive associational rights.[16] The forcibly-changed ideology that Hastings would have students endure in order to "foster a homogenous society" has not historically been nor should now be tolerated by this Court. *See Meyer*, 262 U.S. at 402.

Equal access to public forums on university campuses is a right protected under the First Amendment. *See Healy*, 408 U.S. at 184; *Widmar*, 454 U.S. at 269–270; and *Rosenberger*, 515 U.S. at 830. Government cannot deny equal access to a group to a public forum based on the content of a group's message. *Wid-*

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is different from foreclosing the exercise of that right merely by the assertion of another. 434 U.S. at 363–364.

[16] *See*, supra, Part I for an extended discussion of the expressive association rights of ideological and political student groups.

mar, 454 U.S. at 269–270; and *Rosenberger*, 515 U.S. at 830. The "'denial of recognition [i]s a form of prior restraint, denying to petitioners' organization [a] range of associational activities'" *Widmar*, 454 U.S. at 270 (*quoting Healy*, 408 U.S. at 194). In addition, denying benefits generally, and funding specifically, is denying free speech. *Rosenberger*, 515 U.S. at 837.

In *Widmar*, the University of Missouri–Kansas City routinely provided meeting space for student groups on campus. An organization of evangelical Christian students sought to use the space for prayer, study, and worship contrary to UMKC's policy. UMKC followed its policy and denied the Christians access to the space. *Widmar*, 454 U.S. at 265. Such a denial constituted impermissible "discriminat[ion] against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion." *Widmar*, 454 U.S. at 269.

More than a decade later the University of Virginia, which funded student publications, refused to fund one with a pervasively religious message. *Rosenberger*, 515 U.S. at 826–827. This case established that equal access means there can be no discrimination in eligibility for a right, benefit, or privilege, including funding, on the basis of viewpoint. *Rosenberger*, 515 U.S. at 834.

This point was echoed just few years later in *Southworth* when this Court determined that universities could exact mandatory fees from students to be used on a viewpoint neutral basis, as required by *Rosenberger*, to fund student groups. *Board of Regents v. Southworth*, 529 U.S. 217, 233 (2000)."Viewpoint neutrality is the justification for requiring the student

to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected." *Id.*

The baseline, then, is clear. Government may not exclude groups from a forum based on viewpoint. Thus, government may impose no substantive condition on equal access for student groups unless the government could impose such a condition directly and without violating some other right, except for conditions inherent in the creation of the forum. Hastings' policy imposes such an "intolerable" unconstitutional condition and should be struck down.

As a condition of recognition as a student group on Hastings' campus, student groups must agree with Hastings' "nondiscrimination policy," which includes an "all comers" requirement. Pet. App. 2a; Opp'n Pet. 3. The "all comers" requirement mandates that "all [student] groups accept all comers as voting members even if those individuals disagree with the mission of the group," Pet. App. 2a, and that groups must allow "*any* interested student to participate, become a member or seek leadership positions in the group, regardless." Opp'n Pet. 3 (emphasis in original). This means student groups would have to "tak[e] the risk" that students disagreeing with the groups' message would join. Pet. App. 59a. The condition therefore requires that students seeking to associate around a common set of ideals or beliefs include those who do not share those beliefs in exchange for access to the

limited public forum Hastings has created for student groups. *See* Pet. App. 30a.[17]

The condition commands indirectly what Hastings cannot require directly—student groups to alter their expressive association, thereby changing their message.[18] The existence of such a condition forces student groups into an unconstitutional dilemma: choose between the equally weighty expressive association rights and equal access rights. Thus, any student group must relinquish its ability to maintain ideologi-

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[17] Neither CLS nor Hastings challenge the District Court's finding that Hastings opened a limited public forum in establishing a recognition process by which student groups would be allowed to reserve meeting space, using the school's email list, mailboxes, etc.

[18] Some argue that a university's derecognition of and denial of benefits associated with the limited public forum to a student group is analogous to government denial of funding for abortion. *See Walker*, 453 F.3d at 873-874 (2006) (D. Wood, J., dissenting). However, in abortion funding cases the funding recipients (or those denied funding) are not forced to choose between exercising one of two constitutional rights; instead, the government is permitted to promote and fund its own message. *See Rust*, 500 U.S. at 196–198. In addition, unlike the abortion funding context, this case is not about funding; it is about recognition and access to the forum. *See*, infra, Part II. B. at 29, 30–31 (describing the forum created by Hastings and the benefits associated therewith). Also unlike the abortion funding context, student fee money is not "public funds" which can be used by the government at will; instead the funds are collected from students and must be distributed to student groups in a viewpoint neutral manner. *See Rosenberger*, 515 U.S. at 834; *Southworth*, 529 U.S. at 230 & 235.

cal or political identities and messages in order to access a forum designed to foster ideological and political give and take. Conditioning the benefit in such a way infringes upon the First Amendment rights of each of Hastings' student groups. This is an untenable unconstitutional condition.

Hastings opened a limited public forum when it chose to provide a system of recognition and benefits to student organizations on campus. Pet. App. 30a. These benefits include bulletin board access, the ability to reserve a classroom for an activity, funding for travel and speakers, school mailbox use, and space at the student organizations fair, among others. *See* Pet. App. 7a–8a, 85a. The decision to open the limited forum and to provide the benefits was discretionary. But, once the forum is open, access cannot be limited on a basis that infringes upon the First Amendment speech and associational rights of a group seeking to partake in the benefit of participating in the forum.

Hastings' condition—requiring student groups to accept all comers as members—requires student groups to forgo their right to self-identify and define their respective messages in order to access the limited public forum. This unconstitutionally pits the exercise of one constitutional right against the exercise of another. This is exactly the type of condition that this Court has held "untenable." The Court should likewise hold so here.

Conclusion

Because Hastings' policy unconstitutionally infringes upon the expressive associational rights of student groups, and because Hastings' policy places an unconstitutional condition on student groups, it should be struck down.

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