No. 08-1371

IN THE
Supreme Court of the United States

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

v.

LEO P. MARTINEZ, *et al.*,
Respondents.

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

BRIEF FOR AMICUS CURIAE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (the "ABA"), as amicus curiae, respectfully submits this brief in support of Respondents and asks the Court to affirm.

[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amicus, its members, or counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of nearly 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

For decades, the ABA has worked to eliminate discrimination from our society. The ABA itself and its divisions and sections broadly prohibit discrimination in their operations. For example, Bylaw Section 1.5 of the ABA's Law Student Division[3] provides: "The Division shall not discriminate on the basis of ancestry, color or race; cultural or ethnic background; economic disadvantage; ideological, philosophical or political belief or affiliation; marital or parental status; national or regional origin; physical disability; religion, or religious or denominational affiliation; sex; sexual orientation; or age. The Division shall not encourage or condone discrimination, either implicitly or explicitly, and shall actively discourage discrimination on any such basis." And

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Council participated in the adoption of or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] Available at http://www.abanet.org/lsd/governance/bylaws/bylaws.pdf (last visited Mar. 10, 2010).

among the ABA's many nondiscrimination policies[4] is a resolution urging its members not to hold business or professional gatherings at clubs that discriminate.[5]

The ABA also has long opposed "the provision of federal financial assistance for institutions which discriminate in any of their operations on the basis of sex, race, color, national origin, age, or disability."[6] And, the ABA has encouraged governmental entities at all levels to enact legislation "prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodations."[7]

At the same time, the ABA has recognized that government financial assistance may carry a potential for suppression or discouragement of particular points of view, and has opposed governmental efforts to use funding to curtail freedom of expression. The ABA thus "opposes the use of governmental funding programs as a vehicle to suppress or discourage speech ac-

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[4] The ABA's House of Delegates ("HOD"), with more than 500 delegates, is the ABA's policymaking body. Recommendations may be submitted to the HOD by ABA delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. Recommendations that are adopted by the HOD become ABA policy. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited Mar. 10, 2010).

[5] *ABA Report with Recommendation #10G* (Policy adopted Aug. 1988), available from the ABA.

[6] *ABA Report with Recommendation #102* (Policy adopted Feb. 1986), available from the ABA.

[7] *ABA Report with Recommendation #08* (Policy adopted Feb. 1989), available from the ABA.

tivities by government grantees based on the government's disapproval of the particular content of the speech."[8] As this case demonstrates, public institutions are sometimes challenged to find a way both to make clear that they will not lend assistance to forms of discrimination that are inconsistent with their principles and to respect free speech rights, including rights of religious expression. The ABA believes that the policy challenged in this case successfully does so.

SUMMARY OF ARGUMENT

This case involves an effort by a public law school to balance two deeply held values that are central to the ABA's mission and the mission of our Nation's public institutions of higher education, but are sometimes in tension: combating discrimination, and protecting students' First Amendment rights. In striking that balance, the University of California, Hastings College of the Law, like other public institutions of higher education, is called on to reconcile two well-established principles: first, that government may elect not to subsidize organizations that discriminate in ways that undermine the government's identified mission or conflict with its own messages, and, second, that government may not use its financial assistance to suppress or discourage disfavored speech. Hastings' student-organization policy strikes a sound and constitutional balance between these values and conforms to both of these principles.

This Court has long recognized the constitutionality of nondiscrimination policies applied in a neutral

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[8] *ABA Report with Recommendation #104* (Policy adopted Aug. 1993), available from the ABA.

fashion. It has likewise recognized that the government may condition the provision of subsidies and other forms of assistance on compliance with neutral and generally applicable nondiscrimination policies. Even when public institutions are not compelled by the Constitution or statutes to insist that their grantees not discriminate, they may nonetheless decline to render such assistance to those who would discriminate. In so doing, they take a strong stance against discrimination and make clear that they do not wish to be associated with or lend assistance to discrimination. And public institutions need not lag behind public opinion; the government may prohibit discrimination in its own operations and decline assistance to those that would discriminate, even on bases that are not universally adopted into law.

At the same time, the fact that an organization receives benefits from the government does not mean that it waives its First Amendment rights. This point is particularly salient in the setting of a public university, where diversity of opinion is essential to a university's mission. Thus, universities must ensure that their nondiscrimination and other policies, as applied to student organizations, do not abridge the right of those organizations to communicate a particular message, even though universities may insist that organizations not close their doors to students on discriminatory bases if the organizations are to receive assistance from the school. Public universities may therefore decline to assist or extend official recognition to organizations that choose to discriminate in their membership practices, though universities may not directly compel such organizations to change their viewpoint or prevent them from organizing or participating in university life.

ARGUMENT

I. PUBLIC UNIVERSITIES HAVE A SUBSTANTIAL AND JUSTIFIED INTEREST IN UNIFORMLY ENFORCING THEIR NONDISCRIMINATION POLICIES

Public institutions of higher education are crucibles for cultivation of two values at the heart of the ABA's mission and squarely at issue in this case—combating discrimination and promoting free speech. This Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter* v. *Bollinger*, 539 U.S. 306, 331 (2003). "[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders." *Id.* at 332. As this Court explained in *Sweatt* v. *Painter*, 339 U.S. 629 (1950), law school is a "proving ground for legal learning and practice," in which students are exposed to "the interplay of ideas and the exchange of views with which the law is concerned." *Id.* at 634. As Justice Frankfurter succinctly put it in 1927, "the law and lawyers are what the law schools make them." Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 34 n.1 (1992) (quoting a May 13, 1927 letter from then-Professor Felix Frankfurter).

While public universities have a unique interest in protecting free speech, they also have a substantial and justified interest in enforcing neutral nondiscrimination policies by refusing to subsidize student organizations that discriminate against members of the school community on bases that the school deems inconsistent with its own mission of creating an educational envi-

ronment characterized by equality and fairness. The university's decision not to actively assist such organizations furthers objectives that are critical to the school itself and to society more broadly. As this Court has repeatedly recognized, the government has a compelling interest in combating discrimination. *See Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 628 (1984); *see also Board of Directors of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537, 549 (1987) (state nondiscrimination laws "plainly serv[e] compelling state interests of the highest order" (alteration in original)).

This is particularly the case in higher education, and even more so in law schools, which prepare many of our Nation's future leaders. As Justice Powell noted in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313 (Powell, J., concurring) (quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)); *see also Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954) (public education is "a principal instrument" in the development of "cultural values").

To further that interest, public universities and law schools often promulgate comprehensive nondiscrimination policies that require, among other things, that student organizations not discriminate in their membership or programs if they are to obtain official recognition or school funding. These policies serve as an extension of the universities' undertakings not to discriminate in their own operations, as well as advancing the university's own message about the equal availability of educational and community opportunities to students—that is, that the university will not be associ-

ated with forms of discrimination that the school views as inconsistent with its deeply held principles of equality and fairness.

The university's refusal to provide official sanction to an organization that chooses not to comply with the university's nondiscrimination policies has two important components. First, public universities encourage compliance with their nondiscrimination policies by making that compliance a condition of student organizations' receipt of official recognition and subsidy. Second, a university has a strong interest in choosing to avoid any appearance that it supports or endorses—by the use of its logo, or the provision of financial or other subsidies—organizations that discriminate in ways inconsistent with the university's mission or that contradict its message to current, past, and future students, professors, and the public. A public university could not communicate a message about its commitment to nondiscrimination with credibility and at the same time foster an environment conducive to active participation in student activities if the university were given no choice but to subsidize all student organizations, including those that discriminate on bases the university deems inconsistent with its core values. *See Christian Legal Soc'y* v. *Walker*, 453 F.3d 853, 875 (7th Cir. 2006) (Harlington Wood, J., dissenting) ("[T]he indirect impact of CLS's recognition of a student group maintaining such a policy is that [the law school], intentionally or not, may be seen as tolerating such discrimination. Given that universities have a compelling interest in obtaining diverse student bodies, requiring a university to include exclusionary groups might undermine their ability to attain such diversity.").

Implementation of these nondiscrimination policies thus falls well within "a university's authority to im-

pose reasonable regulations compatible with that mission [of education] upon the use of its campus and facilities." *Widmar* v. *Vincent*, 454 U.S. 263, 268 n.5 (1981). The Court, quite rightly, has not questioned "the continuing validity of cases that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 276-277 (internal citation omitted). As Chief Justice Burger explained in *Healy* v. *James*, 408 U.S. 169 (1972), "student organizations seeking the privilege of official campus recognition must be willing to abide by valid rules of the institution applicable to *all* such organizations." *Id.* at 195 (Burger, C.J., concurring) (emphasis added).

Public universities' ability to implement these nondiscrimination policies turns in large measure on their ability to decline to provide official recognition and subsidies to student organizations that choose not to comply with neutrally enforced prohibitions on discrimination. The constitutionality of such conditions and the absence of any coercion in the way they are typically implemented is a well-recognized aspect of this Court's government-subsidy case law. *See Grove City Coll.* v. *Bell*, 465 U.S. 555, 575-576 (1984) ("Requiring [a college] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the [tuition subsidy] program infringes no First Amendment rights of the College or its students."); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 602-604 (1983) (government may constitutionally

withhold subsidy in the form of tax-exempt status based on university's racial discrimination).[9]

In this case, Hastings provides subsidies and benefits to registered student organizations, including permission to use the school logo and space on designated bulletin boards, access to student activity funds, and reimbursement for travel expenses. The law school's interest in providing these benefits only to organizations that comply with its nondiscrimination policies is

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[9] This latter interest—of government entities not being linked to and not effectively lending support to discrimination through financial assistance and other forms of official recognition—finds expression in an array of federal, state, and local antidiscrimination laws that deny funding to organizations that discriminate on various bases. For example, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race by entities receiving federal financial assistance. 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); *see* 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey) ("'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination'" (quoting President Kennedy's message of June 19, 1963)). Title IX of the Education Amendments of 1972 similarly prohibits discrimination on the basis of sex by educational institutions receiving federal funding. 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]"). These statutes, like Hastings' nondiscrimination policy, are predicated on the principle that public institutions may limit their assistance to organizations that do not engage in discrimination that is inconsistent with the public institution's deeply held values.

manifest. Hastings' uniform and neutral implementation of its nondiscrimination policy demonstrates that public universities can combat discrimination while taking care not to trench upon students' First Amendment rights of freedom of speech and association.

II. THE UNIFORM AND NEUTRAL ENFORCEMENT OF A UNIVERSITY'S NONDISCRIMINATION POLICY DOES NOT OFFEND FIRST AMENDMENT RIGHTS

The ABA agrees that in the "marketplace of ideas" that characterizes the university campus, student groups have a recognized interest in maintaining the integrity of their message. *See Healy*, 408 U.S. at 180 ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995) (underscoring the need for protection of "free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses"); *ABA Report with Recommendation #102* (Policy adopted Feb. 1986), available from the ABA.

The First Amendment encompasses a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," *Roberts*, 468 U.S. at 622, and this right does not "apply with less force on college campuses than in the community at large," *Healy*, 408 U.S. at 180. As this Court has made clear, government may not "force[]" an organization "to accept members it does not desire" and who would substantially alter the desired identity or message of the organization. *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000); *see Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572-573 (1995). The ABA is keenly aware

that, under a long line of Supreme Court precedent, university nondiscrimination policies are constitutionally sound only so long as the restrictions they impose are content- and viewpoint-neutral. *See, e.g.*, *Dale*, 530 U.S. at 659.

Hastings' application of its nondiscrimination policy to CLS complies with the mandates of the First Amendment because it is content- and viewpoint-neutral, and because it leaves open numerous alternative channels for the activities of groups that cannot, or will not, comply with the policy's requirements. It strikes a sound and constitutional balance between the law school's interest in promoting its antidiscrimination message and the student groups' interests in maintaining the integrity of their own message. Even recognizing student organizations' right to freedom of association, this Court's precedents recognize beyond peradventure that the "decision not to subsidize the exercise of a fundamental right does not infringe the right." *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 553 (2001) (internal quotation marks omitted). Notably, Hastings' policy does not resemble the challenged conduct in *Dale* and *Hurley*, which did not concern compliance with a neutral nondiscrimination regulation as a condition to receipt of subsidies. The coercion question at the center of those cases is absent here. *See Grove City Coll.*, 465 U.S. at 575-576; *cf. Dale*, 530 U.S. at 659 (analysis applies only to a regulation that "*directly and immediately affects* associational rights" (emphasis added)).

As this Court's government-funding cases make plain, even though organizations that receive governmental financial assistance have a protected interest in the integrity of their message, public institutions may impose reasonable regulations on receipt of financial and other assistance. *See Rumsfeld* v. *Forum for Aca-*

demic & Institutional Rights, 547 U.S. 47, 58 (2006) ("The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds."). Among these permissible regulations is compliance with neutral nondiscrimination policies. *See Grove City Coll.*, 465 U.S. at 575-576 ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. Grove City may terminate its participation in the [tuition subsidy] program and thus avoid the requirements of [Title IX]." (internal citation omitted)). Hastings' policy—which prohibits discrimination on the basis of broad classifications that are recognized in many other public university nondiscrimination policies—is valid both facially and as applied to CLS.

The test for content discrimination is whether an ordinance is justified with reference to the content of the speaker's—in this case CLS's—speech. This Court has repeatedly recognized that nondiscrimination policies, like the one in place at Hastings, are typically content- and viewpoint-neutral. *See Hurley*, 515 U.S. at 572 (finding an antidiscrimination statute typical in that "it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the *act* of discriminating against individuals" (emphasis added)); *id.* ("[Antidiscrimination p]rovisions like these are well within the State's usual power to enact … and they do not, as a general matter, violate the First or Fourteenth Amendments."); *Roberts*, 468 U.S. at 623 (ruling that a state antidiscrimination law did not "aim at the suppression

of speech"). Hastings' nondiscrimination policy complies with these holdings.[10]

To be sure, there may be situations where a public university applies a facially neutral nondiscrimination policy in a non-neutral way. For example, in *Christian Legal Society* v. *Walker*, 453 F.3d 853 (7th Cir. 2006), the plaintiff alleged that the law school permitted other religious student groups to violate the nondiscrimination policy with impunity. *Id.* at 866; *see also Truth* v. *Kent Sch. Dist.*, 542 F.3d 634, 648 (9th Cir. 2006) (remanding for a determination whether the school district had selectively enforced its nondiscrimination policy). But, in this case, on the basis of facts stipulated to by the parties, the district court found that Hastings applied its nondiscrimination policy in a neutral manner. Indeed, there is no suggestion that Hastings has used its nondiscrimination policy to target unpopular groups or to coerce anyone into changing their viewpoints or messages. *See, e.g.*, *Christian Legal Soc'y of Univ. of Cal.* v. *Kane*, No. C 04-4484, 2006 WL 997217, at *25 (N.D. Cal. May 19, 2006) ("CLS has not demonstrated that Hastings has provided exemptions to the Nondiscrimination Policy to other student organizations while refusing to grant CLS an exemption.").

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[10] The disparate *impact* of a nondiscrimination policy on, for example, religious groups does not transform a content-neutral rule into viewpoint discrimination. "[V]iewpoint disparity, standing alone, does not constitute proof of viewpoint discrimination." *Boy Scouts of Am.* v. *Wyman*, 335 F.3d 80, 93-94 (2d Cir. 2003); *see, e.g.*, *Madsen* v. *Women's Health Ctr.*, 512 U.S. 753, 763 (1994) (policy's disproportionate effect on groups with a particular viewpoint "does not itself render the [policy] content or viewpoint based"); *id.* at 762-763 (injunction against protestors was not viewpoint discriminatory because "none of the restrictions imposed by the court were directed at the contents of petitioner's message").

Moreover, Hastings' nondiscrimination policy, as applied to CLS, left open numerous alternative avenues for the group's activities: after it chose not to comply with the nondiscrimination policy, CLS was able to meet during the academic year without any significant impediment to its activities or its ability to communicate as a group. *Christian Legal Soc'y*, 2006 WL 997217, at *18 ("[I]t is undisputed that despite Hastings' refusal to grant CLS recognized status, the group continued to meet and hold activities throughout the 2004-2005 academic year.... Moreover, there is no evidence that the restrictions to certain forms of communication at Hastings, such as through the Law School newsletter, hindered CLS's ability to communicate with other students."). CLS was permitted to participate in the student organization fair; to reserve Hastings' rooms for meetings and events; and to post announcements about the organization and its activities. *Id.* ("Furthermore, even though CLS was not a recognized student organization at Hastings, Hastings still provided access to bulletin and chalk boards to make announcements, allowed CLS to meet on campus as an organization, and offered CLS use of Hastings' rooms and audio-visual equipment for such meetings and activities."). Thus, on the basis of undisputed, stipulated facts, the district court correctly found that "Hastings' denial of official recognition was not a substantial impediment to CLS's ability to meet and communicate as a group." *Id.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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