No. 08-1371

In the Supreme Court of the United States

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

Petitioner,

v.

LEO P. MARTINEZ, ET AL.,

Respondents.

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

BRIEF OF HASTINGS COLLEGE OF THE LAW RESPONDENTS

ETHAN P. SCHULMAN
CROWELL & MORING LLP
275 Battery Street
23rd Floor
San Francisco, CA 94111
(415) 986-2800

ELISE K. TRAYNUM
UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW
200 McAllister Street
San Francisco, CA 94102
(415) 565-4787

GREGORY G. GARRE
Counsel of Record
MAUREEN E. MAHONEY
J. SCOTT BALLENGER
LORI ALVINO MCGILL
GABRIEL K. BELL
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
gregory.garre@lw.com
(202) 637-2207

QUESTION PRESENTED

Whether a public university violates the First Amendment by creating a program through which public funds, use of the school's name and logo, and other modest benefits are made available to student groups that agree to open their membership to "any student … regardless of their status or beliefs," JA-221 ¶18, thus ensuring that all students have equal access to all school-funded and school-recognized groups.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITY

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTRODUCTION

Because petitioner and its amici apparently have little interest in litigating the case that came to this Court, we begin with the central components of the case that is actually presented.

First, this case does not concern any "force[d]" intrusion into the internal affairs of an expressive association. Pet.Br.2. It concerns whether a public university may limit the provision of public funds and benefits—including the use of the school's own name—to student groups that agree to abide by a longstanding policy of requiring all recognized student groups to open their membership to "any student … regardless of their status or beliefs," JA-221 ¶18, thus ensuring that all students have equal access to all school-funded and school-recognized groups. Every student group at Hastings has a reasonable choice: it may either abide by the open-membership policy and qualify for the modest funding and benefits that go along with school recognition, or forgo recognition and do as it wishes. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006) ("*FAIR*"). But no group is forced to do anything.

Second, Hastings' policy does not discriminate on the basis of viewpoint—so this case is far afield from the prototypical viewpoint discrimination cases on which petitioner grounds its argument.[1] The policy that was jointly stipulated to by the parties and recognized by both courts below "imposes an open

---

[1] *E.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Healy v. James*, 408 U.S. 169 (1972).

membership rule on all student groups—*all* groups must accept *all* comers." Pet.App.2a (emphases added); *see* Pet.App.30a; JA-221 ¶¶17-18. That is the antithesis of a viewpoint-discriminatory rule. To underscore the point, the record shows that Hastings recognized petitioner's predecessor Christian group *for a decade* (when it agreed to abide by the School's open-membership policy). Pet.App.36a; JA-222-25.

Third, Hastings' policy does not impose any "severe burden" on student groups, much less threaten their very existence. Pet.Br.49. This case therefore is nothing like *Healy v. James*, 408 U.S. 169, 176, 181 (1972), where the school "barred" a group from campus and even disbanded the group when it tried to meet in a "campus coffee shop." To the contrary, Hastings has made clear that the Christian Legal Society ("CLS") may use "Hastings facilities for its meetings and activities." JA-294. In the year after it chose to forgo school recognition, CLS continued to meet and hold activities and its membership nearly *doubled*. Pet.App.10a, 13a, 48a. With access to school facilities, the ability to communicate through Internet social networking sites, email, and the like, JA-114, and only a relatively modest amount of funding at stake, any real-world burden on CLS due to its decision to forgo school recognition is slight—and far from coercive.

Fourth, petitioner is not seeking—and by no means has been denied—*equal* access to Hastings' programs and activities. It seeks a *favored* status: the funds and benefits that go along with school recognition *plus* an "exemption" from the rules that apply to every other group seeking such benefits. JA-292. A series of important decisions culminating in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), holds that

religious groups are entitled to equal access to forums opened for speech at America's public schools. Hastings has long embraced that principle. Religious student groups have for decades been an important part of Hastings' educational community and remain so today. But no student group is entitled to a *special* "exemption" from Hastings' neutral and generally applicable open-membership policy. JA-292.

Tellingly, petitioner devotes scant attention in its opening brief to the case that is actually before this Court, instead attacking straw men of its own making. By custom, and for good reason, this Court does not reach out to decide constitutional questions that are not actually presented and that have not received the full benefit of ventilation by the lower courts. There is no reason to depart from that practice here. As to the case that *is* presented, the Court should hold that Hastings' open-membership policy is constitutional because it is viewpoint-neutral, reasonable in light of the purposes of the forum, and non-coercive.

STATEMENT OF THE CASE

CLS's Refusal To Comply With Hastings' Policy

1. Like many public universities, Hastings College of the Law ("Hastings" or the "School") permits students to register qualifying student organizations with its Office of Student Services to receive modest public funding and other benefits, including priority access to facilities. Pet.App.7a, 85a, JA-124-27, 216-19 ¶¶9-10, 270. The funding made available to such registered student organizations, or "RSOs," comes from the mandatory student activity fee imposed by Hastings, a voluntary student activity fee adopted by the student body, and vending machine commission monies that belong to the School. JA-217 nn.1-2.

Hastings maintains this RSO program to provide its law students with opportunities to pursue academic and social interests outside the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience. JA-349 ¶4. Hastings offers RSO status and assistance only to groups that agree to abide by certain basic ground rules that Hastings believes to be essential to the educational purposes of the program and its mission.

To be eligible for RSO status, a group must (1) be a "non-commercial organization whose membership is limited to Hastings students," Pet.App.83a, and (2) agree to abide by the School's policies and regulations, including its longstanding nondiscrimination policy. Pet.App.8a; JA-219 ¶12, 220 ¶14. That policy was adopted in 1990 and states:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination....
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

JA-220 ¶15.

Although the second paragraph of the policy contains a list of particular characteristics, Hastings implements the broader prohibition against "legally impermissible, arbitrary or unreasonable discriminatory practices" by requiring every RSO to open its membership to "any student … regardless of their status or beliefs." JA-221 ¶18; *see id.* ("Hastings requires that [RSOs] allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status and beliefs."); *See also* JA-349 ¶5; Pet.App.2a, 9a; JA-54.

That policy does not foreclose neutral and generally applicable membership requirements unrelated to "status or beliefs." JA-221 ¶18. For example, RSOs have imposed dues, attendance, and even conduct requirements, *see, e.g.*, JA-173, 178, and the law journals have used academic and writing competitions that are open on the same terms to all students.

2. During the 2004-05 academic year, when this dispute arose, Hastings had approximately sixty RSOs, including groups devoted to a wide variety of academic, political, religious, cultural, and athletic topics, as well as many other pursuits. *See* JA-236-45. Those groups included three religious organizations: the Hastings Association of Muslim Law Students, the Hastings Jewish Law Students Association, and Hastings Koinonia. JA-215-16 ¶7, 238, 240.

From 1994-95 through 2003-04, a student group known as Hastings Christian Legal Society or Hastings Christian Fellowship (collectively "HCF") was an RSO at Hastings. Pet.App.9a. HCF is the direct predecessor to CLS. *Id.*; JA-64 ¶2.1. For the first eight years, HCF used bylaws sent to student chapters throughout the years by the National Christian Legal

Society ("CLS-National"). Pet.App.9a. Those bylaws provided that the group would comply with Hastings' policies and regulations. Pet.App.10a. In the latter two years, the group used bylaws that stated that "all students" were welcome to become members. *Id.*

In 2004, HCF decided to formally affiliate with CLS-National. Pet.App.11a. CLS-National required CLS to adopt a specific set of bylaws to become a formal student chapter. *Id.*; Pet.App.99a-108a. Those bylaws require any interested member to sign a "Statement of Faith," which CLS interprets as barring gay students from becoming members or officers. Pet.App.11a-12a, 22a & n.2, 100a-01a; JA-38, 50, 67-68 ¶3.8, 72 ¶¶4.1-4.3, 144-47, 226-27 ¶¶33-35, 280.

In the fall of 2004, CLS adopted CLS-National's bylaws and thereafter refused to comply with Hastings' open-membership policy. Hastings advised CLS that it could not be an RSO unless it complied with the policy. Pet.App.12a. When CLS refused to do so (because it wanted to exclude students "on the basis of religion and sexual orientation," JA-281), Hastings informed CLS that it could not become an RSO, and that it would not be eligible to receive the $250 in travel funds previously set aside for its officers to attend CLS-National's annual conference. Pet.App.6a, 12a-13a; JA-227 ¶37, 229 ¶42.

In the nearly 20-year history of the policy, CLS is the first and only student group that has ever demanded both RSO status *and* an exemption from the open-membership policy. JA-220-21 ¶16.

Hastings' Open-Membership Policy

The record establishes three central facts that are key to understanding Hastings' open-membership policy: the policy is viewpoint-neutral, reasonable in

light of the purposes of the RSO program, and offers interested groups a reasonable and non-coercive choice.

1. Petitioner claims (Pet.Br.19) that Hastings' policy is viewpoint-discriminatory in that only religious groups are forbidden to restrict their membership to persons sharing the group's ideology or beliefs. Not so. The parties jointly stipulated—and the courts below based their rulings on the undisputed fact—that "Hastings imposes an open membership rule on all [RSOs]—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." Pet.App.2a; *see* JA-221 ¶¶17-18. Thus, "for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." JA-221 ¶18.

The record supports that stipulation. For example, the former dean testified that "in order to be a registered student organization you have to allow all of our students to be members and full participants." JA-343. The director of student services confirmed that RSOs must "be open to all students"—"even to students who may disagree with their purposes." JA-320. And that policy has repeatedly been recognized throughout this litigation. *See* Add. 1a-6a.

Pointing to various RSO bylaws, petitioner asserts that the policy has not been implemented in an evenhanded manner. Pet.Br.12. But CLS fails to mention that every one of those groups also signed the policy and thus agreed to abide by it, and that the record establishes that no other RSO "has ever attempted to restrict its membership on the basis of a protected category." JA-350 ¶7. Moreover, the record establishes that Hastings does not interpret the bylaw

references to which petitioner points "as an attempt to establish a test or criteria for membership in any way," JA-350 ¶8, and groups themselves have "confirmed" that their bylaws "allow[] all students to join," JA-351 ¶10. *See also, e.g.*, JA-343. There is, in short, no evidence that Hastings has ever exempted any RSO from complying with its open-membership policy. Pet.App.65a-66a.

2. Hastings' open-membership policy is reasonable in light of the purposes of the RSO program and serves important educational and public policy objectives. A public university is a vibrant civil society of groups with varying degrees of organization, formality, and official connection to the university itself. The vast majority of those associations are informal, private, and frankly exclusionary—such as private study groups, groups of students and faculty members working on joint projects that interest them, and groups that come together around common interests like sports, outdoor activities, religion, or politics. Such groups play a crucial role in the overall intellectual and social ferment of the institution, and Hastings is not in any way hostile to them or to their membership practices.

Non-registered groups are permitted to meet on campus, even in unused classrooms and public spaces at the law school, and to use certain bulletin boards and chalkboards. Any student may email any other student (or any number of other students, so long as the names are entered manually) through the School's Exchange server.[2] And of course students and groups may take

---

[2] *See* Hastings College of the Law, University of California, Email Frequently Asked Questions, *at* http://www.uchastings.edu/infotech/email/faqs.html.

advantage of the many other means of electronic communication in the 21st century—like Internet chat groups or Facebook—to reach out to other students. JA-218-19 ¶¶10-11, 233 ¶61.

RSOs play a different role. They facilitate the university's pedagogical and civic mission and expand the universe of extracurricular academic and social opportunities for all students on a non-exclusive basis. *See* JA-349 ¶¶4-5. CLS quotes a general Hastings directive to the effect that the School should "ensure an ongoing opportunity for the expression of a variety of viewpoints … in accordance with the highest standards of … freedom of expression" as if it were the exclusive purpose of the RSO program specifically. Pet.Br.2-3 (quoting Pet.App.82a, 74a). Hastings certainly values and pursues that principle, and the fact that there were some sixty different RSOs when this lawsuit was filed—and even more today—is a testament to its success. But the program has other objectives too.

The RSO program is an extension of Hastings' educational mission and community. Student groups that choose to join that program are agreeing to accept a particular kind of role within the school community. Hastings provides assistance and funding to such groups because it assumes they will enhance the Hastings community and educational experience for all students. JA-349 ¶¶4-5; *see* Pet.App.37a.

Petitioner repeatedly states that Hastings has disavowed any explicit "sponsorship" of RSOs. *See* Pet.Br.4, 23, 44. And, to be sure, for "liability" purposes, Hastings states that it does not "sponsor" RSOs or otherwise take responsibility for what they do or say. JA-121; *see* Pet.App.83a, 85a-86a. But Hastings is nevertheless intimately connected with RSOs in a

way that it is not with the variety of other informal groups and activities that take place on campus.

Hastings allows RSOs to publicize their official affiliation with the School by using Hastings' name and logo. JA-124-25, 216, 270. It allows them to place announcements in a weekly newsletter published by the Office of Student Services; to use a particular bulletin board in the basement of Snodgrass Hall; and to participate in an annual "Student Organizations Faire" organized and paid for by Hastings. JA-125-27, 216-18. It also gives them office space, priority access to classrooms and other space, and the right to use the school's audio/visual equipment and other property. JA-218-19. RSOs are also eligible for modest amounts of discretionary public funding. JA-217 & nn.1-2.

Against that backdrop, Hastings' open-membership policy serves at least four weighty objectives:

First, the policy ensures that all Hastings students have equal access to all school-recognized and school-funded activities. JA-349 ¶5. Many students, like many people, may tend to gravitate to what is familiar to them, form cliques, or exclude others who are unpopular or socially, intellectually, or physically different. If a group of friends organizing a trip to Seattle to participate in a hockey tournament does not wish to invite some student because he has a different faith, holds unpopular views, or is a native of a country that lacks a hockey tradition, that is their prerogative. But it is a different matter entirely when the school-recognized Hastings Ice Hockey (JA-239) group acts the same way—when it organizes the trip out of offices paid for with tuition money, subsidizes its activities in part with mandatory student activity fees to which the

excluded student has contributed, and competes in jerseys saying "Hastings Ice Hockey."

Second, the policy ensures that public funds and mandatory student activity fees as well as the School's facilities and own name and logo are not used to support groups that choose to engage in conduct that the School and the State of California do not wish to subsidize or lend their name to. That includes discrimination that all—including CLS (Pet.Br.44)—agree the School and State are entitled to disapprove of even if it is not "invidious" as a constitutional matter.

The people of California, through their elected representatives, have barred discrimination based on various enumerated factors, including religion and sexual orientation, "in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid." Cal. Educ. Code §66270. Hastings has concluded that this mandate—which is reinforced by other laws—precludes the School from allowing any such discrimination in its publicly funded RSO program. *See also, e.g.*, Cal. Educ. Code §§66030, 66251, 66252, 66292.2; Cal. Gov. Code §11135(a).[3]

---

[3] Petitioner claims that it is "undisputed" that no "law" prohibits a student group from confining its membership to co-religionists. Pet.Br.9. That is incorrect for groups choosing to participate in programs and activities subsidized by the State. And Hastings has consistently maintained that California law prohibits it from recognizing and subsidizing groups in its publicly funded RSO program that choose to discriminate on the basis of religion or sexual orientation. *See, e.g.*, JA-132, 154, 294; Pet.App.37a, 76a. Petitioner cites various statutory exemptions, Pet.Br.44, but they do not apply to §66270 or the activities at issue in this case. California law does provide an exemption to §66270

Third, a simple open-membership policy allows Hastings to avoid the difficulties, needless entanglement with RSOs' internal operations, and potential allegations of bias or favoritism that would be associated with undertaking to judge whether an RSO's particular reasons for excluding a particular student were legitimate or illegitimate (or, indeed, lawful or unlawful). JA-349 ¶5. Adopting anything short of an all comers rule raises administrability issues that Hastings may reasonably take into account. And Hastings' desire to avoid particularized scrutiny of RSOs' membership decisions is especially compelling as applied to religious groups like CLS.

Fourth, the policy strives to bring together students of different backgrounds and viewpoints in order to foster discourse, cooperation, and learning. *Id.* Groups do form around particular ideas and viewpoints, and Hastings has benefited from great diversity among student groups. JA-236-45. But Hastings also encourages recognized groups to expose students to different views and seeks to foster discussion *within* groups as well. Hastings may conclude that lawyers-in-training, in particular, may benefit from such discourse. And as it has turned out, Hastings for decades has enjoyed the best of both worlds—a rich diversity of RSOs and a guarantee that no student is excluded from joining any RSO.

3. Finally, the choice presented to student groups is reasonable and non-coercive. The amount of funding involved is modest, typically in the range of a few hundred dollars per group on a yearly basis. Moreover, CLS still enjoys access to the School's facilities as well

---

for religious *schools* (Cal. Educ. Code §66271), but it does not contain an exemption for religious organizations at public schools.

as communications engines like the Yahoo! chat group that its president used. Pet.App.48a. Indeed, after CLS chose to forgo RSO status, Hastings repeatedly informed CLS that, "[i]f CLS wishes to form independent of Hastings we would be pleased to provide the organization the use of Hastings facilities for its meetings and activities." JA-294; *see also* Pet.App.8a; JA 232 ¶58, 300.

CLS never requested to use such facilities for its chapter meetings during the 2004-2005 academic year. Pet.App.8a; JA-232 ¶58. But CLS still participated actively in campus life that year. For example, it held weekly Bible-study meetings and hosted a beach barbeque, a Thanksgiving dinner, a campus lecture on the Christian faith and legal practice, several fellowship dinners, an end-of-year banquet, and several informal social activities. Pet.App.13a. CLS also invited Hastings students to attend Good Friday and Easter Sunday church services with it. *Id.* Between nine and fifteen Hastings students regularly attended CLS's meetings and activities during the 2004-05 school year. *Id.* That was substantially more than when CLS's predecessor was an RSO. JA-224 ¶29.

Proceedings Below

When Hastings refused to grant CLS the "written exemption" that it had demanded from the School's open-membership policy, JA-292, 294, CLS filed suit alleging that Hastings had violated, *inter alia*, its rights to free association, free speech, and free exercise of religion under the First Amendment, JA 61-82.

1. The parties jointly stipulated to the facts (JA-213-35) and then filed cross-motions for summary judgment. The district court denied CLS's motion for

summary judgment and granted the motions filed by Hastings and respondent-intervenor Hastings Outlaw.

a. The district court rejected CLS's claim that Hastings' policy violates its right to free speech. The court concluded that the policy regulates conduct, not speech, Pet.App.16a-24a, and that it satisfies the standard of *United States v. O'Brien*, 391 U.S. 367 (1968). Pet.App.24a-27a. The court further held that the policy satisfies this Court's forum analysis. Pet.App.27a-38a. The court explained that the policy is viewpoint-neutral: "Hastings has not excluded CLS *because* it is a religious group but rather because it refuses to comply with the prerequisites imposed on all student organizations." Pet.App.32a; *see* Pet.App.35a-36a. And the court concluded that the policy is consistent with and furthers Hastings' educational mission, and therefore is reasonable in light of the purposes of the forum. Pet.App.36a-38a.

b. The district court also rejected CLS's claim that the policy violates its right to expressive association. Pet.App.38a-62a. The court explained that "Hastings is not directly ordering CLS to admit certain students. Rather, Hastings has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations." Pet.App.42a. If CLS does not wish to participate in the program, it "may continue to meet as the group of its choice on campus, excluding any students they wish, and may continue to communicate its beliefs as it did all through the 2004-2005 academic year." *Id.* The court also concluded that any effect on expressive association was justified by Hastings' compelling interest in barring discrimination in school-funded activities. Pet.App.54a, 59a-62a.

c. The district court also rejected petitioner's claims that the policy violated its free exercise rights, holding that the policy "does not target or single out religious beliefs." Pet.App.63a; *see* Pet.App.62a-69a.

2. The court of appeals affirmed. It explained that "[t]he parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." Pet.App.2a. And pointing to a recent precedent, the court held that "[t]he conditions on recognition are therefore viewpoint neutral and reasonable." Pet.App.2a-3a (citing *Truth v. Kent Sch. Dist.*, 542 F.3d 634, *reh'g en banc denied*, 551 F.3d 850 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2866 *and* 129 S. Ct. 2889 (2009)).

SUMMARY OF ARGUMENT

Hastings' open-membership policy is a constitutionally permissible limit on participation in the School's publicly subsidized RSO program.

I. The open-membership policy before this Court requires all student groups to admit "any student … regardless of their status or beliefs." JA-221 ¶18. Petitioner devotes almost its entire brief to attacking a "dramatically different" (Pet.Br.19) policy that, it says, forces religious groups to accept members regardless of their status or beliefs while leaving other groups free to select members based on their status or beliefs. That claim is refuted by the parties' own joint stipulations, both lower court decisions, and the record. Consistent with settled principles of judicial restraint, the Court should decide the constitutionality of the open-membership policy that the parties stipulated to and litigated below. If that is not the case the Court

believed it was getting when it granted certiorari, it should dismiss the writ as improvidently granted.

II. The School's open-membership policy is constitutional under the settled principles governing access to public funding programs and limited forums, including in the public university context, because it is viewpoint-neutral, reasonable in view of the purposes of the forum, and non-coercive. The policy is a prototypical example of a viewpoint-neutral rule. This Court has held that nondiscrimination laws that enumerate proscribed factors are viewpoint-neutral. *E.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 615, 623 (1984). An open-membership policy is no less neutral. Moreover, the record in this case contains no evidence that the policy has been applied based on viewpoint, and the history of religious-based RSOs at Hastings—which includes petitioner's predecessor—underscores the lack of any viewpoint discrimination.

The open-membership policy is also reasonable in light of the purposes of the RSO program. That policy reasonably ensures that all students enjoy equal access to all student-funded and school-recognized activities. The policy reasonably furthers state laws that prohibit discrimination, including on the basis of sexual orientation, in any program receiving state support. The policy reasonably obviates the need for the School to meddle in the internal affairs of student organizations in reviewing whether students were excluded on a permissible basis. And the policy reasonably promotes discourse *within* student groups and thereby encourages cooperation and learning among students, while at the same time allowing for a rich diversity *among* student groups at Hastings.

Likewise, the choice presented to petitioner is non-coercive. There are some advantages to being an RSO. By forgoing recognition, CLS loses eligibility for a modest amount of public funds as well as access to a bulletin board and certain other means of communications enjoyed by RSOs. But CLS has been granted access to Hastings' facilities, it has ample means—like Internet networking sites and email—to communicate with students, and its membership *grew* the year after it decided to forgo school recognition. As a result, the choice offered to CLS does not go "beyond the 'reasonable' choice offered in [*Grove City College v. Bell*, 465 U.S. 555, 575 (1984)]." *FAIR*, 547 U.S. at 59 (quoting *Grove City*, 465 U.S. at 575).

Petitioner's contrary argument is grounded on the suppositions that Hastings "force[s]" (Pet.Br.2) groups to admit unwelcome students, which is not true in light of the *choice* that all groups have in deciding whether to seek RSO status; that the policy will lead to the "sabotage" or "hijack[ing]" of groups (Pet.Br.28-29 & n.4), which is not supported by one piece of record evidence and is utterly belied by the 20-year experience with the policy at Hastings; and that the policy will "skew[] debate" and eliminate diversity among RSOs (Pet.Br.51), which is contradicted by the rich universe of RSOs—and attendant debate—that has existed at Hastings over the past two decades. If circumstances change, petitioner may bring an as-applied challenge to the policy, but the record before the Court does not support its First Amendment claim.

III. The case law on which petitioner grounds its position underscores that it does not want to litigate the stipulated facts of this case. The equal access cases—including *Rosenberger v. Rector of the*

University of Virginia, 515 U.S. 819 (1995)—are inapposite because those cases involved situations in which religious groups were subject to flagrant viewpoint discrimination. The open-membership policy at issue here is, by contrast, overtly viewpoint-neutral. Neither *Healy v. James*, 408 U.S. 169 (1972), nor *Widmar v. Vincent*, 454 U.S. 263 (1981), supports petitioner's "prior restraint" rule because those cases involved situations in which the plaintiff student groups were completely excluded from campus—again, on viewpoint-discriminatory grounds. CLS, in contrast, has been granted access to Hastings' facilities. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), is fundamentally different because it involved the "forced inclusion" (*id.* at 650) of a scout leader pursuant to a regulatory prohibition, not a reasonable condition on access to public subsidies and a limited forum. And *Employment Division v. Smith*, 494 U.S. 872 (1990), simply underscores that CLS is not entitled to a religion-based exemption from the School's neutral and generally applicable open-membership rule.

IV. Under the rule that petitioner asks this Court to adopt, any "noncommercial expressive association[]" (Pet.Br.2) in America is entitled to receive public subsidies and participate in limited forums while refusing to comply with viewpoint-neutral prohibitions on discrimination. Petitioner carves out discrimination on the basis of race and—"to some extent" (Pet.Br.43)—sex. But it argues that every expressive association has a constitutional right to insist on such subsidies and discriminate on the basis of age, military status, disability, religion, sexual orientation, and *any* other factor. And under petitioner's rule, expressive associations not only may insist that the public

subsidize their practices, they may insist on using the State's name while doing so. Nothing in the First Amendment compels that remarkable result.

ARGUMENT

I. THE COURT SHOULD DEAL WITH THE CASE AS IT CAME TO IT AND AFFIRM OR DISMISS THE WRIT OF CERTIORARI

1. This Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988); *see also National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) (Court generally "do[es] not decide in the first instance issues not decided below"). Petitioner asks this Court to depart sharply from that settled practice.

In this Court, petitioner devotes almost its entire argument to attacking a policy that has never existed at Hastings—one that selectively "targets solely those groups whose beliefs are based on 'religion' or that disapprove of a particular kind of sexual behavior," and leaves other student groups free to choose members based on their beliefs. Pet.Br.19; *see* Pet.Br.42. As its lead example petitioner says that, under Hastings' policy, a "political … group can insist that its leaders support its purposes and beliefs" whereas "a religious group cannot." Pet.Br.20.

The parties, however, jointly stipulated that Hastings' policy is that student groups must open their membership to "any student … regardless of their status or beliefs." JA-221 ¶18. Moreover, the parties specifically stipulated that a political student group like the Hastings Democratic Caucus is *not* free to close its doors to students who have different beliefs. *Id.* Petitioner apparently just refuses to accept the "joint"

in "joint stipulation." Indeed, it says in one sentence that "*[r]espondents* maintain" that Hastings has an open-membership policy, but in the very next sentence admits that this policy is "described in *Joint* Stipulation No. 18." Pet.Br.47 (emphases added).[4]

Petitioner does not address the constitutionality of the open-membership policy that was actually the subject of the litigation below until page 49 of its brief, and then devotes only seven pages to discussing it—much of which is predicated on false premises adopted earlier in the brief. Instead, petitioner devotes almost its entire brief to attacking a straw man: a policy under which only religious groups are selectively denied the freedom to discriminate on the basis of "ideology." *See, e.g.*, Pet.Br.19-20, 39. But that is not, by any stretch, the policy that has been adopted or applied by Hastings, it is not the policy that was jointly stipulated to by the parties, and it is not the policy that served as the basis for the decisions below.

Petitioner refers throughout its brief to two different policies—a "written policy" and an "all-comers" policy. To be clear, Hastings has *one* policy: every student group wishing to become an RSO must

---

[4] Pointing to one sentence in Hastings' answer (JA-93 ¶10.4), petitioner suggests that Hastings "changed" its policy during the course of the litigation. Pet.Br.14, 37, 41-42, 48. That is incorrect. Hastings did not change its policy during this litigation, and read in context the sentence to which petitioner points simply denies an allegation that religious groups were "single[d] out" (JA-79 ¶10.4) for discriminatory treatment by explaining that the policy applies to *all* groups in the same fashion. Moreover, petitioner's interpretation of the answer is contradicted by its own joint stipulations concerning Hastings' policy. JA-221 ¶¶17-18. And, in any event, because petitioner did not raise this argument below or advance it in its certiorari papers, the argument was waived.

admit "any student … regardless of their status or beliefs." JA-221 ¶18. Hastings refers to that policy as the open-membership or all-comers policy. That policy is how Hastings ensures compliance with the written nondiscrimination provision (JA-220 ¶15) in the School's RSO program and its legal obligations under state law. JA-349 ¶5; *see* pp. 7-12, *supra*. And that policy properly takes into account that the "arbitrary or unreasonable discriminatory practices" language of the School's nondiscrimination mandate (JA-220 ¶15) extends its protection beyond the specifically enumerated factors in that provision. *See* p. 5, *supra*.

2. In First Amendment cases, this Court has assumed added leeway to "review the factual record." *Dale*, 530 U.S. at 648-49. But petitioner is not just asking this Court to "review the factual record." It is asking the Court to invent a brand new case for consideration in this Court—and, in the process, to override the joint stipulations of both parties as well as the conclusions of both the district court and the court of appeals as to the policy at issue in this case.

It is well established, however, that parties are bound by their stipulations. Where parties stipulate to the facts, they are entitled to have the "case tried upon the assumption that these ultimate facts, stipulated into the record, were established." *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447 (1905); *see Fisher v. First Stamford Bank & Trust Co.*, 751 F.2d 519, 524 (2d Cir. 1984); *Lloyd v. Franklin Life Ins. Co.*, 245 F.2d 896, 897 (9th Cir. 1957). The joint stipulations are binding concessions and prevent petitioner from attempting to litigate the constitutionality of a policy "dramatically different" (Pet.Br.19) from the one to which it stipulated.

The courts below accepted the stipulated facts. Petitioner's request that this Court ignore those facts "disregard[s] this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi v. Dist. Dir.*, 385 U.S. 630, 635 (1967) (citation omitted); *accord Exxon Co., USA v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996). It is true that this case involves stipulated facts rather than findings of fact. But if anything, the rationale for the "two-court" rule applies with even greater force here, given the absurdity of concluding that a court commits "obvious and exceptional … error" by relying on the facts jointly presented by the parties themselves.

And of course, First Amendment cases are no exception to "the cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment); *see United States v. Resendiz-Ponce*, 549 U.S. 102, 104 (2007). Disregarding the parties' joint stipulations and the decisions of both courts below to decide the constitutionality of a policy that Hastings has never had would leave that "cardinal principle" lying in the street with tire tracks over it.

In any event, the bottom line is that petitioner cannot point to any situation in which Hastings acted in a manner inconsistent with the parties' stipulation—since it is undisputed that Hastings has never, before now, been called upon to enforce its policy. JA-221 ¶16; *see also* JA-221 ¶19; JA-350 ¶7; Pet.App.66a.

3. If this Court granted certiorari based on a different understanding of the case, it should dismiss the writ as improvidently granted. Dismissal of the writ is warranted where the lower courts "ha[ve] not considered" the issue framed by the petitioner. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108 (2001). Dismissal is also warranted where an issue is not "presented by the record" or the record is not "'sufficiently clear and specific to permit decision of the important constitutional question[] involved.'" Eugene Gressman *et al.*, *Supreme Court Practice* 359 (9th ed. 2007) (quoting *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968)); *see id.* at 359-60 (citing cases).

Dismissal is also appropriate where resolution of a case would result in what amounts to an advisory opinion. *See, e.g., Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994). Petitioner is effectively seeking an advisory ruling because even it does not dispute that Hastings' policy *today* requires all groups to accept any student regardless of their status or beliefs. Moreover, much of petitioner's case rests on hypothetical scenarios—like the specter of group "hijack[ings]," Pet.Br.29 n.4—that have not occurred in the *two decades* that Hastings' policy has been in effect.

The constitutional issues presented by this case are undeniably important and—as the number and nature of the amicus briefs filed in this case underscore—of great interest to many. But this Court's cases, not to mention settled principles of judicial restraint, favor dismissing the writ rather than attempting to decide this case based on the made-up policy and hypothetical scenarios alleged by petitioner in this Court.

II. HASTINGS' POLICY PASSES THE SETTLED PRINCIPLES FOR PUBLIC FUNDING AND LIMITED FORUMS

The open-membership policy before this Court is constitutional under the settled principles governing limits on access to public funding and forums.

A. The Government May Condition Funding And Participation In A Limited Forum On Compliance With Reasonable, Viewpoint-Neutral, And Non-Coercive Rules

1. It is well settled that the State is not required to subsidize private speech. *See Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009). Moreover, as this Court recently reaffirmed in *Rumsfeld v. FAIR*, the government "is free to attach reasonable and unambiguous conditions" to participation in a government program. 547 U.S. at 59 (quoting *Grove City*, 465 U.S. at 575). In *Grove City*, this Court held that "[r]equiring [schools] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the … program [and receive federal benefits] infringes no First Amendment rights." 465 U.S. at 575-76.

FAIR involved an association of law schools (which did not include Hastings) that sought "to restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military." 547 U.S. at 52. The association challenged the constitutionality of a federal law that "forces institutions to choose between" their desire to restrict military presence on campus and "continuing to receive specified federal funding." *Id.* This Court rejected FAIR's argument and reaffirmed

that a condition burdening First Amendment rights is unconstitutional only if it "goes beyond the 'reasonable' choice offered in *Grove City* and becomes an unconstitutional condition." *Id.* at 59-60.

2. The *Grove City* baseline that the Court reaffirmed in *FAIR* squares with this Court's unconstitutional conditions jurisprudence generally. In determining whether a restriction on participation in a government program rises to the level of an unconstitutional condition, this Court has considered the relationship between the benefit offered and the condition imposed and whether the choice is coercive.

While the government may place limits on its programs, it may not penalize someone or arbitrarily deny them access to a government program for exercising their constitutional rights *outside* of the program. For example, in *Regan v. Taxation with Representation*, 461 U.S. 540, 546-48 (1983), this Court held that government may limit a tax exemption to entities that refrain from substantial lobbying activities, while recognizing that it may not punish groups for maintaining related lobbying entities that do not participate in the tax exemption program. *See also Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (condition acceptable where there is an "essential nexus" between the condition and "the legitimate state interest"); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (condition unrelated to government's purpose can amount to "an out-and-out plan of extortion"). And while the government may condition benefits on a "reasonable choice," it may not present a choice "so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v.*

Dole, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

In assessing the reasonableness of funding conditions, this Court has deferred to the government's definition of the scope of its own programs. As the Court reiterated in *United States v. American Library Association*, 539 U.S. 194 (2003) (plurality opinion), "[w]ithin broad limits, 'when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.'" *Id.* at 211 (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

Petitioner argues that the government may not impose a condition on benefits or access to a limited forum if it could not do so through a direct regulatory prohibition. Pet.Br.54. In *FAIR*, this Court made the common-sense observation that "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." 547 U.S. at 59-60. But this Court has never adopted the converse proposition that a funding condition is unconstitutional *unless* it could be imposed directly. That would eliminate the need for an unconstitutional conditions doctrine altogether.

Indeed, in *FAIR* the Court observed that a "'reasonable' choice" is *not* an "unconstitutional condition," thus confirming that some choice is permissible—*i.e.*, a "reasonable" one. *Id.* at 59; *see also Ysursa*, 129 S. Ct. at 1099 n.2. And the Court's prior cases preclude petitioner's proposed rule. In *Dole*, for example, the Court did not hold that the funding condition at issue was constitutional because Congress could directly require the States to adopt a minimum drinking age; it held that it was permissible because "Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a

relatively small percentage of certain federal highway funds," the practical effect of which was not "coercive." 483 U.S. at 211. Likewise, in *Regan*, the Court did not hold that Congress could constitutionally bar particular groups from engaging in lobbying activities; it held that Congress could "refuse[] to pay for the lobbying out of public monies" (by withholding a tax exemption for groups engaged in such efforts) and, instead, require groups to maintain separate lobbying and non-lobbying entities to preserve separation. 461 U.S. at 545 (distinguishing *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Speiser v. Randall*, 357 U.S. 513 (1958)).

3. Limited forums for student speech at public universities are a particular type of government subsidy program, but they are subject to the same basic principles. In a series of cases, this Court has held that the purposes of such programs, and the character of the university setting, require that any conditions on participation must be viewpoint-neutral. *See, e.g.*, *Rosenberger*, 515 U.S. at 834. But this Court has also consistently reaffirmed a university's right to enforce viewpoint-neutral conditions on participation in such a forum, including nondiscrimination rules, where they are reasonably related to the legitimate purposes of the program. *See id.* at 829; *Widmar*, 454 U.S. at 273-74; *Healy*, 408 U.S. at 193-94; Part III.A, *infra*.

When a public university creates a limited public forum for use by student groups, it may confine the forum to "the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829. Thus, a university may "reserv[e] it for certain groups or for the discussion of certain topics," so long as the restrictions are viewpoint-neutral and reasonable in light of the purpose served by the forum. *Id.*; *see also*

Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009) ("[A] government entity may create a forum that is limited to use by certain groups … [and] may impose restrictions on speech that are reasonable and viewpoint-neutral.") (citing cases).

In short, both this Court's public funding cases and its limited forum cases point to the same conclusion: Hastings' open-membership condition on access to its RSO program is permissible so long as it is (1) viewpoint-neutral; (2) reasonable in view of the purposes of the program; and (3) not so coercive that it operates like a regulatory measure rather than presenting groups with a "reasonable choice" about whether to participate in the program.[5]

B. The Policy Is Viewpoint-Neutral

The government engages in viewpoint discrimination when it "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829. An open-membership policy like Hastings', applicable to all student organizations without regard to their mission or viewpoint, is quintessentially viewpoint-neutral.

Petitioner eventually concedes at the tail-end of its brief that Hastings' open-membership policy is "nominally" viewpoint-neutral. Pet.Br.51. It is no less viewpoint-neutral in practice. Hastings' policy applies equally to every RSO. It does not target any particular viewpoint or make any distinction between religious and non-religious speech. Pet.App.35a-36a. To be

---

[5] Because Hastings' policy satisfies the standard that this Court has used to evaluate limited forums for speech, it *a fortiori* satisfies the standard for limits on expressive conduct in *United States v. O'Brien*, 391 U.S. at 376-77. Pet.App.24a-27a.

eligible for RSO status, Hastings Outlaw cannot exclude students who believe homosexuality is morally wrong any more than CLS is permitted to exclude students who believe it is not.

The record in this case—which petitioners repeatedly ignore—reveals "no evidence" of discriminatory motive or practice with respect to CLS or religious viewpoints generally. Pet.App.35a. A number of organizations that, like CLS, engage in worship, Christian fellowship, and Bible study have thrived at Hastings as RSOs—both before and after CLS refused to comply with the policy—including the Law Students' Christian Fellowship and Hastings Koinonia.[6] And CLS's own predecessor group, HCF, was an RSO for a decade before this litigation (when it allowed any interested Hastings student to be a member). In short, the policy plainly does not exclude speech because of its "religious viewpoint." *Good News Club*, 533 U.S. at 111. Nor any other viewpoint.

A nondiscrimination policy is also viewpoint-neutral when it prohibits discrimination on the basis of specifically enumerated factors. This Court has repeatedly held that public accommodations laws written that way do not discriminate on the basis of viewpoint (and, indeed, regulate conduct not speech). *See Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993); *Roberts*, 468 U.S. at 614-15; *see also* Eugene Volokh, *Freedom of Expressive Association and Government*

---

6 The 2009-10 list of RSOs includes the Hastings Catholic Law Students Association, Hastings Jewish Law Students Association, J. Reuben Clark Law Society, and Law Students Christian Fellowship. Hastings College of Law, University of California, Student Organizations, *at* http://www.uchastings.edu/student-services/student-orgs/index.html (last visited Mar. 5, 2010).

Subsidies, 58 Stan. L. Rev. 1919, 1930 (2006). And so what petitioner calls the "written" policy that Hastings implements through its open-membership rule is perfectly viewpoint-neutral as well. Contrary to the suggestion of petitioner (Pet.Br.48), Hastings focuses on the open-membership policy because it is the policy that in fact is used by Hastings—as the parties stipulated—and not because of any concerns about its constitutionality. But to remove any doubt, the School's position is that application of the enumerated nondiscrimination factors in JA-220 ¶15 would also be constitutional as applied to CLS here.

Petitioner appears to suggest that prohibitions on discrimination on the basis of religion and sexual orientation are somehow uniquely viewpoint-discriminatory, at least as applied to religious groups.[7] But that argument is contradicted by this Court's cases holding that nondiscrimination provisions are conduct- rather than viewpoint-based. *E.g.*, *Roberts*, 468 U.S. at 628; *see Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). Moreover, this Court has never suggested that legislatures are uniquely disabled from enacting laws protecting against discrimination on the basis of religion or sexual orientation. To the contrary, the Court *struck down* a state constitutional provision that would have prevented localities from extending nondiscrimination protections to sexual orientation. *Romer v. Evans*, 517 U.S. 620, 628-29 (1996); *see also Wisconsin v. Mitchell*, 508 U.S. at 480, 490 (upholding sentencing enhancement applied to crimes based on, *inter alia*,

---

[7] Petitioner says this argument is limited only to "written" proscriptions on religious-based discrimination and does not apply to the School's "all-comers" policy. Pet.Br.37 n.9.

"sexual orientation"). And laws prohibiting discrimination on the basis of religion are an important part of our national fabric. In the end, CLS is simply confusing its *own* viewpoint-based objections to such nondiscrimination laws (which it is entitled to have and voice) with viewpoint *discrimination*.

This Court has long recognized that the fact that a neutral rule may have a *disparate impact* on groups holding particular viewpoints does not establish that it amounts to unconstitutional viewpoint discrimination. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *Madsen v. Women's Health Ctr, Inc.*, 512 U.S. 753, 763 (1994) ("That petitioners all share the same viewpoint … does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated" the restriction.). And *Employment Division v. Smith* underscores that this principle extends to religious groups as well. *See* Part III.D, *infra*.

Petitioner suggests that any funding or limited forum restriction that implicates an expressive group's choice of members is inherently viewpoint-discriminatory. But there is no basis for concluding that a generally applicable, viewpoint-*neutral* condition on participation in a government program is a viewpoint-based restriction on speech simply because associational rights are implicated. Associational interests are implicated almost any time a university (or other public entity) creates a limited public forum. To take only one example, it is commonplace for such forums to be open only to registered students. *See*

Pet.App.83a. But students are constitutionally entitled to associate with non-students. They may even have viewpoint-based reasons for wanting to do so, such as a religious group that wanted to include an ordained minister. Yet no one could seriously question the constitutionality of such a viewpoint-neutral "students only" restriction on the use of university resources. *See Widmar*, 454 U.S. at 267 n.5.[8]

C. The Policy Is Reasonable In Light Of The Purposes Of The Program

1. Hastings' policy ensures that the leadership, educational, and social opportunities afforded by registered student organizations are available to all students. Like countless other universities, Hastings views the RSO program as an important part of its own educational mission and program. Hastings does not allow its professors to host classes open only to those students with a certain status or belief. It would not subsidize bringing outside speakers to the campus if the talk were not going to be open to everyone. And when it creates—and publicly subsidizes—a forum for student speech, it may very reasonably conclude that the student and educational experience is best promoted when all participants in the forum must provide equal access to all students.

---

[8] Because the policy at issue in this case is viewpoint-neutral, petitioner's reliance on *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001), is misplaced. Pet.Br.51-52. As explained in *American Library Association*, the restrictions invalidated in *Velazquez* were "viewpoint-based." 539 U.S. at 213 n.7 (plurality opinion); *see Velazquez*, 531 U.S. at 548-49 (explaining that a "funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest").

Indeed, Hastings' open-membership policy is consistent with public accommodations laws going back all the way back to the middle ages. "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 571 (1995) (quoting *Lane v. Cotton*, 12 Mod. 472, 484-85 (K.B. 1701) (Holt, C. J.)); *see Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N.P. 1835) ("every one coming and conducting himself in a proper manner has a right to be received" by innkeepers). And modern-day legislatures have permissibly extended that concept to any business that "'receives financial support through solicitation of the general public or through governmental subsidy of any kind.'" *Romer*, 517 U.S. at 628 (citation omitted).

The fact that the RSO program is funded in part with mandatory student activity fees reinforces that its benefits should be open to all. Hastings' policies specifically, and reasonably, require that programs funded from mandatory student activity fees must be "germane to the educational mission of the College," "must benefit the student body as a whole," and must "make significant contributions to student life." Excerpts of Record 375 ¶35.11(A). It is reasonable for Hastings to conclude that students should not have to subsidize group activities that they are formally excluded from participating in.

2. The policy also reflects Hastings' obligation to follow state law. California law declares that no person shall be subjected to discrimination on the basis of various enumerated factors, including sexual orientation and religion, in "any program or activity

conducted by any postsecondary educational institution" that receives any financial assistance from the state. Cal. Educ. Code §66270; *see also* Cal. Gov. Code §11135(a). This provision—which petitioner does not mention—legally obligates Hastings to prohibit discrimination in its RSO program. That obligation is reinforced by other provisions, including Cal. Educ. Code §66292.2. *See* p. 11, *supra.* And, if there were any ambiguity, the School may err on the side of caution and nondiscrimination and conclude that public funds and facilities should not be used to support groups that engage in practices that the people of the State of California deem to be discriminatory.[9]

---

[9] California law generally authorizes the Regents of the University of California to determine the extent to which the part of the code in which §66270 is located applies to the University of California. Cal. Educ. Code §67400. But a separate provision specifically obligates the president of "each University of California campus" to ensure "that campus programs and activities are free from discrimination based on … the characteristics listed in Section 66270." Cal. Educ. Code §66292.2. Moreover, although Hastings is "affiliated with the University of California," the School is governed by its own board of directors (and not the Regents). Cal. Educ. Code §§92201, 92204. In addition, the Regents have long imposed the same nondiscrimination mandate embodied in §66270. *See*, *e.g.*, Regents of the University of California, *Policies Applying to Campus Activities, Organizations and Students* §20.00 & App. C (Oct. 20, 2008), *available at* http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/toc.html; Regents of the University of California, *Regents Policy 4402: Policy on Nondiscrimination on Basis of Sexual Orientation* (June 17, 1983), *available at* http://www.universityofcalifornia.edu/regents/policies/4402.html. And that is not surprising since there are well over 100 other public state colleges in California that are subject to the nondiscrimination mandate in §66270 as well.

Petitioner argues strenuously that discrimination on the basis of sexual orientation or religion is not the constitutional or moral equivalent of race or sex discrimination. And petitioner suggests that a rule prohibiting such discrimination merely reflects what is "[]fashionable at Hastings." Pet.Br.39; *see* Pet.Br.36. To be clear, the people of the State of California (not just "the Hastings authorities," Pet.Br.36) have made that judgment. So have many other States and municipalities. Certainly there are other States and municipalities that have chosen not to proscribe such practices, and they are of course entitled not to do so. But it is at least *reasonable* for the School to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.

"Petitioner does not dispute the right of Hastings to include sexual orientation among the categories on which Hastings itself and its *sponsored* organizations may not discriminate." Pet.Br.44 (emphasis added). But petitioner fails to account for the fact that RSOs receive school funds and have the right to use the School's name and logos, JA-216 ¶9(a), and that it is only natural that the outside world will conclude that Hastings' RSOs say something about the "image … the [School] … wishes to project," *Pleasant Grove*, 129 S. Ct. at 1134; *see Hurley*, 515 U.S. at 575-76. "Freedom of association" has never been a means of forcing the State not only to subsidize but to lend its name to practices deemed discriminatory by the citizenry.[10]

---

10 Petitioner asserts that its membership policies discriminate on the basis of belief and conduct—not on the basis of "sexual orientation." *See* Pet.Br.35-36. But as the district court found, petitioner made a "binding … judicial admission[]" that it intended to exclude members and officers based on their "religion and

3. The policy also allows Hastings to ensure that students are complying with basic nondiscrimination requirements (including those that CLS does not challenge) without any need to meddle in an RSO's internal affairs or to inquire into the sincerity of its stated reasons for excluding a student. That is particularly valuable when it comes to the sincerity of religious beliefs. Hastings also need not get into the messy factual business of evaluating whether a particular student was denied participation because of his religious beliefs or instead because of, say, his disability, veterans' status, or age. Hastings should not be required to choose between closing the forum entirely and being placed in the untenable position of judging the bona fides of a particular group's justifications for exclusion in every case.

4. Far from discriminating against those with minority viewpoints, as petitioner suggests (*e.g.*, Pet.Br.30), Hastings' policy reasonably seeks to *promote* minority viewpoints. The policy ensures that students with minority viewpoints may express them without risking expulsion from a student group. In addition, Hastings may reasonably conclude that the RSO program is enhanced if there is an opportunity for debate *within* groups as well as *among* them. In that sense, the School may reasonably determine that the policy promotes "learning among students." JA-349.[11]

---

sexual orientation." JA-460; *see* Pet.App.22a; JA-38, 50, 72 ¶¶4.1-4.3. In any event, the open-membership policy at issue bars any group from excluding a student because of their status or beliefs, and that includes their beliefs about the appropriateness of "nonmarital sex." Pet.Br.36; *see also* Pet.App.22 n.2.

[11] Former Dean Kane explained during her deposition in this case that the policy promotes pluralism not just among *groups* but

Petitioner's challenge to the reasonableness of the policy boils down to the view that absolute ideological purity within groups is necessary to ensure diversity *across* a spectrum of groups. Pet.Br.50. But Hastings' own experience irrefutably shows that its open-membership policy is not incompatible with a diverse universe of student groups. JA-236-45. That is not surprising because students, like other people, often gravitate towards like-minded persons and groups. In any event, it is reasonable for a law school, in particular, to encourage its students to learn to thrive in a setting where they discuss their views with others. Even divinity schools often share that view.[12]

"among[] my students." Deposition of Mary Kane, at 25, *Christian Legal Soc'y v. Kane*, No. C 04 4484 JSW (N.D. Cal. June 6, 2005). She further explained that the policy "promotes an opportunity for students to come together who share different viewpoints." *Id.* Although that sworn testimony was not made a part of the summary judgment record in this case, it is as good a statement as any concerning the purpose of the policy to encourage diversity *within* groups.

12 The President of one divinity school put it this way:

> "We are a diverse campus with more than 35 denominations represented and a fairly wide range of theological points of view. Not everyone here will be like you, think like you or worship like you. … This diversity is something we like. We like it because we believe that it will make you think, be more intellectually agile, and develop in you the skills to help navigate the borderlands of difference."

Andover Newton Theological School, Message from the President, *available at* http://www.ants.edu/welcome/message (last visited Mar. 7, 2010); *see also, e.g.*, Vanderbilt University (Vanderbilt Divinity School) 2009/2010 Student Handbook, Chapter 1: University Policies and Regulations, *available at* http://www.vanderbilt.edu/student_handbook/chapter1.html (last visited Mar. 7, 2010) ("all religious groups," like "all registered groups" shall not discriminate on religious grounds); Harvard

The truth is, Hastings has enjoyed the best of both worlds: a broad and diverse universe of RSOs and an environment in which any student can join any RSO regardless of their status or beliefs. That conclusion is supported by nearly twenty years' experience with the policy. If the open-membership policy were to have the extreme homogenizing effect that petitioner hypothesizes of eliminating the diversity among groups that Hastings has enjoyed, then the School could reconsider the trade-offs. But so far Hastings has not been forced to choose between the extremes of encouraging diversity only *among* groups or only *within* groups; it may reasonably choose a policy that promotes *both* to some degree, as its open-membership policy does in practice. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55, 49 (1973) (upholding State's educational policy, which represented "rough accommodation" of "two competing forces").

Moreover, seasoned administrators at Hastings are not required to agree with CLS about what forms of group structure are best suited to the discourse Hastings hopes to foster and are not required to choose between having no RSO forum at all and creating one that best suits CLS's wishes. It is the state as school administrator—and not the student population, or a single student group—that is entitled to decide the purposes of this limited forum. *See Rust*, 500 U.S. at 194; *Regan*, 461 U.S. at 548-49; *American Library Ass'n*, 539 U.S. at 211-12. And such expert judgments are entitled to no less respect than the difficult

---

Divinity School Student Handbook 58, *available at* http://www.hds.harvard.edu/registrar/handbook/handbook2009-10.pdf (last visited Mar. 7, 2010) (barring religious discrimination).

judgments that school administrators make on other matters. *Cf. Morse v. Frederick*, 551 U.S. 393 (2007).[13]

The administrators of the Nation's public universities may reach—and have reached—different judgments on this issue. But surely there is room for universities reasonably to take different approaches. A State's decision "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985). Hastings' open-membership policy meets that standard.

D. The Choice Presented To Student Groups Is Non-Coercive

Nor is there any reason to view Hastings' conditions on the RSO program as a "severe burden" on anyone's expressive or associational rights. Pet.Br.49. To begin with, though one would scarcely know it from reading petitioner's brief, the policy offers "a choice" (*FAIR*, 547 U.S. at 58), rather than imposing a regulatory proscription. A group may abide by the School's viewpoint-neutral open-membership policy and obtain the modest funding and benefits that go along with school recognition, or forgo recognition and do as it wishes. Nothing is forced on any group; indeed, nothing prevents students from doing both—

---

[13] This Court has held that the government's assessments are entitled to even greater deference when it acts as an employer or public service provider. *See Waters v. Churchill*, 511 U.S. 661, 671-73 (1994); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996). Although the Court need not invoke such precedents to sustain the reasonableness of Hastings' policy, similar considerations nevertheless support giving deference to the government-as-educator in drawing viewpoint-neutral rules governing access to limited forums and public funds.

associating within the RSO program consistent with that program's rules, and also *outside* that program in any manner they wish. *See Regan*, 461 U.S. at 545.

This Court has repeatedly recognized that the denial of funding is neither inherently coercive nor penal. *See American Library Ass'n*, 539 U.S. at 212. In the abortion context, for example, this Court has held that a State has no obligation to provide affirmative financial assistance to indigent women seeking abortions, even though the Court has also held that a State may not ban abortion outright. *Maher v. Roe*, 432 U.S. 464, 475 (1977); *see also National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998); *id.* at 596 ("'[D]enial of participation in a tax exemption or other subsidy scheme does not … as a general rule, have any significant coercive effect.'") (Scalia, J., joined by Thomas, J., concurring in the judgment); *Rust*, 500 U.S. at 193; *Xiu Ling Chen v. Gonzales*, 489 F.3d 861, 862 (7th Cir. 2007) (Easterbrook, J.) ("incentives differ from compulsion") (discussing *Maher* and *Rust*); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91-92 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004). And in *Regan*, *Grove City*, and *Bob Jones University v. United States*, 461 U.S. 574 (1983), this Court held that the denial of federal benefits far more lucrative than the modest funds here was not unduly burdensome. *See* Part II.A, *supra*.[14]

---

[14] Nor is there anything inherently problematic about a religious group choosing to stick by its convictions and turning away public subsidies because the group does not wish to comply with reasonable and viewpoint-neutral strings that are attached. Indeed, at the founding, "[t]he most intense religious sects opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities. Guaranteed state

Held up against those standards, Hastings' policy is within the bounds of the "'reasonable' choice offered in *Grove City*." *FAIR*, 547 U.S. at 59. The relatively modest benefits offered by the RSO program are not so significant "as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Mach.*, 301 U.S. at 590). Petitioner builds its counter-argument around *Healy*, but as explained below, the university in *Healy* barred the plaintiff student group from "exist[ing]" on campus *at all*. 408 U.S. at 181, 183; *see* Part III.A, *infra*. In sharp contrast, Hastings has repeatedly told CLS that it may use "Hastings facilities for its meetings and activities." JA-294; Pet.App.8a; JA-232 ¶58, 300.

The availability of that choice is more than enough to resolve this case, but it also bears mention that this Court has repeatedly rejected the notion that "an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Dale*, 530 U.S. at 653. The only record evidence concerning the impact of allowing gay students and those who hold different religious beliefs to participate in a Christian group's meetings is that their inclusion did *not* "impede the organization's ability to engage in [its] protected activities or to disseminate its preferred views." *Roberts*, 468 U.S. at 627; *see* JA-224, 324-27; Pet.App.58a.[15]

---

support was thought to stifle religious enthusiasm and initiative." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1438 (1990).

15 The fact that the Bible, much like the Constitution, is "a book whose interpretation is not free from controversy"

Petitioner repeatedly suggests that the policy "requir[es] CLS to accept leaders who do not follow its moral teachings." Pet.Br.32; *see also* Pet.Br.2, 27. Again, the policy does not *force* CLS to do anything; it gives it a choice. Moreover, for those groups that accept RSO status, the policy obligates them only to permit members "to *seek* leadership positions." JA-221 ¶18 (emphasis added). The policy places no restrictions at all on the selection process. For CLS, a member may not become a leader without, at a minimum, "a majority vote of the Chapter members," Pet.App.102a; no serious infringement on association could be occasioned by a student selected by (at least) the majority of a group. By ensuring that all students who join RSOs are *eligible* for leadership positions, the policy simply ensures that students are admitted as full-fledged members—not second-class ones.

Petitioner hypothesizes that if it chooses to honor the policy, it will be subject to "sabotage," or even a "hijack[ing]." Pet.Br.28-29 & n.4. But Hastings' open-membership policy is two decades old and there is not one shred of evidence in the record before this Court that any of the scores of RSOs at Hastings has ever been threatened with—much less subjected to—a takeover. To the contrary, the School has always enjoyed a diverse universe of RSOs. Neither petitioner's facial challenge nor certainly its as-applied challenge permits the Court to invalidate the policy on

---

(Pet.Br.30) does not mean that allowing students to offer different interpretations of it would "sabotage[]" CLS. Pet.Br.31. And the only record evidence on this question supports that conclusion, *see* JA-325-27. In any event, if CLS does not wish to allow such discourse, it may of course forgo RSO status. And CLS may consider other options such as a general rule that Bible study leaders must first attend a certain number of meetings.

the basis of a hypothetical theory that has no support in the record and, indeed, virtually no support in the history of higher education in America. *Cf. Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008); *New York v. Ferber*, 458 U.S. 747, 767 (1982).[16]

Though petitioner's opening brief promised that amici would provide "numerous examples" of sabotage and takeover (Pet.Br.29 n.4), petitioner's amici have failed to identify a *single* actual "takeover"—anywhere. The one "example" amici offer is not an example at all; it concerned a mere suggestion of one student on a social networking site that apparently was never acted upon. *See* Br. of *Amici Curiae* Foundation for Individual Rights in Education and Students for Liberty ("FIRE Br.") at 9-10. Amici's other "evidence" has nothing to do with the infiltration or takeover of student groups by dissenters, but involves basic disputes between student groups and universities over eligibility for recognition despite non-compliance with a non-discrimination policy. *See* FIRE Br.8-14. In other words, the best that petitioner and amici have to offer simply confirms that the risk of takeover or sabotage to which petitioner repeatedly alludes is remote.

Petitioner is free to bring an as-applied challenge if circumstances change. Pet.App.49a n.5. But petitioner cannot meet its burden of proving that the policy is unconstitutionally coercive simply by hypothesizing

---

16 There are also checks in place. The School's student code of conduct applies to RSO activities and, *inter alia*, prohibits "[o]bstruction or disruption," "[d]isorderly" conduct, and threats. Policies and Regulations Applying to College Activities, Organizations and Students §§52.00, 54.00, *reprinted in Academic Regulations and Other Rules Applicable to Students* 35-39 (2009-2010), *at* http://www.uchastings.edu/academics/regulations.html.

circumstances that have no foundation whatsoever in experience, much less the case litigated below. *Cf. Ysursa*, 129 S. Ct. at 1099 n.3; *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007); *Finley*, 524 U.S. at 587.

III. PETITIONER'S THEORY OF THE CASE IS BASED ON PRECEDENTS THAT ARE READILY DISTINGUISHABLE

Petitioner rests its case almost entirely on precedents that are readily distinguishable when it comes to the case that is before this Court.

A. Petitioner's Reliance On *Healy* And *Widmar* Is Misplaced

Petitioner builds its case around *Healy* and *Widmar*, and argues that those decisions establish that a public university's denial of recognition to a student group is "presumptively unconstitutional." Pet.Br.17-18; *see also* Pet.Br.21-22. Petitioner bases that argument on the statement in *Healy* that "the effect of the College's denial of recognition"—*in that case*—was "a form of prior restraint." 408 U.S. at 184. But it takes that statement—and the "heavy burden" language that appears in the very next sentence, *id.*—completely out of context. The Court's use of the term "prior restraint" was explicitly tied to the fact that the college in that case had not just refused to recognize the student group at issue—it systematically sought to prevent the group from *existing* on campus, even going so far as to disband an informal meeting of the group in a "campus coffee shop." *Id.* at 181; *see id.* at 176 ("[M]ost importantly—nonrecognition barred them from using campus facilities for holding meetings.").

Likewise, in *Widmar*, the Court considered a policy that "[n]o University buildings or grounds (except

chapels as herein provided) may be used for purposes of religious worship or religious teaching." 454 U.S. at 265 n.3. As in *Healy*, the restriction amounted to a *total* exclusion of religious groups from campus (since there were no chapels on campus). *See id.* at 264-65 (framing the issue as whether a university may "close its facilities" to a religious group altogether). On those facts, virtually on all fours with *Healy*, the Court again analogized the school's policy to a "form of prior restraint." *Id.* at 268 n.5. By contrast, as discussed, CLS has been granted access to the School's facilities for its meetings and activities. JA-294.

Furthermore, *Healy* and *Widmar* both involved total expulsion from campus on a blatantly *viewpoint-discriminatory basis*. In *Healy*, the school banned the group from campus because it found its "philosophy abhorrent." 408 U.S. at 187; *see id.* at 175. And in *Widmar*, the provision at issue expressly targeted "religious worship or religious teaching." 454 U.S. at 265; *id.* at 269-70. This case, again, is the opposite.

Healy and *Widmar* are nevertheless instructive for a different reason. They recognize that student groups may be denied recognition when they fail to comply with "reasonable," viewpoint-neutral conditions—including nondiscrimination rules—"compatible with [the school's] mission upon the use of its campus and facilities." *Widmar*, 454 U.S. at 267 n.5; *see id.* at 277 (reaffirming the school's "right to exclude even First Amendment activities that violate reasonable campus rules"); *Healy*, 408 U.S. at 192-93 (reasonable viewpoint-neutral rules "do[] not impose an impermissible condition on the students' associational rights"); *see id.* at 195 (Burger, C.J., concurring) ("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"). Indeed, *Healy* expressly stated that it was not questioning the school's content-neutral standards for recognition, which prohibited discrimination based on religion. *See id.* at 183 n.11.[17]

B. *Rosenberger* And The Equal Access Cases Are Similarly Inapposite

Petitioner's reliance on *Rosenberger* and the "equal access" cases is also unavailing. In those cases, religious groups were singled out and denied access to public facilities or funds because of their religious viewpoint. Neither *Rosenberger* nor any other case retreats from the settled principle that a public university may set reasonable, viewpoint-neutral rules.

In *Rosenberger*, a university created a program to subsidize the costs of various student publications, but refused to fund publications that "'promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.'" 515 U.S. at 827 (citation omitted) (alterations in original). Breaking no new ground, the

---

[17] Petitioner offers a string cite for the proposition that "denial of [certain] incidents of registered status, even with access to meeting space, is a constitutional infringement under *Healy*." Pet.Br.25. But *every one* of those cases was decided on the ground that the school had engaged in *viewpoint* discrimination. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006); *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 528 (3d Cir. 2004) (Alito, J.); *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1333 (5th Cir. 1984); *Gay Activists Alliance v. Board of Regents of Univ of Okla.*, 638 P.2d 1116, 1121-22 (Okla. 1981); *Gay Lib v. University of Mo.*, 558 F.2d 848, 852, 854-55 (8th Cir. 1977); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 164-65 (4th Cir. 1976); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

Court held the First Amendment "forbid[s] the State to exercise [such] viewpoint discrimination." *Id.* at 829. Likewise, in *Good News Club* and *Lamb's Chapel*, religious groups were denied access to facilities solely because they proposed to address from a religious viewpoint subjects otherwise within the scope of the limited forum. *See Good News Club*, 533 U.S. at 111; *Lamb's Chapel*, 508 U.S. at 393-94.

In stark contrast, Hastings' open-membership policy is plainly viewpoint-neutral. *See* Part II.B, *supra*. CLS has been offered the same viewpoint-neutral choice as every other student group at Hastings, and thus enjoys the *same* access to the RSO program as every other group. Surely a doctrine built on guaranteeing religious groups equal access at our Nation's public schools does not support petitioner's claim to *special* access. Indeed, extending the doctrine to such claims ultimately could cause it to unravel given the unique concerns presented by "singl[ing] out religious entities for special benefits." *Rosenberger*, 515 U.S. at 854-55 (Thomas, J., concurring). And there is an unmistakable (and unfortunate) irony in petitioner's attempted reliance on the equal access cases to invalidate a policy that exists to ensure equal access by all students to all school-funded activities.

C. Neither *Dale* Nor *Hurley* Extends To The Choice At Issue Here

Petitioner is also wrong in suggesting that this case follows "*a fortiori*" from *Boy Scouts of America v. Dale*." Pet.Br.45. In *Dale*, New Jersey sought to apply its public accommodations law to *compel* the Boy Scouts to reinstate "an avowed homosexual and gay rights activist" as a scout leader. 530 U.S. at 644. The Court found that "the *forced inclusion* of Dale"

violated the Boy Scouts' right of expressive association. *Id.* at 650 (emphasis added). By contrast, Hastings' policy does not "force" CLS to admit anyone. It simply presents groups with a choice: Open your membership and enjoy access to limited public funds and benefits, or forgo such public subsidies and exclude whomever you wish. *Dale* is therefore inapposite.

Petitioner's reliance on *Hurley* is similarly misplaced. Like *Dale*, *Hurley* involved the direct application of a public accommodations law rather than a funding condition. Moreover, *Hurley* concerned a group seeking access to a quintessential public forum—the streets. 515 U.S. at 560-62. When the State creates a limited forum for expression it is entitled to define the purposes of the forum and limit participation in a manner reasonably consistent with those purposes, so long as the limits are viewpoint-neutral. Part II.A, *supra*. The State cannot define or limit the purposes of private expression on the streets of Boston. The government certainly could not, for example, decree that only veterans may march in the streets. But the government *could* open a parade ground at West Point on the Fourth of July to honor various military units and limit participation to groups composed only of members of those units. *Cf. Regan*, 461 U.S. at 547-48; *Cornelius*, 473 U.S. at 806-07.

This Court has consistently held that a campus speech forum is a *limited* forum subject to reasonable, viewpoint-neutral rules. *See, e.g.*, *Good News Club*, 533 U.S. at 106-07; *Rosenberger*, 515 U.S. at 829; *Widmar*, 454 U.S. at 268 n.5. Petitioner is thus quite wrong in saying that this case is about "driv[ing]" anyone's views "from the public square." Pet.Br.58.

D. Petitioner's Half-Hearted Free Exercise Argument Is Telling

Petitioner does not address the Free Exercise Clause until page 40 of its brief and does so only in passing. The reason is obvious—*Employment Division v. Smith*. "Under *Smith*, neutral, generally applicable laws are not subject to First Amendment challenge no matter how severe an impediment they may be to the exercise of religion." Michael W. McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 819, 819 (1998); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) ("In *Smith*, … we rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*, 374 U.S. 398 [(1963)].").

Nevertheless, despite the rule of *Smith*, there is an unmistakable current in the briefs of petitioner and its amici that the policy at issue in this case cannot be applied to *religious* groups—in particular—because of the unique burdens that religious groups alone assertedly would face if they were required to abide by it. These are precisely the sort of considerations that *Smith* dismisses in the case of a neutral and generally applicable law—like the policy here. And it is hard to see what would be left of *Smith* if a religious group could circumvent it simply by reframing its alleged injury in terms of *associational* rights.[18]

---

[18] In *Smith*, this Court hypothesized that "a challenge on freedom of association grounds" may be "reinforced by Free Exercise Clause concerns." 494 U.S. at 882. But the Court did not suggest that a plaintiff bringing such a challenge would be excused from having to establish a violation of freedom of association, or

As petitioner notes (Pet.Br.46), many laws include religious-practice-based exemptions. "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." *Smith*, 494 U.S. at 890. This Court has always treated such exemptions as a permissible means of *accommodating* religion through the "play in the joints" of the Religion Clauses rather than constitutionally compelled carve-outs. *See, e.g.*, *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987); *cf. Shrum v. City of Coweta*, 449 F.3d 1132, 1143 (10th Cir. 2006) ("The religious accommodation requirements of Title VII … extend beyond the dictates of the Free Exercise Clause, as interpreted by *Smith* ….") (McConnell, J.).

Courts have generally recognized a "ministerial exception" that exempts the church-minister relationship from the reach of direct regulatory prohibitions, such as Title VII's, that might otherwise compel intrusions into a church's selection of its

---

would be entitled to a wholesale exemption from *Smith*. That would leave little of *Smith*, since virtually any free exercise claim could be reframed as a free association claim. It is not surprising, then, that the lower courts have routinely rejected such "hybrid" rights challenges in the context of viewpoint-neutral zoning ordinances directly bearing on a religious group's associational rights. *See, e.g.*, *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031-33 (9th Cir. 2004); *see also Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008) ("[N]o court has ever allowed a plaintiff to bootstrap a free exercise clause in this manner. We decline to be the first.") (citation omitted).

leadership, in order to prevent excessive entanglement between government and religion. *See, e.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294, 303-04 (3d Cir. 2006). That exception is not at issue here because this case involves a funding condition and the policy at issue does not compel the selection of anyone. Moreover, CLS has not held itself out as a *church* and does not seek funding for *clergy*. *See* Pet.App.67a n.6.[19]

IV. THE FIRST AMENDMENT DOES NOT REQUIRE STATES TO SUBSIDIZE DISCRIMINATORY PRACTICES

This Court has long held that the government is not required to subsidize entities engaged in discriminatory practices, simply because it subsidizes other associations that do not engage in discriminatory practices. *See, e.g.*, *Bob Jones*, 461 U.S. at 583; *Norwood v. Harrison*, 413 U.S. 455, 462-63 (1973). That rule accounts for the fact that a State's "decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan*, 461 U.S. at 549. It also reflects the fact that extending public subsidies to a group may be viewed as a sign of the State's approval of group's mission or activities. *Cf. Hurley*, 515 U.S. at 575. Indeed, if petitioner is constitutionally entitled to RSO status, then it is entitled to the use of Hastings' own name and logo. JA-216 ¶9(a). While RSOs must specify in written materials that Hastings does not "sponsor" them, JA-219 ¶13, the School may

---

19 Of course, "a law targeting religious beliefs as such is never permissible." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). In this case, however, there is no basis for concluding that the policy at issue in this case was designed to "target[] religious beliefs." Pet.App.63a.

reasonably act on the assumption that members of the public will not always read the fine print.

Petitioner concedes that compelling state interests would still allow the government to refuse to subsidize and assist groups that discriminate on the basis of race and—"to some extent," petitioner says—sex. Pet.Br.43. But the "straightforward" rule that it advocates (Pet.Br.2) would grant any "noncommercial expressive association[]" in America a First Amendment right to receive public funds and participate in limited public forums while excluding individuals on the basis of *any* other factor, including "age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates." *Romer*, 517 U.S. at 629.

Military reservists and servicemen may be particularly vulnerable to discriminatory treatment under petitioner's rule. College students represent approximately 30 percent of reserve personnel, *see* Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 St. Thomas L. Rev. 859, 863 (2002), and, sadly, are not immune from discrimination on campus.[20] But

---

[20] *See, e.g.*, Alec Magnet, *Veterans Take Grievances to Columbia Provost*, N.Y. Sun, Feb. 1, 2006, *available at* http://www.nysun.com/new-york/veterans-take-grievances-to-columbia-provost/26823/ ("[A]nti-military bias and comments, mostly by other students, are prevalent university-wide"); Andrew Lee, *Discrimination Against the Military Must End*, Tufts Daily (Nov. 15, 2006; updated Aug. 17, 2008) *available at* http://www.tuftsdaily.com/2.5519/discrimination-against-the-military-must-end-1.593009 (discussing "schism between the

under petitioner's rule, the official Hastings Outdoor Club (JA-241) could refuse to let student reservists participate in a school-subsidized hiking trip because the student leaders of that group disagree with the military's conduct of the war on terror. And Hastings not only would be constitutionally precluded from doing anything about it, it would have to subsidize the group's activities and let it use the School's name.

Petitioner's theory would render unconstitutional federal, state, and local laws conditioning the eligibility of expressive associations and other groups to receive public funds, use public facilities, or participate in limited public forums on their willingness to comply with routine nondiscrimination provisions. To take only one example, the federal government has long required any group wishing to contract with the government to agree "not [to] discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin." Exec. Order No. 11246, 30 Fed. Reg. 12,319, 12,320 (Sept. 24, 1965).[21] In 2002, the President carved out an exemption for religious groups. Exec. Order No. 13279, §4, 67 Fed. Reg. 77,141, 77,143 (Dec. 16, 2002). But the President did not suggest that this accommodation was constitutionally compelled.

---

military and civilians on campus" and noting that "[m]isunderstandings are fostered by a lack of dialogue").

[21] *See also, e.g.*, Office of Disability Employment Policy, Dep't of Labor, *Demystifying the Rehabilitation Act: What Faith-Based and Community Organizations Need to Know, at* http://www.dol.gov/odep/ pubs/fact/faith.htm (last visited Mar. 5, 2010). Nothing in the amicus brief filed by the States of Michigan *et al.* is to the contrary. Indeed, that brief is based solely on the mistaken premise that Hastings' open-membership rule is viewpoint-based. *See* Br. of *Amici Curiae* Michigan *et al.* at 3.

Furthermore, adopting petitioner's position also would invite similar claims by other groups seeking exemptions from viewpoint-neutral and generally applicable equal access policies. Although Hastings respects CLS's "complete right" to its religious beliefs, JA-343, and the right of other groups to express their viewpoints, nothing prevents the School from adopting a neutral and generally applicable open-membership policy that allows it to avoid subsidizing groups that engage in exclusionary practices, especially those proscribed by state law. That goes for the student environmental group that refuses to admit students who do not believe in global warming as much as it does for the student hate group that refuses to admit students who accept the Holocaust as historical fact.[22]

* * * * *

Hastings agrees with petitioner this far: "this case is most emphatically *not* a clash between religious freedom and rights pertaining to sexual orientation."

---

[22] A number of universities have been forced to struggle with student groups organized around animus towards persons of different backgrounds or viewpoints. *See*, *e.g.*, David Holthouse, *Black Hats on Campus: Student Hate Group Roils Michigan State*, Intelligence Report (2007), *available at* http://www.splcenter.org/intel/intelreport/article.jsp?aid=869 (last visited Mar. 5, 2010) (describing Michigan State student group that tried to organize a "Catch an Illegal Immigrant Day" contest, held a "Koran Desecration" competition, joked about distributing smallpox-infested blankets to Native American students, and hosted a series of lectures by hate group leaders that drew skinheads and other white supremacists to the MSU campus). Of course, such groups are protected by the First Amendment from viewpoint-based discrimination. But the Court has never suggested that they enjoy a First Amendment right to public funds and other public benefits where they refuse to comply with viewpoint-neutral nondiscrimination rules.

Pet.Br.58. Indeed, as petitioner frankly admits, "[t]he right that CLS is asserting … is by no means limited to religious groups." Pet.Br.19. Far from it. Petitioner claims that *every* "noncommercial expressive association[]" (Pet.Br.2) in America has a First Amendment right *both* to demand access to public funds and benefits—indeed, even the right to use the State's own name—and to demand a special exemption from viewpoint-neutral nondiscrimination provisions that apply to such public funds or benefits. This Court has never come close to adopting such a remarkable proposition. And there is no reason to do so here.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed, or the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

ETHAN P. SCHULMAN
CROWELL & MORING LLP
275 Battery Street
23rd Floor
San Francisco, CA 94111
(415) 986-2800

ELISE K. TRAYNUM
UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW
200 McAllister Street
San Francisco, CA 94102
(415) 565-4787

GREGORY G. GARRE
Counsel of Record
MAUREEN E. MAHONEY
J. SCOTT BALLENGER
LORI ALVINO MCGILL
GABRIEL K. BELL
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
gregory.garre@lw.com
(202) 637-2207

Counsel for Hastings College of the Law Respondents

ADDENDUM

TABLE OF CONTENTS

Page

ADDENDUM

1. The following are portions of the record reflecting Hastings' open-membership policy:

Deposition of Judy Chapman (July 6, 2005)

- In determining whether student organization bylaws comply with the policy, the director of student services looks to see "is the organization open to all Hastings students." JA-108.
- "Q. … Is it permissible for student organizations, for registered student organizations to limit their membership to students who can support their group's purpose or mission?

  A. … [T]hey need to be open to all students so it would not be permissible, no.

  Q. So student organizations have to be open even to students who may disagree with their purposes?

  A. Yes. …. [W]e would say membership in all organizations is open to all students." JA-320.

Deposition of Mary Kay Kane (July 6, 2005)

- "[I]n order to be a registered student organization you have to allow all of our students to be members and full participants if they want to. Somebody may not come to you initially with all of your views but all of our organizations should be open to every member in the community…. But to the extent that they would not allow every member of our community, any member of our community who

wanted to participate, then they should not be able to be a registered student organization." JA-343-44.

- "Q. Is it fair to say it is the college's position that any student should be able to join or seek to lead an organization, any registered student organization?

  A. Yes.

  Q. Regardless of their religious beliefs, right?

  A. Correct.

  Q. Regardless of their political beliefs?

  A. Correct." JA-346.

Joint Stipulation (Oct. 7, 2005)

- "In order to become a registered student organization, a student organization's bylaws must provide that its membership is open to all students and the organization must agree to abide by the Nondiscrimination Policy." JA-221 ¶17.
- "Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." JA-221 ¶18.
- "Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." JA-221 ¶18.

Pl's Motion for Summary Judgment (Oct. 7, 2005)

- "Hastings interprets the Policy on Nondiscrimination such that student organizations must allow *any* student, regardless of their status or beliefs, to participate in the group's activities and meetings and to become voting members and leaders of the group. For example, Hastings requires that the Hastings Democratic Caucus must allow an ardent Republican to be president of the organization." *Id.* at 4.

Defs' Motion for Summary Judgment and Opposition to Pl's Motion for Summary Judgment (Oct. 21, 2005)

- "Hastings interprets the Policy as requiring registered groups to allow *any* interested student to participate, become a member or seek leadership positions in the group, regardless of the student's status or beliefs." *Id.* at 3.

Declaration of Judy Chapman (Oct. 21, 2005)

- "Hastings interprets the Nondiscrimination Policy as requiring that student organizations wishing to register with Hastings allow any Hastings student to become a member and/or seek a leadership position in the organization. Hastings requires registered student organizations to be open to all students in this manner for several reasons." JA-349 ¶5.

Pl's Reply in Support of Summary Judgment and in Opposition to Defs' Motions for Summary Judgment (Nov. 7, 2005)

- "To determine whether a student organization's constitution conforms to the Policy on Nondiscrimination, Ms. Chapman checks to see if the organization ensures that *any* interested student may participate, become a member or seek a leader position in the group, regardless of the students' beliefs." *Id.* at 3 (internal quotation marks, citation, and ellipsis omitted).

Hearing Before the District Court on Cross-Motions for Summary Judgment (Dec. 2, 2005)

- Pl's Counsel: "It's important to understand what Hastings' policy is. According to paragraph 18 of the stipulated facts, … 'Hastings requires that registered student organizations allow any student to participate, become a member or seek leadership positions in the organization regardless of their status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership policies in the organization.'" JA-438-39.

- Defs' Counsel: "[A]s a condition to funding those organizations, giving them facilities, giving them access to channels of communication—you have to open your doors to any student who is interested in participating in your group." JA-445.

District Court Opinion (May 19, 2006)

- "Hastings requires registered student organizations to allow any student to participate, become a member, or seek leadership positions, regardless of their status or beliefs." Pet.App.9a.

Brief of Appellant (Sept. 28, 2006)

- "Hastings illustrates the application of the Nondiscrimination Policy by explaining that for the Hastings Democratic Caucus to gain recognition, it must open its leadership and voting membership to Republicans." *Id.* at 29.

Brief of Appellees (Jan. 12, 2007)

- "Hastings interprets the Policy as requiring registered groups to allow *any* interested student to participate, become a member or seek leadership positions in the group, regardless of the student's status or beliefs." *Id.* at 3.

Court of Appeals Opinion (Mar. 17, 2009)

- "The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." Pet.App.2a.

Petition for Writ of Certiorari (May 5, 2009)

- "The material facts of this case are undisputed." *Id.* at 2.
- "Hastings asserts that it requires RSOs to 'allow any student to participate, become a member, or

seek leadership positions in the organization, regardless of their status or beliefs.'" *Id.* at 4.

Reply on Petition for Writ of Certiorari (July 21, 2009)

- "Of course, in the instant case, Respondents will recognize CLS only if it agrees to allow *anyone* to become a leader or voting member, without regard to his or her viewpoint, conduct or expression." *Id.* at 9 n.2.

2. The following are pertinent provisions of the California Code:

CALIFORNIA GOVERNMENT CODE § 11135

Title 2. Government of the State of California
Division 3. Executive Department
Part 1. State Departments and Agencies
Chapter 1. State Agencies
Article 9.5. Discrimination

§ 11135. Programs or activities funded by state; discrimination on basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability; federal act; definitions; legislative findings and declarations

(a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.

* * *

CALIFORNIA EDUCATION CODE § 66030

Title 3. Postsecondary Education
Division 5. General Provisions
Part 40. Donahoe Higher Education Act
Chapter 2. General Provisions
Article 4. Educational Equity for Students

§ 66030. Intent regarding educationally equitable environments

(a) It is the intent of the Legislature that public higher education in California strive to provide educationally equitable environments that give each Californian, regardless of age, economic circumstance, or the characteristics listed in Section 66270, a reasonable opportunity to develop fully his or her potential.

(b) It is the responsibility of the governing boards of institutions of higher education to ensure and maintain multicultural learning environments free from all forms of discrimination and harassment, in accordance with state and federal law.

CALIFORNIA EDUCATION CODE
§§ 66251-66252

Title 3. Postsecondary Education
Division 5. General Provisions
Part 40. Donahoe Higher Education Act
Chapter 4.5. Sex Equity in Education Act
Article 1. Title and Declaration of Purpose

§ 66251. Policy; purpose

It is the policy of the State of California to afford all persons, regardless of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code, equal rights and opportunities in the postsecondary institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor.

§ 66252. Legislative findings and intent

(a) All students have the right to participate fully in the educational process, free from discrimination and harassment.

* * *

CALIFORNIA EDUCATION CODE
§§ 66270-66271

Title 3. Postsecondary Education
Division 5. General Provisions
Part 40. Donahoe Higher Education Act
Chapter 4.5. Sex Equity in Education Act
Article 3. Prohibition of Discrimination

§ 66270. Prohibited discrimination

No person shall be subjected to discrimination on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any characteristic listed or defined in Section 11135 of the Government Code or any other characteristic that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid.

§ 66271. Exception

This chapter shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.

CALIFORNIA EDUCATION CODE § 66292.2

Title 3. Postsecondary Education
Division 5. General Provisions
Part 40. Donahoe Higher Education Act
Chapter 4.5. Sex Equity in Education Act
Article 5. Compliance and Enforcement

§ 66292.2. Primary responsibility for ensuring that university campus activities and programs are free from discrimination

The President of the University of California and the chancellor of each University of California campus shall have primary responsibility for ensuring that campus programs and activities are free from discrimination based on age and the characteristics listed in Section 66270.

CALIFORNIA EDUCATION CODE § 67400

Title 3. Postsecondary Education
Division 5. General Provisions
Part 40. Donahoe Higher Education Act
Chapter 16. Applicability to University of California

§ 67400. Regents of university; provisions applicable by resolution

No provision of this part shall apply to the University of California except to the extent that the Regents of the University of California, by appropriate resolution, make that provision applicable.

CALIFORNIA EDUCATION CODE § 92201

Title 3. Postsecondary Education
Division 9. University of California
Part 57. University of California
Chapter 3. Special Colleges
Article 1. Hastings College of the Law

§ 92201. Affiliation with University of California

The college is affiliated with the University of California, and is the law department thereof.

CALIFORNIA EDUCATION CODE § 92204

Title 3. Postsecondary Education
Division 9. University of California
Part 57. University of California
Chapter 3. Special Colleges
Article 1. Hastings College of the Law

§ 92204. Board of directors; function; quorum; compensation; members; term of office

The business of the college, which includes the power to incur indebtedness, shall be managed by the board of directors. Six directors constitute a quorum for the transaction of all business. The directors shall serve without compensation.

One of the directors shall always be an heir or representative of S.C. Hastings. All other directors taking office after January 1, 1981, shall serve for terms of 12 years. Directors in office prior to January 1, 1981, shall serve for the terms provided in the bylaws of the college in effect on that date.