No. 08-1371

In the Supreme Court of the United States

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

v.

LEO P. MARTINEZ, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents offer no real defense of the written Policy under which they denied recognition to CLS. They offer no answer to our demonstration that the written Policy's religious nondiscrimination requirement is the only one that singles out groups based on their *beliefs*, or that it is wholly unreasonable to apply such a rule to *religious* groups. They also fail to address our showing that the Policy's sexual orientation prong is the only one that limits student groups' ability to exclude leaders based on *conduct*—to require that leaders practice what the group preaches.

Instead, Respondents say the only policy before this Court is the all-comers policy, the requirements of which continue to evolve. But the stipulated facts show that the written Policy remains fully in play. And even if Respondents' position were supported by the record, it would not save them. Respondents say the all-comers policy precludes discrimination based on "status or belief." Under the First Amendment, however, Republican student groups have the right to exclude Democratic leaders, feminist student groups have the right to exclude male chauvinists, and religious groups such as CLS have the right to exclude leaders who reject their core values. To forbid groups to form on the basis of shared beliefs is to forbid freedom of association at its most fundamental level.

Respondents also say they are merely denying "benefits" or "subsidies" ("modest" ones at that), as if this relieves them of First Amendment obligations. But this Court has repeatedly held that college speech forums are not mere government benefits, which may be denied to groups the government

disapproves, and that the freedom of association may no more be infringed by denial of otherwise available benefits than by outright prohibition. The justifications Hastings offers for excluding CLS from its speech forum are not even reasonable, let alone substantial or compelling. Hastings certainly cannot exclude CLS on account of its exercise of the constitutional right of freedom of association.

FACTUAL ISSUES

A. The stipulations place both the written Policy and the all-comers policy before this Court.

Claiming that we seek to "override the joint stipulations of both parties," Hastings suggests this Court should ignore the College's written Policy. HB-21.[1] Claiming such a Policy "never existed" (HB-19), Hastings asks this Court to decide the case based on the all-comers policy or "dismiss the writ." HB-23. These suggestions are wildly off the mark.

Stipulations cannot be stretched beyond their words. We stipulated to the existence of an all-comers policy, Joint Stipulation 18, JA-221, but we never stipulated that the all-comers policy predated discovery, is non-pretextual, or displaces the written Policy. Nor did we stipulate that the all-comers policy was ever enforced against a student group, or that it was the rationale Hastings gave when excluding CLS from the forum. All those propositions are con-

[1] As Intervenor-Respondent's arguments largely track those of Hastings, we refer to Outlaw's arguments only when they differ. We cite Hastings' Brief as "HB," Outlaw's brief as "OB," and our opening brief as "CLSB."

tradicted by the record—including several stipulations that Hastings ignores.

Joint Stipulation 14 states that registered student groups must "abide by the Policy on Nondiscrimination ('Nondiscrimination Policy')." JA-220. Joint Stipulation 15 quotes that policy, which sets forth nine specific criteria on which covered groups may not discriminate. JA-220. This is what we have called the "written Policy." It is not an all-comers policy. It singles out "religion" as the only viewpoint-based ground on which groups may not discriminate. As Hastings "admit[ted]" in its Answer, this Policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." JA-93. Just not religious ones.

The parties also stipulated that *both* policies are in effect. Joint Stipulation 17 states: "In order to become a registered student organization, a student organization's bylaws must provide that its membership is open to all students *and* the organization must agree to abide by the Nondiscrimination Policy." JA-221 (emphasis added). As the conjunction "and" indicates, those are two different requirements.

Contrary to Hastings' claim that its "open-membership policy is two decades old," HB-42, Joint Stipulation 16 says the policy adopted in 1990 was the "Nondiscrimination Policy," defined in Joint Stipulation 15 as the written Policy. JA-220. Respondents cite nothing before 2005 that contains any hint of the all-comers policy. As late as its Answer (JA-93) and its Response to Interrogatories (JA-161), Hastings relied exclusively on the written Policy.

Nor did CLS's predecessor group "agree to abide by the School's open-membership policy" "*for a decade*." HB-2 (emphasis in original). Rather, from 1994 through 2001, that group's bylaws limited voting and officeholding to students who subscribed in writing to a statement of faith identical to that of the national CLS. JA-222-223, 258-260; HB-5-6.

Contrary to Respondents (HB-22), the courts below considered both policies, although without explicitly distinguishing between them. The district court quoted both the written Policy (Pet. App. 8a) and Joint Stipulation 18 (*id.* at 9a)—referring to "protected categories" (*id.* at 63a), which can only apply to the written Policy, since the all-comers policy contains no such categories. The Ninth Circuit paraphrased the all-comers policy, but based its decision entirely on *Truth* v. *Kent School District*, 542 F.3d 634, 639-640 (9th Cir. 2008), which involved not an all-comers policy but a nondiscrimination policy indistinguishable from Hastings' written Policy. Pet. App. 2a-3a.

Even in their brief to this Court, while insisting that the Court avert its eyes from the written Policy, Respondents cannot help reaching for the written Policy when it suits them—to craft a legal basis for the all-comers policy (HB-21), and to explain why Hastings recognized other groups with restrictive membership policies (HB-7).

In short, the stipulated facts and arguments compel consideration of both policies. This Court should affirm CLS's right to register as a student group under either policy, lest Hastings later reinstate its decision under whichever version escapes review.

B. Hastings takes liberties with the record.

Respondents make several factual assertions that either are contrary to, or unsupported by, the record. Because Respondents prevailed on summary judgment, the evidence must be viewed in the light most favorable to CLS. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). From Respondents' briefs, one would think it was the other way around.

1. The effect of nonrecognition on CLS

According to Hastings, the effect of nonrecognition on CLS was "slight," since, after Hastings denied recognition, "CLS continued to meet and hold activities and its membership nearly *doubled*." HB-2 (emphasis in original), HB-13. This says nothing about what CLS's membership might be if CLS were recognized. But in any event, Hastings neglects to mention that CLS's meetings were entirely "off campus," in apartments or dorm rooms—though Respondents conceded this point before the district court (JA-442). And the claim that CLS membership "doubled" is based on an apples-to-oranges comparison of "attendance" after nonrecognition (Pet. App. 13a) to formal membership in prior years (JA-224, ¶ 29). See HB-13. If evidence were taken now, it would show that nonrecognition has nearly destroyed the CLS chapter.

2. Access to media and meeting rooms

Respondents do not deny that CLS is barred from all campus communications media: the student e-mail list, the activities fair, newsletters that inform students of group activities, and the right to post notices. Respondents do, however, assert that "Hastings has made clear that the Christian Legal Society (CLS) may use 'Hastings facilities for its meetings and activities'" (HB-2), and they brief this case on the

assumption that CLS had access to meeting space on campus. Respondents cite this "fact" as their basis for distinguishing cases such as *Healy* and *Widmar*. HB-44-45.

The meeting space offered to CLS, however, is purely an indulgence, not a right, and may be revoked at any time. In district court, Hastings candidly described its offer as "an attempt to be accommodating here *in this litigation*." JA-441 (emphasis added). And its brief nowhere commits Hastings to abide by this policy indefinitely.

We urge the Court to read Hastings' full explanation to the district court of the terms under which CLS is allowed to meet on campus. JA-441-444. Here are the salient points in Hastings' own words:

> In an attempt to be accommodating, Hastings did say, "if you want to use university facilities, if you want to use classrooms, there is flexibility in that regard.["] Hastings allows community groups to some degree to use its facilities, sometimes on a pay basis, I understand, if they're available after priority is given to registered organizations. We offered that.

JA-442.

But with the "one exception" of "a traditional public forum"—namely "the street in front[] of the law school"—Hastings maintained that it "could properly exclude a student organization from all of the benefits that flow from participation in this limited public forum." JA-443-444.

Thus, far from having a "right" to meet in Hastings classrooms, CLS has nothing more than the "flexibility" offered to outside "community groups" to

use facilities to "some degree," perhaps "on a pay basis," and only "if they're available after priority is given to registered organizations." And "Hastings could properly exclude" CLS even from that.

In practice, things are worse. As the record shows, CLS twice tried to take Hastings up on its offer—without success. JA-297-306. In August 2005, a CLS officer asked permission to hold an "advice table" on "the beach" (a campus patio) and to promote an oceanside bonfire through campus media. His e-mail was labeled "time sensitive." JA-298. *Ten days later*, Hastings replied that CLS should contact someone else to "request to use" campus property, and that all further inquiries should be made by "your attorney." JA-296-298. The dates for both events had passed.

In September, CLS (through counsel) e-mailed Hastings, asking "to reserve a room on campus" for a guest speaker. JA-302-303. After a week's delay and another e-mail reminder, Hastings' General Counsel replied that "[b]ecause CLS is not a registered student organization, at this point use of college resources is limited." JA-301-302. She granted permission to use "the beach" (apparently in reference to the earlier request), but did not mention the request for a room for the guest speaker. *Ibid*. CLS did not get a response in time to host the speaker. *This* is what Hastings advertises as "access" to "facilities." HB-45.

Respondents' assertion that CLS could operate on campus as a "non-registered group" (HB-8) likewise cannot be squared with the record. Hastings' regulations make clear that the Nondiscrimination Policy applies to "all individuals and activities on College properties." Pet. App. 75a (§ 11.00). If Hastings pre-

vails, there would be no legal basis under the Policy for CLS to be present "on College properties" at all.

The Court should not decide this case on the false premise that petitioner enjoys access to campus facilities. That access is theoretical at best, can be yanked at any time, and does not extend to communications media.

3. Restrictive membership policies of other student groups

As discussed in our opening brief (CLSB-12-14), during the same year that CLS was denied recognition, other student groups—including Outlaw—submitted bylaws restricting membership or leadership to students who adhere to their core beliefs. None was denied recognition. This confirms that the all-comers policy either was not yet in place or is enforced selectively, and that the process is viewpoint-discriminatory. See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) (the character of a forum is determined by "practice" as well as "policy").

Hastings responds that "no other RSO 'has ever attempted to restrict its membership on the basis of a protected category.'" HB-7-8. But that is precisely the point: the all-comers policy contains no "protected categor[ies]." If Hastings was looking for restrictions based on protected categories, it was enforcing the written Policy, not the all-comers policy. And of course, the written Policy allows *secular* groups to limit membership to students who agree with their views, which is why those groups' bylaws never raised eyebrows.

Outlaw's response is even less forthcoming. As we have noted (CLSB-12-13), Outlaw's bylaws re-

serve the right to remove any officer who "work[s] against the spirit of the organization's goals." Pet. App. 138a. That is a right CLS would like to enjoy. Outlaw's answer? "Outlaw complies with the Hastings Policy and does not exclude any student from *membership* on the basis of status or beliefs." OB-6-7 (emphasis added). It offers no explanation for why Outlaw, but not CLS, should have the right to restrict *leadership*. Of course, we do not begrudge Outlaw the freedom to exclude from leadership students who might work against "the spirit of the organization," even if that might exclude members of CLS. We question only its unwillingness to see that freedom extended to others.

ARGUMENT

I. Respondents Virtually Concede That Their Written Policy Is Viewpoint-Discriminatory.

In our opening brief (CLSB-36-40), we demonstrated that Hastings' written Policy is facially viewpoint-discriminatory because it denies religious groups, alone among all other viewpoint-based organizations, the right to confine leaders and voting members to students who share their beliefs. Besides claiming that this Policy "has never existed" (HB-19), Hastings offers only two responses (HB-29-31).

First, Hastings cites two cases for the general proposition that policies "prohibit[ing] discrimination on the basis of specifically enumerated factors" are "viewpoint-neutral." HB-29 (citing *Wisconsin* v. *Mitchell*, 508 U.S. 476, 487 (1993), and *Roberts*, 468 U.S. at 614-615). But *Mitchell* upheld a hate-crimes enhancement on the ground that it was "aimed at conduct unprotected by the First Amendment" (508 U.S. at 487), which no one would say of this case. *Roberts*

upheld application of a nondiscrimination law to a group's membership on the ground that it "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." 468 U.S. at 627. Neither case involved a group singled out by virtue of its viewpoint from a freedom enjoyed by other groups. Whenever that has been the case, this Court has held the restriction unconstitutional. CLSB-37-38.

This is not mere "disparate impact" (HB-31). The written Policy applies on its face to "religion" and no other viewpoint.

Second, Hastings asserts that "nondiscrimination provisions are conduct- rather than viewpoint-based." HB-30. But "religion" presents a twist. Religion is a belief as well as a characteristic. In most contexts, including "religion" among the prohibited categories of discrimination is benign, even commendable. But applying religious nondiscrimination requirements to religious groups turns religious freedom on its head. For them, the ability to "discriminate" in favor of their beliefs is not only noninvidious, but essential. CLSB-43.

Respondents offer no response on this point, writing as if anything labeled "discrimination" is inherently a compelling concern. But unlike eradicating racism, the government has no legitimate interest in interfering with the ability of religious groups to prefer co-religionists. The explicit premise of *Corporation of Presiding Bishop* v. *Amos* was that religious groups have a free exercise right to "define and carry out their religious missions," including the right to use religious criteria in selecting employees who engage in "religious activities." 483 U.S. at 335-336; ac-

cord *id.* at 341-342 (Brennan, J., concurring). The functional equivalent for a religious student group is the right to use religious criteria in selecting its officers, Bible study leaders, and voting members. See Br. of American Islamic Congress, et al., 33-35.

Nor do Respondents explain how CLS's rule forbidding unrepentant sexual *conduct* outside of traditional marriage violates Hastings' prohibition of discrimination on the basis of sexual *orientation*.[2] As we have explained, this is the only forbidden category that arguably restricts a group's ability to be selective in terms of its members' conduct. CLSB-10, 39. Respondents now admit that even their all-comers policy allows student groups to restrict their membership on the basis of "conduct." HB-5. But if other student groups can exclude students whose conduct is inconsistent with their beliefs, it is viewpoint-discriminatory to make CLS the exception.

Respondents' only justification is to claim that CLS conceded that its nonmarital conduct rule is discrimination based on sexual orientation. HB-35 n.10. But as we explained (CLSB-10, 39), CLS officers refused to pledge not to discriminate on the basis of "sexual orientation" only because Hastings officials interpreted such a pledge as barring a nonmarital sex rule. For the same reason, the Complaint alleged that CLS considered "sexual orientation" in its selection of officers and members (JA-460) because that is how Hastings interprets its Policy. Respondents simply ignore our explanation, twisting CLS's respect

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[2] See American Psychological Ass'n Help Center, *What Is Sexual Orientation?*, http://www.apa.org/helpcenter/sexual-orientation.aspx (distinguishing between "sexual orientation" and "sexual behavior"); Br. of U.S. Conf. of Catholic Bishops 7-11.

for Hastings' interpretation of its Policy into a "binding * * * judicial admission" that CLS discriminates on the basis of "orientation." HB-35 n.10. In fact, the parties stipulated that CLS's rule applies only to "conduct." Joint Stipulation 34, JA-226.

Hastings now retreats from its original interpretation, claiming that its policy does not proscribe restrictions based on "conduct." HB-5. If Hastings would make official that "sexual orientation" under its Policy does not include "conduct," CLS could agree not to discriminate on the basis of sexual orientation.

II. The All-Comers Policy Provides No Constitutional Basis For Denying Recognition to CLS.

Hastings' all-comers policy forbids students from forming groups based on "status or belief." Joint Stipulation 18, JA-221. We have no objection to prohibiting "status" discrimination. But the freedom of individuals to form groups based on shared "beliefs" is fundamental. As Tocqueville wrote long ago: "An association simply consists in the public and formal support of specific doctrines by a certain number of individuals who have undertaken to cooperate in a stated way in order to make those doctrines prevail." Alexis de Tocqueville, *Democracy in America* 190 (J.P. Meyer ed. 1969). Restricting a group's right to organize around a shared "belief" is a broadside assault on associational liberty.

Respondents' overriding theme is that exercising the rights of speech and association on campus, using campus facilities, is merely a "modest * * * benefit[]" or "subsidy" that the government may take away for virtually any reason. HB-1, 24-28. But as *Healy* made clear, the right to associate and speak as a group on

campus is much more than that. To university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the citizen. To be sure, public colleges are not constitutionally obligated to open their facilities for speech. But all of them do so. And having done so, they must comply with the First Amendment.

As this Court has repeatedly held, the right to participate in a university speech forum is not governed by the deferential standards applicable to ordinary government "benefits" and "subsidies." See *Rosenberger*, 515 U.S. at 834 (rejecting application of *Rust* and *Regan* to student activity funding); *Southworth*, 529 U.S. at 229. Respondents thus rely on an argument rejected long ago. HB-25-26.

A. Hastings fails to distinguish the relevant precedents addressing burdens on speech, association, and religion.

In our opening brief, we based our speech and association claims on the conjunction of two lines of cases.

1. One line, exemplified by *Healy* and *Widmar*, protects the right of students at public colleges to "associate to further their personal beliefs" by forming organizations, and holds that the denial of recognition to a particular student organization is a form of "prior restraint" that requires a "heavy burden" of "justification." *Healy*, 408 U.S. at 181, 184.

Respondents dismiss *Healy* and *Widmar* on the ground that they involved not just denial of official recognition but "*total* exclusion" of the groups from

campus. HB-45 (emphasis in original). Here, Hastings says, "CLS has been granted access to the School's facilities for its meetings and activities." *Ibid.*

We have already dealt with Respondents' factual assertion that CLS has access to meeting rooms. See pages 5-8, *supra*. But as a legal matter, there is no support for confining those decisions to cases of total exclusion. *Healy* went out of its way to emphasize the importance of access to the "customary media for communicating with the administration, faculty members, and other students," without which "the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited." 408 U.S. at 181. Such a limitation, the Court said, "cannot be viewed as insubstantial." *Id.* at 181-182. Not one lower court decision applying *Healy* and *Widmar* has confined those cases to total exclusion. CLSB-25.[3]

Nor are *Healy* and *Widmar* distinguishable on the ground that Hastings' policy is merely a reasonable regulation of conduct. HB-45-46. Membership rules based on agreement with a group's beliefs are not mere conduct—they are constitutive of identity and determinative of message. *Roberts*, 468 U.S. at 623; *Hsu*, 85 F.3d at 861. In *Healy*, the Court was concerned to leave the college latitude to protect against "a substantial threat of material disruption." 408 U.S. at 189. The Court did not suggest that the college could control the way the group structured itself,

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[3] Respondents also attempt to limit *Healy* to viewpoint discrimination, but at most one of the four reasons the defendant put forward for excluding SDS was viewpoint-based. 408 U.S. at 187-188.

made decisions, or chose leaders. By the same token, Hastings has every right to insist that CLS refrain from disruptive activities or other misconduct, but it cannot insist that CLS be a different kind of group.

2. This Court's expressive association cases—including *Roberts*, *Hurley*, and *Dale*—protect CLS's right to control its message by choosing its members and leaders. Hastings tries to distinguish these cases on the ground that they "involved the direct application of a public accommodations law" rather than the denial of benefits. HB-47-48. But these opinions explicitly repudiate any such limitation.

Both *FAIR* and *Roberts* noted that "freedom of expressive association" reaches laws "impos[ing] penalties or withhold[ing] benefits based on membership in a disfavored group." *FAIR*, 547 U.S. at 69; *Roberts*, 468 U.S. at 622. For this proposition, both cases cited *Healy*, which shows that denying recognition to a student group falls precisely within the scope of the right.

Respondents insist that requiring CLS to accept non-Christian voting members and leaders, as well as students who unrepentantly violate CLS's moral code, would not affect the group's speech. HB-42-43. If this is a legal claim, it is contrary to this Court's cases. *Dale*, 530 U.S. at 654 (inclusion of Dale would "surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs"); *Hurley*, 515 U.S. at 574-575; *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

If it is a factual claim, it is frankly preposterous. As the Seventh Circuit noted, forcing CLS to accept those who repudiate its central tenets would not merely affect its speech, but "would cause the group

as it currently identifies itself to cease to exist." *Christian Legal Soc'y* v. *Walker*, 453 F.3d at 863. At a minimum, enforcing Hastings' policy would put the group at the mercy of other students, many of whom do not wish CLS well. A single student invoking his right to lead a CLS Bible study could make a mockery of the occasion; a handful of students invoking their right to vote on policies and speakers could upend the group's creed.

Scrambling to defend this line of argument, Hastings says its open-membership policy "is two decades old and there is not one shred of evidence in the record before this Court that any of the scores of RSOs at Hastings has ever been threatened with—much less subject to—a takeover." HB-42. But until at least 2005, only the written Policy applied and it did not limit the ability of non-religious groups to protect themselves, which many of them did. See pages 8-9, *supra*. So of course there is no record evidence of takeovers. Moreover, Respondents do not even attempt to deny that their policy could force changes in a group's message more subtle than a "takeover." Outlaw admits that "[w]hat is orthodox for a student group" may become "heretical" if "the membership changes." OB-40. That kind of change should not be forced by governmental regulation.

In any event, the legal question is not whether *Hastings* thinks a group would be endangered by admitting non-adherents, or whether the record shows that a group has *already* been compromised. The question is whether admitting non-adherents to CLS would "affect[] in a significant way [CLS's] ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648. Allowing non-adherents to lead Bible studies and represent CLS at the student organiza-

tion fair would affect CLS's message no less than making Dale a scoutmaster would have affected the Scouts'. CLSB-45-46. And if there were any doubt on that question, this Court would have to "give deference" to CLS's own judgment about "what would impair its expression." *Dale*, 530 U.S. at 653. The amicus briefs of Islamic, Jewish, Protestant, Catholic, Sikh, and conservative political student groups attest that CLS's judgment in this regard is widely shared.

3. Hastings dismisses our free exercise claim, asserting that (1) it is foreclosed by *Smith*, and (2) the right to choose religious leaders is confined to the selection of "*clergy*" by a "*church*." HB-49-51. But *Smith* expressly reaffirmed that the right of religious association—a combination of free association and free exercise—is protected even against neutral laws. 494 U.S. at 882. And *Amos* held that the right to prefer co-religionists extends to all who engage in "religious activities" at "religious organizations," 483 U.S. at 335-336, not just "clergy" in "churches."

B. The all-comers policy is viewpoint-discriminatory.

Contradicting their claim that the all-comers policy is "quintessentially viewpoint-neutral" (HB-28), Respondents admit that they employ the policy to deny support to activities "that the School and the State of California do not wish to * * * lend their name to." HB-11. This is an unvarnished admission of viewpoint discrimination.

Indeed, Respondents' amicus ASUCH, Hastings' student government association, trumpets the fact that Hastings' policy enables students who "disagree" with the group to "join in order to effect change from within." ASUCH Br. 8-9. Indeed, the Policy is struc-

tured so that small and politically unpopular groups can be overwhelmed by a hostile majority, who need only "join" and vote to change the group's message. CLSB-29-30; see ASUCH Br. 25 ("[T]he vast majority of Hastings students share the values the school seeks to promote by enforcing the Policy."). But as this Court has held, subjecting student groups to majority vote violates viewpoint neutrality. *Southworth*, 529 U.S. at 235; *Santa Fe Ind. School Dist.*, 530 U.S. at 304-305.

The fact that the policy does not target particular viewpoints by name (HB-28) does not make it neutral. See *Velasquez*, 531 U.S. at 547. The Policy is an intentional tool for both the College administration and the politically dominant elements of the student body to give vent to their "disapproval" (HB-35; see ASUCH Br. 8-9) of dissenters. As such, it warrants the strictest constitutional scrutiny.

C. The all-comers policy lacks justification.

Because the all-comers policy imposes a severe burden on freedom of association (see pages 15-17, *supra*), abridges the free exercise of religion (see page 17, *supra*), and is viewpoint discriminatory (see pages 17-18, *supra*), it can be upheld only if necessary to achieve a compelling governmental interest. Even assuming the policy is neutral, denial of recognition can be upheld only if the state bears its "heavy burden" of justification. *Healy*, 408 U.S. at 184. And at the very least, Hastings must show that its policy is reasonable in light of the purposes of the forum. The all-comers policy fails each of these tests.

As we have shown (CLSB-52), and Respondents do not dispute, to be "reasonable in light of the purpose served by the forum" demands significantly

more than a mere rational basis. The government must demonstrate a reasonable connection between any restrictions and the "purposes of the forum." Under the stipulated facts, the purpose of the RSO forum is "to promote a diversity of viewpoints *among* registered student organizations." Joint Stipulation 8, JA-216 (emphasis added). Respondents do not mention this Stipulation, but instead posit a variety of "other objectives" (HB-9), the principal one of which is "to foster discussion *within* groups as well." HB-12 (emphasis in original). Respondents point to no pre-litigation evidence that this was among the purposes of the forum.

That is unsurprising, as the two objectives are logically incompatible. Forced diversity within groups eliminates diversity among groups. See Br. of Gays and Lesbians for Individual Liberty 10-12, 14-19. We explained this problem at length in our opening brief. CLSB-49-53. Hastings' only response is to say it has not yet noticed any homogenizing effect, and might be willing to "reconsider" its policy if it does. HB-38. But that assessment is based on Respondents' false premise that the all-comers policy has been in effect for twenty years, which is contradicted by the joint stipulations and proof of actual practice. See pages 2-4, *supra*. And Hastings does not even attempt to claim that its policy promotes the *stipulated* purpose of the forum.

Hastings' actual "practice" toward other groups (*Perry*, 460 U.S. at 47) belies any genuine purpose of encouraging "discourse, cooperation, and learning" through diversity *within* RSOs. Five years after announcement of the all-comers policy, Hastings still allows groups other than CLS to limit membership based on agreement with the group's beliefs. The Na-

tional Lawyers Guild, for example, requires members to "agree with the objectives of the organization as set forth herein,"[4] and the Black Law Students Association limits members to those "who are committed to the purpose of this organization."[5] As these bylaws show, Hastings' alleged purpose of "expos[ing] students to different views" *within* each RSO (HB-12) is a sham.

Hastings offers four other justifications for the all-comers rule, none of which is reasonably related to the stipulated purpose of the forum.

First, drawing on public accommodations law, Hastings argues that its policy "ensures that all Hastings students have equal access to all school-recognized and school-funded activities." HB-10, 16, 32. But this controversy is not about access to *activities*. All CLS activities—its Bible studies, speakers, and dinners—are open to all students, without exception, and always have been. Joint Stipulation 36, JA-227. This case is about whether students who do not share (or openly revile) CLS's beliefs are entitled to determine the content of CLS's speech by *voting* on its policies, taking a turn *leading* a Bible study, or *getting elected* to CLS leadership. That is quite another matter, with no pedigree in public accommodations law.

Respondents falsely analogize this case to one in which Hastings Ice Hockey excludes a student from an outing "because he has a different faith, holds un-

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[4] http://www.uchastings.edu/student-services/studentorgs/national-lawyers-guild.html

[5] http://www.uchastings.edu/student-services/docs/bylaws/bylaws-blsa.pdf

popular views, or is a native of a country that lacks a hockey tradition." HB-10. CLS excludes no one from its activities. This case might resemble Hastings' hypothetical if students who disliked hockey joined Hastings Ice Hockey and voted to redirect its energies to a sport that more students like. That would destroy Hastings Ice Hockey and impoverish the range of options available to all students.

Here is a better analogy. Hastings' RSO forum is like a "Speakers' Corner," where the various student groups are each allotted a soapbox. All students have the right to mill around, listen to whatever group's speakers they find interesting, and participate in any discussions. If pizza is provided, they have a right to eat (if they stay for the talk). But they do not have the right to demand a turn at another group's soapbox, determine another group's message, or vote to change the speaker.

Second, Hastings says the policy "reflects Hastings' obligation to follow state law." HB-11, 33 (citing Cal. Educ. Code § 66270). Even if true, state law must give way to federal constitutional rights. But it is not true. California Education Code § 66270 prohibits certain enumerated types of discrimination (it is not an all-comers policy) within any "program or activity conducted by" a public college. RSOs are not "programs or activities" of the College; if they were, the Establishment Clause would forbid them to be religious; political RSOs could not engage in electioneering; sororities would have to admit men; and Hastings would be liable for any torts that RSOs commit. See Pet. App. 85a (disclaiming liability for RSO activities). Moreover, California law specifically exempts student organizations from a ban on funding groups that "discriminate" on a basis prohibited

by § 66270. After prohibiting membership dues or other expenses for private associations that discriminate on one of these enumerated bases, California Education Code § 92150 states: "This section does not apply to * * * any funds that are used directly or indirectly for the benefit of student organizations." And California exempts religious organizations altogether from its prohibitions on employment discrimination based on religion and sexual orientation. Cal. Gov. Code § 12926(d). It is Hastings' policy, not CLS, that is out of kilter with California law.

Third, Hastings argues that the all-comers policy "allows Hastings to ensure that students are complying with basic nondiscrimination requirements (including those that CLS does not challenge) without any need to meddle in an RSO's internal affairs or inquire into the sincerity of its stated reasons for excluding a student." HB-36. This argument is baffling. Instead of a few defined categories, which according to Hastings have never before been violated, the all-comers policy makes every student group's membership policy a potential issue for controversy—rife with ill-defined distinctions between such concepts as conduct, speech, belief, and status. HB-5. Far from easing administrative difficulties, the all-comers policy vastly multiplies the occasions for "meddling."

Finally, Respondents say "it is only natural that the outside world will conclude that Hastings' RSOs say something about the 'image * * * the [School] * * * wishes to project.'" HB-35 (citations omitted; ellipses and brackets in original). "The policy ensures that * * * the School's facilities and own name and logo are not used to support groups that choose to engage in conduct that the School and the State of

California do not wish * * * to lend their name to." HB-11.

This justification not only fails the "reasonableness" test; it flies in the face of decades of this Court's precedents, which teach that governmental disapproval of, offense at, or desire not to be associated with student speech activities is not a valid ground for excluding groups from a forum. *E.g.*, *Healy*, 408 U.S. at 187-188 ("The College * * * may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."); *Widmar*, 454 U.S. at 274 ("an open forum in a public university does not confer any imprimatur of state approval"); *FAIR*, 547 U.S. at 64-65. As Hastings has already made clear, RSOs are "neither sponsor[ed] nor endorse[d]" by the school (Joint Stipulation 13, JA-219); and it cannot exclude a group from the forum for fear of unwarranted misunderstanding. *Mergens*, 496 U.S. at 250.

In our opening brief, we also argued that it cannot be "reasonable" to restrict access to a speech forum on the basis of a group's exercise of the constitutionally protected right of association. CLSB-55. One aspect of being "reasonable" is respecting constitutional rights. Tellingly, Respondents offer no response.

D. The peculiarity, incoherence, and suspect history of the all-comers policy all point to pretext.

Before the Court accepts the assurances of Respondents and their amici that the all-comers policy is a normal part of university governance in America, it should take a look at what other universities do, the

policy's internal contradictions, and its suspect history.

The brief filed by amicus Association of American Law Schools (AALS) is instructive. That brief asserts up and down that Hastings' all-comers policy is excellent and commendable. But its canvass of U.S. law schools reveals only four—all private—that have anything resembling an all-comers policy. AALS Br. 20 n.5. AALS cites not a single public law school, other than Hastings, that has such a policy.[6] Significantly, although AALS prohibits law schools from discriminating based on religion or sexual orientation, it deems religiously affiliated law schools exempt from the religious nondiscrimination requirement (AALS Handbook 59, § 6-3.1 (2009)), and allows them to forbid "nonmarital sexual conduct" if the prohibition applies to both heterosexuals and homosexuals. *Id.* at 82, 4. That is precisely what we propose. Better to do as AALS does, not what it says.

And consider the scope of the policy. Respondents assure us that the all-comers policy implements the written Policy. HB-5, 21, 36. But the written Policy applies not only to student groups, but to Hastings itself. CLSB-9. We can believe that Hastings refrains from discriminating based on the nine enumerated categories of the written Policy. But can Hastings possibly maintain that it has an all-comers

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[6] Respondents' amici State Universities misleadingly assert (at 11-12) that there are all-comers policies at public law schools in Idaho and Iowa. The University General Counsel in Iowa and the SBA Judiciary in Idaho have concluded that the referenced policies could not lawfully be used to exclude CLS. Their opinions are attached to this brief as Appendices A and B.

policy for selecting students or faculty, or administering its programs?

And what does the all-comers policy actually encompass? It shifts with every wind. When Respondents filed their Answer, it did not exist. JA-93. When first announced by the Dean during discovery, the policy was truly "all-comers": "in order to be a registered student organization you have to allow all of our students to be members and full participants." JA-343 (Kane Dep.). By the time Hastings' lawyers drafted Joint Stipulation 18, this transmogrified into a prohibition of restrictions based on "status or belief." JA-221. Now, Hastings' brief announces further modifications: RSOs may charge dues; impose attendance requirements; enforce membership restrictions based on "conduct"; and use "academic and writing competitions." HB-5. (Could CLS base membership on a competitive test of religious orthodoxy?) More troublingly, Respondents say the policy allows them to deny RSO status to any activities they "do not wish to * * * lend their name to." HB-11.

Respondents do not define any of these terms. If student groups may exclude members on the basis of "conduct," do Respondents now concede that CLS's nonmarital sexual conduct rule is permissible? Does "conduct" include expressive conduct? Does it include refusal to sign a piece of paper (such as CLS's Statement of Faith)? Hastings argues strenuously that requiring members to sign the Statement of Faith is "conduct" (HB-30); it must follow that a student's refusal to sign is also "conduct." But if that is so, and groups can exclude students based on conduct, this case is over and we have prevailed. The all-comers policy thus seems to encompass almost anything and almost nothing.

Finally, the provenance of the all-comers policy smacks of pretext. When CLS approached director Chapman about registering, she handed the students a copy of the written Policy, JA-130, and when she denied their application she cited the written Policy. JA-132. Other RSOs presented bylaws that required support for their core beliefs, and it never occurred to Hastings officials that these bylaws were problematic. The first mention of an all-comers policy came during discovery, after Hastings witnesses had been pressed about the viewpoint-discriminatory character of the written Policy. Either the all-comers policy was "presented only as a litigating position," *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 871 (2005), or it is selectively applied. Either way, it is an insufficient basis for refusing to recognize CLS.

III. The Availability Of Funding For Eligible Activities Is No Reason To Deny RSO Status To CLS.

This case has never focused on money. Recognition confers "eligibility to apply for student activity fee funding" (JA 217), but the record contains little information concerning what specific activities are eligible. We suspect Respondents obsess about funding because it is so hard to defend excluding CLS from meeting places and communications media.

In any event, this Court established the constitutional framework for student activity fund programs in *Southworth* and *Rosenberger*. Under these cases, student activity funds are a "metaphysical" forum governed by the "same principles" that apply to speech forums. *Rosenberger*, 515 U.S. at 830; *Southworth*, 529 U.S. at 229-230. Thus, Hastings can no more ex-

clude CLS from eligibility for student activity funding than it can exclude CLS from meeting space.

Respondents harp on the government's broad discretion over general spending programs. HB-26. But as this Court has held, the First Amendment principles applicable to funding in the context of speech forums are different from those applicable to general government subsidies. *Rosenberger,* 515 U.S. at 834; *Southworth*, 529 U.S. at 229-230; *Davey*, 540 U.S. at 720 n.3. Accordingly, there is no risk that a ruling in CLS's favor will create a broad "First Amendment right [for expressive associations] to receive public funds." HB-52. This Court's cases already draw the line.

IV. Invalidating Hastings' Policies In This Context Presents No Threat To Laws Against Invidious Discrimination.

Respondents' final tactic is to say our position "would render unconstitutional federal, state, and local laws conditioning the eligibility of expressive associations and other groups to receive public funds, use public facilities, or participate in limited public forums on their willingness to comply with routine nondiscrimination requirements." HB-53. But we have no quarrel with "routine nondiscrimination requirements." CLS excludes no one from its activities. Our position is simply that expressive associations have the right to form around and choose leaders based on shared *beliefs*, without forfeiting their other freedoms, such as the freedom to meet and speak on campus. That should not be controversial. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) (the "freedom to believe" is "absolute").

It is difficult to see how a decision about an all-comers policy could pose any threat to laws prohibiting invidious discrimination. An all-comers policy is not an anti-discrimination policy; most of its applications involve innocuous grounds for distinction. Public entities may not use their unquestioned right to prohibit invidious discrimination as an excuse to prohibit associations from forming on the basis of entirely legitimate criteria. For all the concern expressed by Respondents' amici, they have not identified a single state, city, public college, or school board, other than Hastings, that forbids association on the basis of shared belief.

Nor does our challenge to the *written* Policy undermine traditional anti-discrimination laws. The federal government and every state have largely codified our position, exempting religious organizations from prohibitions on religious discrimination. CLSB-44. This Court has treated that right as constitutionally protected. CLSB-40-41 (discussing *Amos* and *Smith*). Similarly, every state with laws prohibiting sexual orientation discrimination has some form of exemption for religious organizations. CLSB-46. To the extent that these protections are not already codified, this Court has recognized First Amendment exceptions to anti-discrimination laws in the past, and the sky has not fallen. *Hurley*; *Dale*.

Respondents' position boils down to the proposition that the government may deny any "benefit" (no matter how essential to a group's survival) on account of whatever it labels "discrimination" (no matter how noninvidious and even constitutionally protected). That idea is inconsistent with decades of precedent. The unconstitutional conditions doctrine draws distinctions based on the nature of the right, the charac-

ter of the organization, the closeness of connection to the government, and the strength of the government's interest. *Bd. of Comm'rs* v. *Umbehr*, 518 U.S. 668, 680 (1996). That a university can be denied tax exemptions for discriminating against African-American students, HB-51, a concern at the heart of modern Equal Protection, does not mean that an Orthodox synagogue could be denied tax exemptions for excluding members of Jews for Jesus or that a church could be barred from renting a public facility because it withholds communion from persons who are not baptized, as suggested in *Bronx Household* v. *Bd. of Education*, 492 F.3d 89, 120 (2d Cir. 2007) (Leval, J., concurring). Indeed, it is essential that this Court enforce constitutional rights even when "benefits" are involved, lest an expanding state entail a shrinking sphere of civil liberty.

Finally, Respondents and their amici overlook the unique setting of this case: a forum expressly created to foster a diversity of views among groups on campus. RSOs are not government-sponsored, do not speak for the University, and do not administer government programs. Whatever may be the reach of viewpoint-neutral laws against invidious discrimination in other contexts, the First Amendment does not permit the exclusion of a group from a campus forum for speech simply because the group exercises a well-recognized constitutional right of freedom of association based on adherence to shared beliefs.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment below should be reversed.

Respectfully submitted.

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