American Bar Association
www.supremecourtpreview.org

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 OF STATE UNIVERSITIES AND STATE UNIVERSITY SYSTEMS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

SCOTT L. SHUCHART
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
apincus@mayerbrown.com
(202) 263-3000

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. PUBLIC UNIVERSITIES TYPICALLY PURSUE THEIR EDUCATIONAL MISSIONS BY CONDITIONING RECOGNITION OF STUDENT ORGANIZATIONS ON AGREEMENT TO ABIDE BY NONDISCRIMINATION POLICIES. 6

A. Many Public Universities Apply Nondiscrimination Requirements Similar To The Hastings Policies At Issue In This Case. 8

B. Nondiscrimination Policies Further The Principles Underlying Antidiscrimination Laws, Universities' Educational Missions, And Other Important Government Interests. 12

C. Nondiscrimination Policies Have Not Been Used To Undermine University-Recognized Groups. 15

D. Students Can And Do Participate In Groups Not Formally Recognized By Their University. 19

II. UNIVERSITY NONDISCRIMINATION POLICIES DO NOT VIOLATE THE FREE SPEECH GUARANTEE. 21

TABLE OF CONTENTS—continued

Page

A. A University May Condition Recognition Of Student Organizations Upon Compliance With Viewpoint-Neutral Standards Reasonably Related To Its Educational Mission. 22

B. Petitioner's Compelling Interest Standard Is Not Supported By The Court's Precedents And Would Dramatically Limit The Government's Ability To Manage Use Of Its Resources. 28

C. Nondiscrimination Policies Are Reasonable Viewpoint-Neutral Standards For Universities' Recognition Of Student Groups. 29

1. Registered Student Organization Nondiscrimination Policies Are Viewpoint Neutral. 29

2. Registered Student Organization Nondiscrimination Policies Are Reasonable. 34

III. UNIVERSITY NONDISCRIMINATION POLICIES DO NOT VIOLATE THE RIGHT OF FREE ASSOCIATION. 35

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

CASES

Arkansas Educational Television Comm'n v. *Forbes*, 523 U.S. 666 (1998) 27

Bethel School District No. 403 v. *Fraser*, 478 U.S. 675 (1986) 14

Bob Jones University v. *United States*, 461 U.S. 574 (1983) 36

Boy Scouts of America v. *Dale*, 530 U.S. 640 (2000) 35, 37

Brown v. *Board of Education*, 347 U.S. 483 (1954) 14

City of Madison, Joint School District No. 8 v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) 23

Cornelius v. *NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985) .... passim

Davenport v. *Washington Education Ass'n*, 551 U.S. 177 (2007) 27

Employment Division v. *Smith*, 494 U.S. 872 (1990) 38

Good News Club v. *Milford Central School*, 533 U.S. 98 (2001) 23, 24, 30

Greer v. *Spock*, 424 U.S. 828 (1976) 24

Grove City College v. *Bell*, 465 U.S. 555 (1984) 36

Hague v. *CIO*, 307 U.S. 496 (1939) 23

Hazelwood School District v. *Kuhlmeier*, 484 U.S. 260 (1988) 15

Healy v. *James*, 408 U.S. 169 (1972) 36, 37

TABLE OF AUTHORITIES—continued

Page(s)

Lamb's Chapel v. *Center Moriches School District*, 508 U.S. 384 (1993) 31

Legal Servs. Corp. v. *Velazquez*, 531 U.S. 533 (2001)... 36

Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974)... 25

Locke v. *Davey*, 540 U.S. 712 (2004)......................... 38

Madsen v. *Women's Health Center, Inc.*, 512 U.S. 753 (1994)... 32

Perry Education Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)............................. 22, 23, 25, 26

Pleasant Grove City v. *Summum*, 129 S. Ct. 1125 (2009).................................. 4-5, 23

Roberts v. *U.S. Jaycees*, 468 U.S. 609 (1984)................................. 29, 30, 38

Rosenberger v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995)....................... 21, 24, 25, 30-31

Rust v. *Sullivan*, 500 U.S. 173 (1991)... 36

Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 23

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) 17

USPS v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)... 22

Widmar v. *Vincent*, 454 U.S. 263 (1981)............ 21, 30

Wisconsin v. *Mitchell*, 508 U.S. 476 (1993).............. 30

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTIONAL PROVISIONS

California Constitution, Article IX, § 9 3

STATUTES

20 U.S.C. § 1681 13

Age Discrimination in Employment Act of 1967, 29 U.S. §§ 621-634 13

Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq*.. 13

Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2 13

Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4311... 13

California Education Code
- § 92201 3
- § 92204 3

OTHER AUTHORITIES

Arizona State University, University Student Initiatives Manual, http://www.asu.edu/aad/manuals/usi/usi1302-01.html 11

California State University, Long Beach, CSULB Religious Clubs, http://www.csulb.edu/divisions/students/sld/campus_organizations/religious/ 19

TABLE OF AUTHORITIES—continued

Page(s)

D.X. Cheng, *Students' Sense of Campus Community: What It Means, and What To Do About It,* 41 NASPA Journal (Issue 2, 2004) 7

Georgia Institute of Technology, *Constitution Checklist*, *at* http://involvement.gatech.edu/pdf/Constitution%20Checklist.doc 10

K. Hernandez et al., *Analysis of the Literature on the Impact of Student Involvement on Student Development and Learning: More Questions than Answers?*, 36 NASPA Journal (Issue 3, 1999) 7

Kansas Board of Regents, *Policy and Procedures Manual* (1995), *at* http://www.kansasregents.org/download/aca_affairs/policymanual/061208%20Policy%20Manual%20revised%20links_1.pdf 9

Lexis-Nexis 50 State Survey, Anti-Discrimination 13

Michigan State University, *Constitution Sample for Student Organizations* (2007), *at* http://www.studentlife.msu.edu/current_students/rso/documents/sample.pdf 10

Ohio State University, Student Organizations/SOURCE: Organization Registration & Management, http://ohiounion.osu.edu/studentorgs/orgs_manage.asp 20

TABLE OF AUTHORITIES—continued

Page(s)

E. Pascarella & P. Terenzini, *How College Affects Students: Findings and Insights From Twenty Years of Research* (1991) 7

Rutgers University-New Brunswick, Religious Life, http://getinvolved.rutgers.edu/organizations/religious-life.................................. 21

Rutgers, The State University of New Jersey, Student Involvement Office, *Student Organization & Advisor Handbook 2008-2009* (2008), *at* http://getinvolved.rutgers.edu/documents/organizations/student-organization-and-advisor-handbook-fall08.pdf. 9

Rutgers, The State University of New Jersey, *University Code of Student Conduct* (2007), *at* http://www.rci.rutgers.edu/~polcomp/judaff/docs/UCSC.pdf.......................... 17

University of Alabama, Student Handbook, Guidelines for Non-Fraternal Student Organizations, http://www.studenthandbook.ua.edu/nonfratguidelines.html.. 10

University of Alaska Board of Regents, Regents' Policy P09.07.01, *http://www.alaska.edu/bor/policy/9p/p09-07.html* 20

TABLE OF AUTHORITIES—continued

Page(s)

University of Arkansas, Student Handbook, Code of Student Life, Non-Discrimination Policy for Student Organizations, http://handbook.uark.edu/chapters.php?chapter=8&p=6 10

University of California, Berkeley, Campus Life & Leadership, http://students.berkeley.edu/osl/studentgroups/public/index.asp?todo=listgroups 18

University of California, Berkeley, Religious Student Organizations, http://students.berkeley.edu/osl/studentgroups/public/index.asp?todo=listgroups&GROUPTYPEID=1718........... 19

University of California, Los Angeles, UCLA Student Groups: A-Z, http://www.studentgroups.ucla.edu/home/?page_id=3644.. 18

University of California, Los Angeles, UCLA Student Groups: Religious, http://www.studentgroups.ucla.edu/home/?page_id=6040.. 19

University of California, Nondiscrimination Policy Statement for University of California Publications Regarding Student-Related Matters, http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/ucappc.html 12

TABLE OF AUTHORITIES—continued

Page(s)

University of California, *Policy on Registered Student Organizations* (2004), http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/uc70.html 12

University of Colorado, *Relationship Statement: University of Colorado and Student Organizations* (2005), *at* www.colorado.edu/StudentAffairs/sofo/forms/relationship_statement.pdf................ 6-7, 20

University of Delaware, Student Centers' Policies, http://www.udel.edu/student-centers/policy/policy_freedomofassoc.html#membership.. 9

University of Delaware, Student Organizations, http://www.udel.edu/RSO/ 18

University of Delaware, Student Organizations: Religious, http://www.udel.edu/RSO/religious.html 19

University of Georgia, *Creating a Constitution*, *at* www.uga.edu/stuorgs/policies/pdfs/newconstitution.pdf 11

University of Hawai'i at Mānoa, *Registered Independent Organizations (RIO): Application for Registration* (2009), *at* http://www.hawaii.edu/caps/rio/documents/RIO_App_AY09-010-1.pdf 10

University of Idaho, Student Organizations, Start a New Club, http://stuorgs.uidaho.edu/New 11

TABLE OF AUTHORITIES—continued

Page(s)

University of Illinois, Registered Organization Registration, http://www.union.illinois.edu/involvement/rso/registration.aspx 10

University of Iowa, *Constitutional Guidelines* (2009), *at* http://wiki.uiowa.edu/download/attachments/19468875/Constitutional+Guidelines.pdf............................ 11

University of Nebraska-Lincoln, Recognized Student Organizations (RSOs), http://involved.unl.edu/organizations/ 18

University of New Mexico, Chartered Student Organization Policy, http://pathfinder.unm.edu/policies.htm#charteredstudentorg 10

University of Oregon, Student Organizations: Religious, http://diversity.uoregon.edu/students-religious.htm 20

University of Wyoming, Recognized Student Organizations, http://www.uwyo.edu/RSO/........ 18

Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919 (2006) 30, 32

West Virginia University, *WVU Student Organizations Services Resource Guide 2009-2010*, *at* http://sos.wvu.edu/r/download/42256.................. 10

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are ten public universities and university systems. Each amicus conditions official recognition of student groups on compliance with nondiscrimination principles.

Amici believe strongly that these requirements are entirely consistent with the First Amendment, and file this brief to explain why petitioner's contrary position is inconsistent with the Court's jurisprudence, and would have dramatic adverse consequences for amici's ability to allocate public funds and access to public facilities. Amici consist of the following institutions:

- Rutgers, The State University of New Jersey, the eighth oldest institution of higher learning in the United States, which is a comprehensive public research and land-grant university with over 55,000 students enrolled in 27 schools and colleges at three campuses across the state.

- The Pennsylvania State University, an institution that is privately incorporated, but has been deemed by the Commonwealth of Pennsylvania to be a public instrumentality, performing many of the functions of a public university. The University's 25 campuses enroll nearly 93,000 students, more than 44,000 of which are found at its main campus at University Park.

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

• University of Rhode Island, a land-grant public research institution of higher education with its main campus in Kingston, Rhode Island, and other campuses located throughout the state.

• The University System of Maryland, which has 11 universities, two research institutions, and two regional higher education centers that serve more than 150,000 undergraduate, graduate, and professional students.

• The University of Kentucky, which is a land-grant public research institution fully engaged in teaching and research.

• The University of Montana, a state higher education institution comprised of some 19,000 students with campuses in Missoula, Butte, Dillon, and Helena, Montana.

• The University of Oregon, a public teaching and research university that is part of the Oregon University System. The University has over 20,000 students, most of whom are located on its campus in Eugene, Oregon.

• Oregon State University, a public research and land-grant university that is part of the Oregon University System. OSU is composed of 11 academic colleges, with most of its more than 20,000 students enrolled at its main campus in Corvallis, Oregon.

• Portland State University, which is the largest university in the Oregon University system, and provides access throughout the life span to a quality liberal arts education for undergraduates and an appropriate array of professional and graduate programs especially relevant to metropolitan areas.

• The Board of Trustees of the California State University, which governs the California State University system, which has 23 campuses and educates over 440,000 students.

• The Regents of the University of California, which governs the University of California system, which consists of ten campuses and educates over 220,000 students.[2]

SUMMARY OF ARGUMENT

University students' participation in voluntary organizations is an integral part of their educational experience. Members of student organizations gain opportunities to learn about particular areas of endeavor and persons different from themselves, as well as being part of a group, managing their time, and acting in a leadership capacity—experiences that may not be found within the walls of a lecture hall.

Most, if not all, public universities have adopted student group recognition standards to determine

---

[2] The Regents of the University of California is a public corporation, upon which the California Constitution confers governing authority over the University of California. See Cal. Const. Art. IX, § 9. Although Hastings College of the Law is "affiliated with" the University of California (Cal. Ed. Code § 92201), it is governed by a separate Board of Directors (Cal. Ed. Code § 92204). Hastings and University of California officials set policies relating to registered student groups for their respective institutions independently and pursuant to separate authority delegated by their respective governing boards. The Hastings officials named as defendants in this action are subject to the authority of the Hastings Board of Directors, not The Regents of the University of California.

which student organizations are eligible for university support—support that typically includes preferential access to university facilities and communication systems; use of the university logo; and financial assistance. Student organizations that are not eligible for support are permitted to meet on campus, but they do not receive the support extended to recognized groups.

Membership nondiscrimination policies are a common requirement for recognition of student organizations. These policies fall into two broad groups: those prohibiting discrimination based upon particular student characteristics and those requiring that participation in the student organization be open to all students. They rest on three basic interests: implementing the public policies reflected in federal and state nondiscrimination laws; ensuring the availability to students on a nondiscriminatory basis of publicly-funded (and/or student-funded) resources; and furthering universities' educational missions by demonstrating the importance to our society of nondiscrimination principles as well as providing students with the experience of participating in organizations with individuals of different backgrounds and points of view.

University student group recognition programs plainly constitute a limited public forum under this Court's First Amendment jurisprudence. They are created for a specific purpose and are accompanied by specific admission requirements and application processes tied directly to the legal standards that govern public universities as well as those universities' educational missions. Universities accordingly may impose standards governing access to these forums "that are reasonable and viewpoint-neutral."

Pleasant Grove City v. *Summum*, 129 S. Ct. 1125, 1132 (2009).

Nondiscrimination policies are viewpoint neutral. They distinguish among student organizations on the basis of conduct, not on the basis of point of view. Contrary to petitioner's claim, these policies do not single out religious organizations. They apply to all student organizations, whether religious or not.

These policies are also reasonable. Prohibitions of discrimination based on specified categories reflect policies embodied in federal and state law, prevent distribution of public resources to groups that discriminate, and promote schools' educational missions. Requirements that student organizations accept all students give all students an equal opportunity to utilize publicly-funded facilities and public funds, and they allow students to arrive at their own views by interacting with persons with different perspectives.

Finally, petitioner is wrong in asserting that these policies can be abused to prevent an organization from fulfilling its mission: There are numerous nondiscriminatory means of protecting an organization against that extremely remote possibility. Indeed, the broad range of recognized student groups on campuses across the country—including religious groups—by itself demonstrates the fundamental errors underlying petitioner's position.

Petitioner's free association claim fails for the same reasons as its free speech claim. Viewpoint-neutral, reasonable standards for access to government resources are plainly permissible under this Court's precedents.

ARGUMENT

I. PUBLIC UNIVERSITIES TYPICALLY PURSUE THEIR EDUCATIONAL MISSIONS BY CONDITIONING RECOGNITION OF STUDENT ORGANIZATIONS ON AGREEMENT TO ABIDE BY NONDISCRIMINATION POLICIES.

University campuses—like other places in which people live or work—give rise to thousands of different aggregations of individuals. Some of these groups are transitory, formed for a week, a month or a semester; some exist for years or decades. Some involve social activities or hobbies; others address issues of national concern. Some are formal, others entirely ad hoc.

Students' participation in these groups enhances their educational experience. As the University of Colorado explains:

> The cultural, intellectual, social, spiritual and recreational activities conducted by student organizations provide students with opportunities to socialize, learn about people who are different from themselves, and feel involved with the University. Organizing the groups and their activities also provides opportunities for students to acquire leadership skills and experiences. The intellectual and personal development of students in this manner is an important contribution to the University's mission of preparing educated, responsible citizens for our society.

University of Colorado, *Relationship Statement: University of Colorado and Student Organizations* 1

(2005), *at* www.colorado.edu/StudentAffairs/sofo/forms/relationship_statement.pdf.[3]

Some student groups may seek to use university resources in conjunction with their activities—for example, exclusive use of particular university rooms or grounds for meetings or other activities; use of university communication systems to provide notice of their activities; use of the university's logo; and access to other university resources. In addition, many universities maintain a fund for use by student organizations, which is drawn from the university's general budget or from a discrete student activity fee assessed on all students.

To avoid ad hoc determinations regarding which of hundreds of student groups may obtain these university resources and which may not—as well as to promote use of these resources in a manner that is consistent with important government interests, including furthering the university's educational mission—many universities have adopted criteria with which a student group must comply in order to obtain "recognized" or "registered" status. That status, in turn, entitles the group to specified privileges such as preferential access to university facilities and use of the university's name and logo, and, frequently, university funding. Groups that do not obtain recognized status are not banned from university cam-

---

[3] Academic research supports this conclusion. See E. Pascarella & P. Terenzini, *How College Affects Students: Findings and Insights From Twenty Years of Research* (1991); D.X. Cheng, *Students' Sense of Campus Community: What It Means, and What To Do About It,* 41 NASPA Journal (Issue 2, 2004); K. Hernandez et al., *Analysis of the Literature on the Impact of Student Involvement on Student Development and Learning: More Questions than Answers?*, 36 NASPA Journal (Issue 3, 1999).

puses; they simply do not obtain the benefits that come with that status.

This case involves the First Amendment standard applicable to the criteria utilized by public universities to determine which student groups receive recognized status.

A. Many Public Universities Apply Nondiscrimination Requirements Similar To The Hastings Policies At Issue In This Case.

Hastings is not at all unique in limiting recognized status to student organizations that comply with a nondiscrimination policy. Nondiscrimination policies are a common requirement for recognition of student organizations at public universities throughout the country.

These policies take a variety of forms, with each public university or university system adopting a policy based on its determination regarding the applicable educational and other governmental interests. They fall primarily into two broad groups—policies prohibiting discrimination based upon particular student characteristics ("category-based" policies) and policies requiring that participation in the student organization be open to all students ("all-comers" policies).[4]

Category-based policies prohibit discrimination on the basis of specified characteristics (*e.g.*, race,

---

[4] Much of petitioner's argument appears to rest on disputes over the meaning of Hastings' policy. Amici take no position on the content of Hastings' policy, and file this brief to explain why policies that require nondiscrimination on specified grounds and/or acceptance of all comers are constitutionally permissible.

gender, ethnicity, age, religion, sexual orientation, etc.). For example, Rutgers University explicitly prohibits student organizations from discriminating on the basis of identified protected categories:

> Clubs and organizations may not deny membership to anyone on the basis of race, creed, color, religion, national origin, ancestry, age, sex, disability, marital status, familial status, affectional or sexual orientation, or veteran status; with the exception of social sororities or fraternities which are entitled by law to remain single-sex organizations if tax exempt under 504a of IRS code 1954.

Rutgers, The State University of New Jersey, Student Involvement Office, *Student Organization & Advisor Handbook 2008-2009* at 26 (2008), *at* http://getinvolved.rutgers.edu/documents/organizations/student-organization-and-advisor-handbook-fall08.pdf. The University of Delaware,[5] the University of Kansas,[6] and West Virginia University[7] similarly condi-

---

[5] "RSOs may not discriminate on the basis of race, creed, color, gender, age, religion, national origin, veteran, handicap status, or sexual orientation." University of Delaware, Student Centers' Policies, http://www.udel.edu/student-centers/policy/policy_freedomofassoc.html#membership.

[6] "The established policy of the Board of Regents of the State of Kansas prohibits discrimination on the basis of age, race, color, religion, sex, marital status, national origin, physical handicap or disability, status as a Vietnam Era Veteran, sexual orientation or other factors which cannot be lawfully considered, within the institutions under its jurisdiction." Kansas Board of Regents, *Policy and Procedures Manual* 37 (1995), *at* http://www.kansasregents.org/download/aca_affairs/policymanual/061208%20Policy%20Manual%20revised%20links_1.pdf.

tion recognition of student groups on compliance with category-based nondiscrimination policies.

Many schools choose to include sexual orientation on a list of protected categories, while others do not[8]; similarly, some schools choose to include veteran status or height and weight on the same categorical list.[9] Some institutions may choose to grant

---

[7] West Virginia University, *WVU Student Organizations Services Resource Guide 2009-2010* at 2-3, *at* http://sos.wvu.edu/r/download/42256 (Student group constitutions must include a statement that "the organization will not deny membership on the basis of race, sex, age, disability, veteran status, religion, sexual orientation, color or national origin."). See also University of Alabama, Student Handbook, Guidelines for Non-Fraternal Student Organizations, http://www.studenthandbook.ua.edu/nonfratguidelines.html; University of Arkansas, Student Handbook, Code of Student Life, Non-Discrimination Policy for Student Organizations, http://handbook.uark.edu/chapters.php?chapter=8&p=6; Georgia Institute of Technology, *Constitution Checklist*, *at* http://involvement.gatech.edu/pdf/Constitution%20Checklist.doc; University of Hawai'i at Mānoa, *Registered Independent Organizations (RIO): Application for Registration* 3 (2009), *at* http://www.hawaii.edu/caps/rio/documents/RIO_App_AY09-010-1.pdf; University of Illinois, Registered Organization Registration, http://www.union.illinois.edu/involvement/rso/registration.aspx; University of New Mexico, Chartered Student Organization Policy, http://pathfinder.unm.edu/policies.htm#charteredstudentorg.

[8] For example, the University of Delaware and the University of Arkansas include sexual orientation, while the University of Alabama does not. University of Delaware, Student Centers' Policies, *supra*, note 5; University of Arkansas, Student Handbook, *supra*, note 7; University of Alabama, Student Handbook, *supra*, note 7.

[9] Michigan State University, *Constitution Sample for Student Organizations* (2007), *at* http://www.studentlife.msu.edu/current_students/rso/documents/sample.pdf (height, weight, and veteran status).

an exception to religious organizations that wish to limit membership or leadership on the basis of shared religious beliefs, as the University of Georgia does[10]; others do not provide for such an exemption.

All-comers policies mandate that—in order to obtain recognition—a student group permit all enrolled students to join. These policies sometimes include an enumeration of specific grounds on which discrimination is prohibited, but go on to require that recognized groups permit all students to join. For example, the policy of the University of Iowa states:

> In no aspect of its programs shall there be any difference in the treatment of persons on the basis of race, national origin, color, creed, religion, sex, age, disability, veteran status, sexual orientation, gender identity, or associational preference, or any other classification which would deprive the person of consideration as an individual. The organization will guarantee that equal opportunity and equal access to membership, programming, facilities, and benefits *shall be open to all persons*.

University of Iowa, *Constitutional Guidelines* 1 (2009), *at* http://wiki.uiowa.edu/download/attachments/19468875/Constitutional+Guidelines.pdf (emphasis added).[11]

---

[10] University of Georgia, *Creating a Constitution* 1, *at* http://www.uga.edu/stuorgs/policies/pdfs/newconstitution.pdf. See also Arizona State University, University Student Initiatives Manual, http://www.asu.edu/aad/manuals/usi/usi1302-01.html (same).

[11] For another example of an all-comers policy, see University of Idaho, Student Organizations, Start a New Club, http://stuorgs.uidaho.edu/New.

The University of California ("UC") system similarly requires that "[m]embership in a Registered Campus Organization shall be open to any student, consistent with the [the UC Nondiscrimination Policy Statement], with the exception that membership in an official recognized sorority or fraternity may be limited by gender." University of California, *Policy on Registered Student Organizations* § 70.10 (2004), http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/uc70.html (all Internet authorities last visited Mar. 13, 2010).[12]

B. Nondiscrimination Policies Further The Principles Underlying Antidiscrimination Laws, Universities' Educational Missions, And Other Important Government Interests.

The nondiscrimination elements of student group recognition policies rest on three basic interests: implementing the public policies reflected in nondiscrimination laws, ensuring the availability to students on a nondiscriminatory basis of publicly-funded (and/or student-funded) resources, and furthering universities' educational missions.

[12] The nondiscrimination policy, which applies to "admission, access, and treatment in University programs and activities," bars discrimination "on the basis of race, color, national origin, religion, sex, gender identity, pregnancy, physical or mental disability, medical condition (cancer related or genetic characteristics), ancestry, marital status, age, sexual orientation, citizenship, or service in the uniformed services." University of California, Nondiscrimination Policy Statement for University of California Publications Regarding Student-Related Matters, http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/ucappc.html.

First, the states and the federal government recognize the importance of prohibiting discrimination—the federal government and all 50 states have enacted numerous antidiscrimination laws. These statutes prohibit discrimination on the basis of race, gender, religion, national origin, sexual orientation, disability, veteran status, and other bases. They extend to a variety of areas, such as employment, housing, education, and public accommodations. See Age Discrimination in Employment Act of 1967, 29 U.S. §§ 621-634; Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4311; Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2; Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.*; Lexis-Nexis 50 State Survey, Anti-Discrimination, *available at* www.lexis.com. In many instances, these requirements, like university nondiscrimination policies, are linked to the receipt of public resources. See, *e.g.*, 20 U.S.C. § 1681.

While state antidiscrimination laws and university student organization nondiscrimination policies do not always mirror each other, the university policies both ensure compliance with applicable legal provisions and reflect the principles embodied in these laws.

Second, universities have a strong interest in ensuring that student- and taxpayer-funded resources are not distributed in a discriminatory manner. Public universities are funded, in significant part, by state taxpayers. At many universities, all students must pay activity fees that support the school's recognized student organizations. An all-comers policy reflects a university's judgment that all students should have an equal opportunity to obtain the benefit of these resources. Similarly, a policy barring

category-based discrimination embodies the conclusion that the best use of the resources is to allocate them to organizations that do not bar students from utilizing these resources on the basis of protected characteristics.

Third, this Court has recognized that public schools—including public post-secondary schools like amici—do more than teach students the "three Rs"; they also prepare students to become full, contributing citizens of their communities and of the nation. Society has "an interest in teaching students the boundaries of socially appropriate behavior," *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986), and "schools must teach by example the shared values of a civilized social order," *id*. at 683. See also *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954) (explaining that education is a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment").

This Court in *Fraser* said that "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct." 478 U.S. at 683. Schools similarly may determine that essential lessons of tolerance and nondiscrimination cannot be conveyed in a school that provides support to student groups with discriminatory membership policies.

In addition, the presence within student groups of individuals holding different views provides an educational opportunity, allowing members to learn to voice disagreements respectfully and think critically about their own beliefs. Students who are un-

certain of their own views are afforded the opportunity to learn through exposure to the views of others, rather than being limited to joining organizations that reinforce already-established beliefs.

Finally, although the speech of recognized student groups is not attributed to the university itself, those groups are, by definition, linked publicly to the university. They are listed on the university website, use the university's logo, hang fliers on university bulletin boards, obtain university email addresses, and often obtain financial resources from the university. The Court has recognized the concerns associated with affirmatively promoting "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 271 (1988). Schools therefore may further their interest in teaching nondiscrimination by declining to grant recognized status to groups that engage in discriminatory activity.

C. Nondiscrimination Policies Have Not Been Used To Undermine University-Recognized Groups.

One objection sometimes voiced to category-based and all-comers nondiscrimination policies is that they allow students opposed to an organization's mission to join en masse, elect themselves into leadership positions, and undermine the organization's purpose (or destroy it altogether). See Pet. Br. 28 ("If the Democratic Caucus sent its members out to spread its views to the public, Republican participants would be able to sabotage the enterprise and wreak havoc on the group's chosen message. If numerous enough, the Republican *agents provocateurs*

could muster a majority vote to invite Karl Rove to be the Caucus's keynote speaker.").

In amici's collective experience, the theoretical possibility of a "takeover" attempt virtually never is realized; actual attempts are extraordinarily rare. And student organizations and universities retain ample tools to prevent any attempt from achieving success. For that reason, amici have concluded that the benefits provided by nondiscrimination policies, discussed above, far outweigh the highly theoretical possibility of disruption.

Petitioner claims that "[t]his [takeover] scenario is not speculative," and promises that amicus Foundation for Individual Rights in Education (FIRE) will provide "numerous examples of similar incidents" in its amicus brief. See Pet. Br. 29 n.4. In fact, petitioner and FIRE between them point to only a *single* example of such a hostile takeover ever occurring: in April 1993, when Republican students at the University of Nebraska "showed up at the Young Democrats' election meeting and, outnumbering the Young Democrats, elected themselves as the new officers of the group." *Ibid.*[13]

---

[13] FIRE discusses one situation where opponents of an organization *discussed the possibility* of a takeover but does not indicate that the plan ever was carried out. FIRE Am. Br. 8-9. FIRE's other examples are wholly inapposite, involving students destroying/stealing other groups' property/signs or trying to disrupt those groups' events, *id.* at 16-20, or complaining about the discriminatory policies or practices—or calling for derecognition based on those policies or practices—of those groups, *id.* at 10-11. These "examples" do not involve takeovers of groups—they involve other types of interference with the activities of student organizations that, if unjustified and abusive, can be prohibited and punished by a university.

Moreover, student organizations can employ a variety of nondiscriminatory tools effective in preventing the rare "hostile takeover" attempt from succeeding. For example student groups may adopt rules limiting voting membership or officer positions to individuals who have been members for more than a year (or a longer period) or who have attended a prescribed number of meetings within the past year. Such attendance requirements prevent a critical mass of an organization's "opponents" from spontaneously deciding to show up at the last meeting of the year, vote themselves into leadership, and sabotage the organization's mission. Indeed, the record in this case indicates that some recognized organizations at Hastings utilize such attendance requirements. J.A. 173, 178.

Finally, the Court has recognized in a related context that "conduct by [a] student, in class or out of it, which for any reason * * * materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Students whose sole purpose is to invade the rights of others by disrupting an organization and preventing it from fulfilling its stated mission might well be subject to disciplinary action. Indeed, many universities have policies prohibiting students from engaging in disruptive activities.[14]

---

[14] *E.g.*, Or. Admin. R. 571-021-0120 (2009); Rutgers, The State University of New Jersey, *University Code of Student Conduct* § 10 (2007), *at* http://www.rci.rutgers.edu/~polcomp/judaff/docs/UCSC.pdf.

The lack of any substance to the "takeover" chimera is demonstrated by the large number of recognized student organizations that exist today, including organizations focused on the very matters of public controversy that petitioner claims would be targets for disruption.

UCLA, for example, lists over 800 student organizations on its website, categorizing them as academic, arts, cultural, Greek, health, recreation, religious, service, and special interest groups. University of California, Los Angeles, UCLA Student Groups: A-Z, http://www.studentgroups.ucla.edu/home/?page_id=3644. The University of Delaware, a significantly smaller institution, has over 250 student organizations. University of Delaware, Student Organizations, http://www.udel.edu/RSO/.[15]

Recognized student groups on the campuses of the University of California—to pick just one example—include organizations supporting Second Amendment rights, groups for and against abortion rights, groups affiliated with Young Americans for Freedom and other politically conservative organizations, and groups promoting the socialist perspective.[16]

Religious-oriented organizations also exist as recognized student groups in large numbers at universities with nondiscrimination policies. The New

---

[15] See also University of Nebraska-Lincoln, Recognized Student Organizations (RSOs), http://involved.unl.edu/organizations/ (over 400 RSOs); University of Wyoming, Recognized Student Organizations, http://www.uwyo.edu/RSO/ (over 200 RSOs).

[16] See, *e.g.*, University of California, Berkeley, Campus Life & Leadership, http://students.berkeley.edu/osl/studentgroups/public/index.asp?todo=listgroups.

Brunswick campus of Rutgers University, for example, is home to more than 40 religious and religious cultural organizations.[17]

D. Students Can And Do Participate In Groups Not Formally Recognized By Their University.

The nondiscrimination policy at issue here—and the ones just discussed—apply only with respect to official recognition of student organizations. Amici, and to amici's knowledge all public universities, permit students to gather together in non-registered groups.

The University of Colorado, for example, explains how non-registered groups fit into the University community: "Independent student organizations are free to exist or disband and are fully responsible for their own activities. Student organizations must comply with University policies and procedures in scheduling and conducting activities on campus, but the groups' goals, membership and activities are de-

---

[17] Rutgers University-New Brunswick, Religious Life, http://www.getinvolved.rutgers.edu/organizations/religious-life. California State's Long Beach campus has 26 religious groups. California State University, Long Beach, CSULB Religious Clubs, http://www.csulb.edu/divisions/students/sld/campus_organizations/religious/. The University of California, Los Angeles, lists 84 religious student groups, University of California, Los Angeles, UCLA Student Groups: Religious, http://www.studentgroups.ucla.edu/home/?page_id=6040, while Berkeley lists 71. University of California, Berkeley, Religious Student Organizations, http://students.berkeley.edu/osl/studentgroups/public/index.asp?todo=listgroups&GROUPTYPEID=1718. The University of Delaware has 24 religious student organizations. University of Delaware, Student Organizations: Religious, http://www.udel.edu/RSO/religious.html.

termined solely by the groups themselves." University of Colorado, *Relationship Statement: University of Colorado and Student Organizations* 3 (2005), *at* www.colorado.edu/StudentAffairs/sofo/forms/relationship_statement.pdf.[18]

Student groups thus have the option of agreeing to comply with their universities' nondiscrimination policies in order to gain the benefits that come from university recognition, or acting as a group of students without university recognition and thereby avoiding the restrictions imposed by university policies. See Pet. Br. 11 (Hastings CLS afforded opportunity to meet on campus although not a recognized student organization).

In addition, large numbers of religious organizations are present on university campuses, not as student groups but rather as independent entities that use their own resources to enable students to participate in religious life. For example, the University of Oregon has over 20 such groups encompassing a variety of religious denominations.[19]

---

[18] See also University of Alaska Board of Regents, Regents' Policy P09.07.01, http://www.alaska.edu/bor/policy/9p/p09-07.html ("While student organizations may be informally formed within the university community, those that register with the university in accordance with Regents' Policy 09.07.04 [which, among other things, forbids discrimination] will acquire privileges as well as concurrent responsibilities."); Ohio State University, Student Organizations/SOURCE: Organization Registration & Management, http://ohiounion.osu.edu/studentorgs/orgs_manage.asp (including "unregistered" as a status for student organizations that do not complete registration requirements and so do not receive benefits or resources).

[19] University of Oregon, Student Organizations: Religious, http://diversity.uoregon.edu/students-religious.htm. See also

II. UNIVERSITY NONDISCRIMINATION POLICIES DO NOT VIOLATE THE FREE SPEECH GUARANTEE.

Petitioner asserts repeatedly that this case is controlled by this Court's decisions in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). In fact, the issue presented here was not addressed by the Court in those cases.

Widmar and *Rosenberger* involved attempts to limit speech by groups that the government had admitted to a limited public forum. The Court held that the government entities could not discriminate on the basis of a speaker's viewpoint among speakers that satisfied the criteria for admission to a limited public forum.

Indeed, the Court in *Rosenberger* specifically observed that the petitioners' student organization had agreed to abide by university-created standards that were preconditions to admission into the limited public forum. 515 U.S. at 823, 824 (to be eligible to have University pay bills, a student group had to become a "contracted independent organization," which required, among other things, that the organization "pledge not to discriminate in its membership"; petitioners' organization had acquired that status). See also *Widmar*, 454 U.S. at 265 (student organization had been recognized by the university).

Those cases accordingly did not address the issue here, the extent to which the First Amendment limits government's ability to prescribe the rules governing entry into the limited public forum. This Court's

Rutgers University-New Brunswick, Religious Life, http://getinvolved.rutgers.edu/organizations/religious-life.

precedents make clear that the government may adopt viewpoint-neutral standards for entry to a limited forum, such as a student group recognition program, that are reasonably related to its purpose. Nondiscrimination policies plainly satisfy that standard.

A. A University May Condition Recognition Of Student Organizations Upon Compliance With Viewpoint-Neutral Standards Reasonably Related To Its Educational Mission.

"[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the Government." *USPS* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Access to student organization recognition programs—plainly a limited public forum created by universities for specific purposes—may be governed by reasonable, viewpoint-neutral standards.

1. Not all government-controlled forums for speech are created equal: "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Under the forum analysis utilized by this Court, the government's ability to regulate access to a particular forum—whether physical or programmatic—turns upon the nature of that forum.

The government has the least latitude to limit speech in traditional public forums. These are areas, like streets and parks, that "have immemorially been held in trust for the use of the public and, time out of

mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939). Exclusionary regulations in this context are subject to a strict scrutiny standard. *Perry Educ. Ass'n*, 460 U.S. at 45.

Designated public forums, places where "the Government has intentionally designated a place or means of communication" for *public use*, are subject to similar restrictions; in these forums, "speakers cannot be excluded without a compelling governmental interest." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); see, *e.g.*, *City of Madison, Joint Sch. Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976) (school board meeting open to the public); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (municipal theaters "designed for and dedicated to expressive activities").

Alternatively, "a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City*, 129 S. Ct. at 1132. "When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 106 (2001) (quoting *Rosenberger*, 515 U.S. at 829).

A limited public forum may be subject to "restrictions on speech that are reasonable and viewpoint-neutral." *Pleasant Grove City*, 129 S. Ct. at 1132; ac-

cord *Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 806.[20]

The Court explained in *Rosenberger* that the "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." 515 U.S. at 829; accord *Greer* v. *Spock*, 424 U.S. 828, 836 (1976) ("[N]o less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (quotation marks and citation omitted)).

In contrast to the compelling interest and narrow tailoring requirements that apply to limits on access to a traditional public forum, standards governing access to a limited public forum "need only be reasonable; [they] need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. Reasonableness is context-specific, "assessed in the light of the purpose of the forum and all the surrounding circumstances." *Id*. at 809.

Restrictions may be justified in terms of the government's managerial autonomy and interest in avoiding certain associations or entanglements. For example, the Court has upheld limitations designed to "avoid[] the appearance of political favoritism" and

---

[20] Although the Court in *Cornelius* used the term "nonpublic forum" to refer to the government-sponsored fundraising campaign at issue in that case, it has in subsequent opinions characterized *Cornelius* as a case involving a "limited public forum" and applied the standard set forth in *Cornelius* in determining the permissibility under the First Amendment of the standards prescribed for entry into a limited public forum. See *Good News Club*, 533 U.S. at 106-107; *Rosenberger*, 515 U.S. at 829.

minimize "controversy that would disrupt the [governmental] workplace and adversely affect" the forum itself. *Id.* at 809-810. Furthermore, the state has wide discretion in determining the dangers that certain topics or speakers pose to the integrity of a limited forum; "[it] need not wait until havoc is wreaked to restrict access." *Id.* at 810.

Once it has opened a limited public forum, of course, "the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829. The government is obligated to apply its standards even-handedly and in particular may not discriminate between otherwise eligible groups on the basis of their viewpoint. *Cornelius*, 473 U.S. at 806.

2. Public universities' programs for recognition of student groups clearly qualify as limited public forums under this Court's jurisprudence.[21]

The distinction between public and limited public forums turns largely on the government's intent in creating the forum, *Cornelius*, 473 U.S. at 803. The Court has inferred intent to create a limited or entirely nonpublic forum from government attempts to restrict access through, for example, admission criteria and application processes, *id.* at 804, or permis-

---

[21] The limited public forum here is the university student group recognition program, which may provide recognized groups with a means of communication, use of a university logo, monetary support, and preferred access to university property. In defining a given forum, the Court has "focused on the access sought by the speaker" (*Cornelius*, 473 U.S. at 801), even when the resulting forum is "more * * * metaphysical than * * * spatial or geographical." *Rosenberger*, 515 U.S. at 830. See, *e.g.*, *Perry Educ. Ass'n* (intra-school mail system); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on public buses); *Cornelius* (a federal employee fundraising campaign).

sion requirements, *Perry Educ. Ass'n*, 460 U.S. at 47. The Court has also considered the purpose of the forum, and the policy underlying the limitations on entry or subject matter.

Thus, in *Cornelius*, it was significant that the Combined Federal Campaign, the fundraising program to which petitioners sought entry, had been designed to limit the disruption that unlimited and ad hoc fundraising solicitation had created in the past—making it unlikely that the government intended to allow open access to any and all tax-exempt charitable organizations. 473 U.S. at 805.

Another consideration is the character of the property implicated by the forum, with the Court presuming a limited or nonpublic forum where the property is itself inconsistent with, or would be unduly disrupted by, expressive activity. In such cases, "the Court is particularly reluctant to hold that the government intended to designate a public forum." *Id*. at 804; see also *id*. at 805-806.

Each of these factors weighs in favor of finding student group recognition programs to be limited public forums. Universities do not open their facilities, funds, and communication media for use by the general public, or even by an undifferentiated class of university students. Student groups must actively apply for recognition and meet certain requirements aimed at promoting the educational goals of the university before they will be admitted to the forum. These requirements include nondiscrimination and anti-hazing policies, size requirements, faculty sponsorship rules, and policies requiring that students be in good standing. Some schools even limit the number of organizations with a given mission or constituency. Such requirements are far from "ministerial"

(*Cornelius*, 473 U.S. at 804), but directly serve and promote the educational mission of the university. See pages 13-15, *supra*.

By imposing these criteria, the university "reserve[s] eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 679 (1998) (quoting *Cornelius*, 473 U.S. at 804) (internal citations omitted). Schools do not intend to create a forum for unlimited public discourse through their student group programs, and it is clear that such forums are not open to just any group of students who wish to participate. "[S]elective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Cornelius*, 473 U.S. at 805.

Finally, the "nature of the Government property involved," *ibid.*, in student group recognition—access to university facilities and funds—and the university context reinforce the limited nature of the forum, as the Court has long recognized that government may exercise autonomy over its educational mission, internal affairs, and resources.

Public universities therefore may limit access to this forum "so long as the distinctions drawn are viewpoint neutral and reasonable in light of [its] purpose." *Davenport* v. *Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007) (citing *Cornelius*, 473 U.S. at 799-800, 806).

B. Petitioner's Compelling Interest Standard Is Not Supported By The Court's Precedents And Would Dramatically Limit The Government's Ability To Manage Use Of Its Resources.

Petitioner asks this Court to transform the public educational domain into a public forum by ignoring the settled principles of the Court's forum cases and subjecting virtually every university decision relating to speech to strict scrutiny review, with the result that public universities would have little ability to manage access to university facilities and funds. That approach is not just legally unsupportable; it would lead to unacceptable practical consequences.

Indeed, petitioner acknowledges that "[t]he right that CLS is asserting * * * is by no means limited to religious groups." Pet. Br. 19. Granting petitioner's argument would mean that "a public university [would not be allowed to] * * * require [any] * * * student groups to admit as leaders and voting members those who disagree with their core beliefs and viewpoints." *Ibid.*

We agree. Accepting petitioner's argument would require all public universities to recognize, sponsor, and carve out exceptions from their nondiscrimination policies for the "White Supremacist" group, the "Anti-Semitic" group, the "Atheists Only" group, the "No Mixed-Race Couples Allowed" group, and countless other groups asserting that discriminatory conduct is an integral part of their message. Under petitioner's logic, requiring such groups to admit African-American, Asian, Jewish, or religious students, or mixed-race couples, as a condition of granting them registered status would unconstitutionally im-

pede their ability to "control their own message and identity." Pet. Br. 18.

Nothing in the First Amendment requires that result in the context of access to government facilities and funds. The flaw in petitioner's argument is its failure to recognize that university student group recognition programs are limited public forums—not "public forums" as petitioner repeatedly states—access to which may be governed by reasonable viewpoint-neutral standards.

C. Nondiscrimination Policies Are Reasonable Viewpoint-Neutral Standards For Universities' Recognition Of Student Groups.

Nondiscrimination policies for recognition of student organizations, such as those in effect at universities across the country, are reasonable viewpoint-neutral standards that do not violate the First Amendment rights of students who wish to engage in discrimination prohibited by those policies.

1. *Registered Student Organization Nondiscrimination Policies Are Viewpoint Neutral.*

A governmental institution discriminates on the basis of viewpoint when it targets "particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829. Neither category-based nondiscrimination policies nor all-comers policies contravene this ban on viewpoint discriminatory restrictions.

a. Prohibitions of discrimination on the basis of protected categories are viewpoint neutral. In *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984), the Court held that a Minnesota act prohibiting discrimination

in public accommodations "because of race, color, creed, religion, disability, national origin or sex" does not, on its face, "aim at the suppression of speech, [and] does not distinguish between prohibited and permitted activity on the basis of viewpoint * * * ." *Id*. at 615, 623. See also *Wisconsin* v. *Mitchell*, 508 U.S. 476, 487 (1993); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1930 (2006) ("[A]ntidiscrimination rules are content-neutral. They do not treat expressive associations differently based on what the associations say.").

Requiring compliance with nondiscrimination policies simply does not target "particular views." *Rosenberger*, 515 U.S. at 829. An organization is not denied recognized status because of its particular beliefs, message, or speech. Rather, it is denied recognized status because it refuses to agree not to engage in discriminatory conduct. A school's nondiscrimination policy regulates how a group must act in order to be recognized as a student organization—it may not violate the university's nondiscrimination policy in determining who can be a member or a leader—but it does not single groups out on the basis of their beliefs. All groups must abide by the nondiscrimination policy, and the policy is accordingly viewpoint neutral.[22]

---

[22] This case is therefore entirely different from *Widmar*, in which the challenged restriction was a "discriminatory exclusion from a public forum based on the religious content of a group's intended speech." 454 U.S. at 269-270; see also *Good News Club*, 533 U.S. at 107 n.2 ("exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination"); *Rosenberger*, 515 U.S. at 831 (university "selects for disfavored treatment those student journal-

b. Petitioner asserts that prohibiting discrimination on the basis of religion constitutes viewpoint discrimination as applied to religious groups, because it supposedly prevents only religious groups from controlling their message by selecting leaders based on their beliefs, and that the policy therefore is not viewpoint neutral. That simply is not true.

First, universities' nondiscrimination policies apply to restrictions on membership; they do not require that students with conflicting beliefs join a group or win votes to lead it. Members of a religious group may individually exercise their vote to place someone in a leadership position based on that person's beliefs or conduct, just as any other member of any other group may vote in support of a candidate he or she believes will best serve the purposes and goals of the organization.

Second, petitioner's argument, if accepted, could not be confined to religious groups, because other forms of discrimination can similarly be claimed to be integral to a group's ideology. The "Anti-Integration" group that "believes" that whites are superior to blacks—and would like to be able to use university funds to express that belief—is equally subject to a nondiscrimination-on-the-basis-of-race policy, *and* the "Atheists Only" group is limited by a nondiscrimination-on-the-basis-of-religious-belief policy. Nondiscrimination policies apply to *all* groups, including groups with discriminatory ideolo-

---

istic efforts with religious editorial viewpoints"); *Lamb's Chapel* v. *Center Moriches Sch. Dist.*, 508 U.S. 384, 393 (1993) (finding "discriminat[ion] on the basis of viewpoint" because of exclusion of speech "dealing with the subject matter from a religious viewpoint").

gies, because access to the limited public forum is reserved to those who agree not to discriminate.

Restricting access to a limited public forum on the basis of a group's conduct (here, discrimination) is viewpoint neutral, whether or not the limitation has a disproportionate effect on groups with certain beliefs, for the additional reason that the focus of the inquiry is on the *government's* purpose, not the effect on those subject to the government's regulation. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); Volokh, *Freedom of Expressive Association*, at 1931-1932 (many content neutral—and therefore viewpoint neutral—rules affect speakers differently). Disparate impact does not alter the fact that the government's purpose for managing the forum is viewpoint neutral.

Third, even if petitioner's argument could somehow be limited to nondiscrimination on the basis of religion, it would mean that all student organizations, including non-religious ones, would be free to engage in religious discrimination. A nonreligious group could contend that the ability to engage in religious discrimination is essential to its mission—for example, a group dedicated to promoting adherence to scientific methods could seek to exclude fundamentalist Christians on the ground that a belief in creationism would taint their message. Or an anti-immigration group could seek to exclude persons other than Christians and Jews on the ground that they sought to maintain the religious "purity" of the Nation's population.

And requiring universities to permit religious discrimination by religious groups would open the door to debate on what qualifies as a religious student organization. A university would be forced to pass judgment on each and every group that wanted to engage in religious discrimination, declaring whether or not it considered the group sufficiently "religious." Universities that wish to avoid drawing such viewpoint-based lines instead can choose to require the same nondiscrimination policy compliance from all groups, an option petitioner seeks to remove.

c. Petitioner also argues that the sexual orientation provision of Hastings' nondiscrimination policy (which petitioner interprets as a category-based policy) is viewpoint discriminatory.[23] It contends that a sexual orientation nondiscrimination policy "selects for disfavored treatment 'those whose beliefs differ from the College on this disputed question.'" Pet. Br. 40 (quoting *Rosenberger*, 515 U.S. at 831). As with religion, however, all groups are subject to the same standards for recognition—they must agree to comply with the nondiscrimination policy. Petitioner's argument would apply equally to a requirement barring discrimination on the basis of gender or veteran status or any other ground: Groups that believe in

---

[23] Petitioner does not argue that an all-comers policy is viewpoint discriminatory with regard to sexual orientation. In fact, the example that petitioner uses to argue that the categorical policy is viewpoint discriminatory—that an animal rights group would be able to exclude a hunter because he did not conduct himself "in accordance with the group's stated beliefs," Pet. Br. 39-40—demonstrates why such an argument cannot be asserted in that context. Under an all-comers policy, no group would be able to base membership on requiring students to "practice what they preach." Pet. Br. 39.

discrimination on the prohibited basis would not be eligible for recognition and would claim "disfavored treatment" because their views differed from the university.

For example, a gay-rights group seeking to exclude heterosexuals, on the theory that individuals who engage in heterosexual conduct cannot sufficiently appreciate the gay rights mission to be effective leaders of the organization, would also be denied recognized status under a sexual orientation nondiscrimination policy. Just because an organization feels it will be affected by such a policy does not mean that the government's purpose in enacting that policy was viewpoint-discriminatory.

2. *Registered Student Organization Nondiscrimination Policies Are Reasonable.*

Standards for access to a limited public forum must also be reasonable; such reasonableness "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809.

It is reasonable for educational institutions to craft nondiscrimination policies that reflect the principles underlying federal and state laws and policies. As government institutions, public universities are subject to the enforcement of these laws and prepare students who will have to understand, appreciate, and work within that legal landscape.[24] It is simi-

[24] Petitioner seems to contend that a category-based university policy is *per se* unreasonable unless it replicates precisely the antidiscrimination provisions of state and federal regulatory statutes. Pet. Br. 44, 46. But a government entity surely may reasonably determine that a broader, and more easily administrable, rule may be applied with respect to access to govern-

larly reasonable for a university to ensure that its student- and taxpayer-funded resources are distributed on a nondiscriminatory basis. Beyond that, such policies are consistent with the universities' educational missions. See pages 12-15, *supra*.

Petitioner argues that all-comers policies are irrational. See Pet. Br. 49-53. But these policies, which have been adopted by a number of institutions (see pages 11-12 & note 11, *supra*), serve the plainly-reasonable government interest in ensuring that no student is deprived of the opportunity to utilize taxpayer- and student-funded facilities and activities, as well as enable students uncertain about their views to participate in organizations and learn from their peers in order to decide what views to espouse, rather than restricting them to organizations that will reinforce their pre-existing views. See pages 14-15, *supra*. And petitioner's argument that all-comers policies can be abused to prevent an organization from fulfilling its mission is simply wrong: There are numerous nondiscriminatory means of protecting an organization against that extremely remote possibility. See page 16, *supra*.

III. UNIVERSITY NONDISCRIMINATION POLICIES DO NOT VIOLATE THE RIGHT OF FREE ASSOCIATION.

Petitioner relies on *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), and earlier expressive association cases. But those cases involve the government acting as regulator, reaching into a private organization and *mandating* compliance with nondiscrimination principles.

---

ment resources and funding, given the different consequences than in the regulatory context.

A university's student group recognition program, by contrast, "establishes a subsidy for specified ends," *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 543 (2001). That subsidy takes the form of preferential access to government resources as well as direct government funding. "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991). A nondiscrimination policy, as a reasonable, viewpoint-neutral condition on student group recognition, is therefore entirely consistent with this Court's precedents regarding government subsidies. See, *e.g.*, *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575-576 (1984); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 602-604 (1983).

The Court held in *Grove City* that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. * * * Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the BEOG program infringes no First Amendment rights of the College or its students." 465 U.S. at 575-76. Petitioner's argument here is directly contrary to the rationale and holding in that case.

Petitioner also errs in relying on *Healy* v. *James*, 408 U.S. 169 (1972). There, members of a prohibited student organization tried to meet at "[a] coffee shop in the Student Center * * * but were disbanded on the President's order since nonrecognized groups were not entitled to use such facilities." *Id.* at 176. Here, what is at issue is preferential use of government facilities and access to government subsidies.

Petitioner was not banned from meeting on campus.[25]

Nor was petitioner compelled to change its membership requirements. This case is therefore unlike *Dale*, in which the regulation "forced [the Boy Scouts] to accept members it [did] not desire." 530 U.S. at 648 (quoting *Roberts* v. *U.S. Jaycees*, 468 U.S. at 623). In contrast, petitioner remains free to ignore the university's nondiscrimination principle at no expense to its "internal structure or affairs," *ibid*; it simply cannot obtain the preferential access and funding that comes with participation in the recognized student organization program.

Finally, it would be peculiar if a rule governing access to a limited public forum passed muster under free speech principles but ran afoul of the First Amendment principles protecting expressive association. This Court has treated the two as closely linked. See, *e.g.*, *Roberts*, 468 U.S. at 622 (describing expressive association rights as "correlative" to and "implicit" in First Amendment speech, worship, and

[25] Then-Justice Rehnquist concurred in the result in *Healy*, declining to endorse the majority's reasoning. He interpreted the majority's holding as "sen[ding] [the case] back for reconsideration because respondents may not have made it sufficiently clear to petitioners that the decision as to recognition would be critically influenced by petitioners' willingness to agree in advance to abide by reasonable regulations promulgated by the college." 408 U.S. at 201. Going on to observe that "[p]rior cases dealing with First Amendment rights are not fungible goods," he found in those decisions an "important distinction"—"[t]he government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens." *Id*. at 203.

petition rights). Applying the limited public forum standard to expressive association claims avoids any inconsistency while taking into account the recognized interests of the government as educator, property owner, and appropriator of public funds.[26]

CONCLUSION

The judgment of the court of appeals should be affirmed.

---

[26] To the extent a Free Exercise claim is before the Court, *Employment Division* v. *Smith*, 494 U.S. 872 (1990), requires the conclusion that the application to a religious group of a public university's general nondiscrimination rule does not violate the Free Exercise Clause. Also, the rationale of *Locke* v. *Davey*, 540 U.S. 712 (2004), which held that the government could decline to fund students pursuing degrees in theology, would appear to permit government entities to decline to provide funding to religious groups in some circumstances, at least in states with legal constraints similar to the one imposed by the Washington Constitution.

Respectfully submitted.

SCOTT L. SHUCHART
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

MARCH 2010