No. 08-1371

IN THE
Supreme Court of the United States

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

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

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

BRIEF ON THE MERITS FOR RESPONDENT-INTERVENOR HASTINGS OUTLAW

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QUESTION PRESENTED

1. Whether a public university, in choosing to establish a forum for student groups that receive official recognition and a small subsidy, has sufficient latitude under the First Amendment to establish, as a viewpoint-neutral condition for receiving limited benefits, the requirement that a recognized group be open to all students?

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INTRODUCTION

Hastings Outlaw is a registered student organization at the Hastings College of Law ("Hastings") whose members have a strong interest in being able to participate in all other Hastings-affiliated registered student organizations, regardless of their individual status or beliefs. Its members have chosen to attend a law school, Hastings, that has concluded that its students benefit educationally from the equal opportunity to meaningfully participate in any recognized student organization.

To advance its educational objectives, Hastings has decided to confer certain limited benefits on non-commercial registered student groups that open their membership to any Hastings student. The petitioner here, the Hastings student chapter of the Christian Legal Society ("CLS"), claims a constitutional right to an exemption from Hastings' Nondiscrimination Policy that would broadly permit it to exclude other students from membership while receiving the benefits that Hastings provides to registered student organizations ("RSOs"). But what CLS ignores in its brief is Hastings' legitimate interest in allocating its limited resources only to assist those student groups that are open and accessible to all students. Hastings has reasonably concluded that its open access policy channels resources in a manner that will most enhance the educational opportunities available to its students.

The viewpoint-neutral decision not to provide benefits to groups with exclusionary policies does not

single out CLS's views or suppress its ability to speak or to associate. As a group of students organized for religious purposes, CLS remains free to exercise its expressive association rights both on the law school campus and in the community at large, including the right to exclude potential members on the basis of religious belief. But CLS has no right to demand a *subsidy* from the law school while failing to abide by the requirement that all RSOs must be open to all students. Absent any suggestion – and there is none in the record – that Hastings' policy is aimed at suppressing certain specific viewpoints or ideas, Hastings' policy must be upheld under the First Amendment.

STATEMENT

A. Registration of Student Organizations and the Hastings Nondiscrimination Policy.

Hastings – a public law school located in San Francisco – has made the decision to provide assistance "to students wishing to create organizations among themselves for academic and/or social purposes" in order to provide students with "opportunities to pursue academic and social interests outside of the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience." Joint Appendix ("JA") 349 ¶¶ 3-4. Hastings allows non-commercial student organizations to register with the College to receive certain benefits, so long as they comply with the College's Policies and Regulations Applying to College Activities, Organizations and Students,

which includes compliance with Hastings' Policy on Nondiscrimination ("Nondiscrimination Policy" or "Policy"). *See* JA 219-20 (Joint Stipulation of Facts ("JSF") ¶¶ 12, 14).

A broad array of organizations have registered as RSOs, formed around a variety of interests chosen by students. In the 2004-05 academic year, there were approximately sixty registered student organizations at Hastings, three of which had a religious focus. *See* JA 215-16 (JSF ¶ 7). Other RSOs have identified themselves as promoting any number of interests, including professional development,[1] social entertainment,[2] athletic interaction,[3] provision of legal services to the disadvantaged,[4] political engagement,[5] the study of religion,[6] and academic

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[1] *See, e.g.*, JA 409 (Association of Communications, Sports & Entertainment Law seeks to provide students with opportunities "to learn more about the practice of law in the sports and/or entertainment industries" and "to make professional connections within these fields"); JA 420 (Internet Technology & Venture Group promotes "professional & social development," fostering a "greater understanding of the Internet, technology, and venture capital and its application of the law").

[2] *See, e.g.*, JA 417 (Hastings OWLS "flock together to improve life at Hastings" and "to party"); JA 423 (UC Hastings Poker Club seeks to "provide a community for people to play poker").

[3] *See* JA 415 (Hastings Intramural Basketball League); JA 418 (Hastings Soccer Club).

[4] *See, e.g.*, JA 409-10 (Association of Students for Kids); JA 411 (General Assistance Advocacy Project).

[5] *See* JA 413 (Hastings Democratic Caucus); JA 418 (Hastings Republicans).

research and publication.[7] In addition to RSOs, nonregistered student groups and organizations can exist and operate on campus. JA 233 (JSF ¶¶ 61-62), 300, 345-46.

The benefits provided to RSOs include use of the Hastings name and logo, eligibility to send mass emails through the Associated Students of the University of California at Hastings ("ASUCH"), a listing on the Office of Student Services' website, participation in the Student Organizations Fair, use of the Student Information Center for distribution of materials to the Hastings community, use of certain bulletin boards, and eligibility to apply for use of limited office space and rooms. *See* JA 216-19 (JSF ¶¶ 9-10). Nonregistered student groups are similarly eligible to reserve campus facilities for their events, and Hastings allows these groups to communicate to the Hastings community through generally available bulletin boards or classroom chalkboards. Academic functions and College-sponsored events have priority over student group events for use of Hastings' facilities, and RSO events are given priority over non-RSO events. *See* Appendix to the Petition for Writ of Certiorari ("Pet. App.") 78a-79a. RSOs may also apply for discretionary travel funds, as well as

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[6] *See* JA 411 (Hastings Association of Muslim Law Students seeks "to promote a greater understanding of Muslims, Islam, Islamic Law & Islamic Culture"); JA 415-16 (Hastings Koinonia seeks to "study the Bible" and "discuss the Christian worldview and its logical consequences").

[7] *See, e.g.*, JA 416 (Hastings Law and Policy Review); JA 418 (Hastings Race & Poverty Law Journal).

student activity fee funding derived from student fees assessed to support activities that support Hastings' educational "mission." Pet. App. 89a, 93a; *see also* JA 216-18 (JSF ¶ 9).

To become an RSO, a student organization must agree to comply with Hastings' Nondiscrimination Policy, and a group's failure to comply with the Policy may result in the denial or revocation of the status and privileges of being an RSO. JA 221, 222 (JSF ¶¶ 17, 20, 21). The Nondiscrimination Policy applicable to RSOs provides that "[t]he College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices," and provides that Hastings and the student groups it subsidizes "shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." JA 220 (JSF ¶ 15); Pet. App. 88a.

To ensure that "the educational and social opportunities these [registered student] organizations provide are available to all students," Hastings has interpreted the Policy as requiring registered student organizations to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." JA 221 (JSF ¶ 18); *see also* JA 349 ¶ 5. 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 (JSF ¶ 18). In order to become an RSO, a student organization's bylaws must provide that its

membership is open to all students. JA 221 (JSF ¶ 17).

Groups that comply with this open access requirement are eligible for law school-provided recognition and benefits because they serve important educational purposes. Such groups provide students with exposure to a diversity of ideas and points of view and allow students to take advantage of a wide variety of educational and social opportunities. JA 349. Further, by admitting individuals with varied perspectives, such groups also foster educationally valuable dialogue. *Id.* But organizations that do not wish to comply with the open access rule remain free to express their beliefs on campus and to exclude members based on these beliefs. JA 345-46.

Although CLS now seeks to create some doubt about the true breadth of Hastings' Policy, in the district court following discovery, CLS expressly stipulated that the Policy is understood and applied to require all recognized student groups to open their membership to all Hastings students regardless of status or belief. *See* JA 221 (JSF ¶¶ 17, 18).

Thus, the Bylaws of the Hastings Republicans, to take one example, provide that "[m]embership is open to all Hastings Students, and membership rules shall not violate the Nondiscrimination Compliance Code of Hastings." JA 183. Similarly, Respondent Hastings Outlaw complies with the Hastings Policy and does not exclude any student from membership

on the basis of status or beliefs. Pet. App. 136a.[8] Since the adoption of the Nondiscrimination Policy in 1990, no student organization – other than CLS – has sought an exemption. *See* JA 220-21 (JSF ¶ 16).

The record evidence uniformly showed that Hastings has applied its open access policy consistently to all organizations. CLS has identified membership provisions in some student organizations' bylaws that, it believes, suggest that only students who share the same interests or goals were permitted to become members. *See* Pet. Br. 12-14. But CLS stipulated in the district court that Hastings applies the Nondiscrimination Policy to all RSOs. JA 221 (JSF ¶ 17). Moreover, CLS cannot point to even one instance of another student group excluding members on the basis of such beliefs. To the contrary, Hastings' Director of Student Services testified that she had seen no registered student organization at Hastings "restrict[ing] its membership based on either students' beliefs or agreement with the group's objectives." JA 350-51.

The case of the La Raza student group is instructive. La Raza's bylaws contain an explicit nondiscrimination provision stating that La Raza will not "discriminate on the basis of race, sex, color, creed, national origin, ancestry, age, sexual

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[8] *See also* JA 172 (Hastings Koinonia); JA 211 (La Raza); Pet. App. 146a (Vietnamese American Law Society); *id.* 119a (Hastings Democratic Caucus); *id.* 129a (Hastings Health Law Journal Development Team); *id.* 110a (Association of Trial Lawyers of America); *id.* 142a (Silenced Right); *id.* 132a (Hastings Motorcycle Riders Club).

orientation, or disability." JA 191. La Raza's bylaws also provide that membership encompasses students of Hastings who are of "Raza background." JA 192. But after Hastings became aware that the La Raza bylaws "could be interpreted as requiring that voting members of the group be of Hispanic descent" notwithstanding the bylaws' express racial nondiscrimination provision, La Raza's officers confirmed that they believed that "any Hastings student may become a voting member of La Raza," JA 351, and pledged to amend the bylaws to make this clear. *See* JA 351-53.

B. The Dispute with CLS.

Petitioner CLS is a nonregistered student organization at Hastings. Following a change in leadership in 2003-04, Petitioner first became affiliated with the national Christian Legal Society ("CLS-National") and then decided to restrict its membership to only those students who share a particular set of religious beliefs.

For ten years, from the 1994-95 academic year to the 2003-04 academic year, Hastings recognized a student group known as Hastings Christian Legal Society or Hastings Christian Fellowship as a registered student organization. *See* JA 222-23 (JSF ¶ 22). From the 1994-95 through the 2001-02 academic years, Hastings Christian Legal Society used a set of bylaws sent to student chapters from CLS-National, and the bylaws provided that Hastings Christian Legal Society would comply with Hastings' Policies and Regulations. *See* JA 223 (JSF ¶ 23), 256.

In the 2002-03 and 2003-04 academic years, this student organization registered as Hastings Christian Fellowship ("HCF"), under a different set of bylaws, which provided that "HCF welcomes all students of the University of California, Hastings College of Law." JA 223 (JSF ¶ 25) (quotations omitted). During this time, "HCF did not have a formal or informal policy of any kind barring gay, lesbian, or bisexual persons from becoming members or officers. Nor did HCF condition membership or officer positions on the basis of a person's religion or their affirmation of a 'Statement of Faith.'" JA 355-56 ¶ 3; *see also* JA 223 (JSF ¶ 25).

At the close of the 2003-04 school year, three students assumed leadership of HCF informally without a vote of the membership, and the new leaders decided to affiliate their student organization officially with CLS-National. *See* JA 225 (JSF ¶¶ 30-31). That decision to associate with CLS-National led to a change in HCF's membership policies. As a condition of becoming formally associated with CLS-National, student chapters must adopt the bylaws prescribed by CLS-National. *See* JA 225 (JSF ¶ 32). The bylaws promulgated by CLS-National for the 2004-05 school year required all members and officers to agree to and sign a "Statement of Faith." JA 226 (JSF ¶ 33). Students who refuse to sign or affirm the Statement of Faith are not permitted to become CLS members or officers and, specifically, cannot vote for or remove officers, amend the group's constitution, or stand for election for an officer position. *See* JA 227 (JSF ¶¶ 35-36). It is CLS's position that what it believes to be "unrepentant

homosexual conduct" is inconsistent with the Statement of Faith and is thus grounds for barring someone from becoming a member or officer. JA 226 (JSF ¶ 34); *see* JA 67-68.

CLS submitted its application for registration, along with its constitution, to the Office of Student Services in early September 2004. *See* JA 227-28 (JSF ¶ 38). Although the submitted constitution prohibited discrimination on the basis of "age, disability, color, national origin, race, sex, or veteran status," it did not bar discrimination based on sexual orientation or religion. Pet. App. 101a.

Shortly thereafter, the Office of Student Services informed CLS that its constitution was not in compliance with Hastings' Nondiscrimination Policy and informed CLS that, in order to become a registered student organization, CLS must open its membership to *all* students regardless of religious beliefs or sexual orientation. *See* JA 228 (JSF ¶¶ 39-40). CLS's Vice President responded with a letter prepared by CLS-National, requesting "an exemption from the religion and sexual orientation portions of the Nondiscrimination Compliance Code" because "agreement with [Hastings' Nondiscrimination Policy] is inconsistent with the CLS chapter's Statement of Faith and its membership and leadership decisions." JA 281; *see also* JA 228 (JSF ¶ 40).

Because CLS refused to include language in its constitution indicating that it would comply with Hastings' Nondiscrimination Policy, Hastings informed CLS that it could not become a registered

student organization; in doing so, Hastings made clear that "[i]f CLS wishes to form independent of Hastings[, Hastings] would be pleased to provide the organization the use of Hastings facilities for its meetings and activities," but that Hastings was "precluded from using student fees to fund [CLS] activities until CLS bylaws comport with the Hastings nondiscrimination compliance code." JA 294. As a result of CLS's failure to become a registered student organization, Hastings withdrew certain travel funds that had been set aside prior to CLS's submission of its registration paperwork. *See* JA 229 (JSF ¶ 42).

While not eligible for subsidies and benefits provided by the law school to RSOs, CLS met and remained active on campus as a nonregistered student organization. During the 2004-05 school year, CLS held weekly Bible studies, hosted a beach barbeque, a Thanksgiving dinner, a campus lecture on the Christian faith and legal practice, several fellowship dinners, an end-of-the-year banquet, and also invited Hastings students to attend Good Friday and Easter Sunday church services with the group. *See* JA 229 (JSF ¶ 44). Nine to fifteen students regularly attended CLS events. *See* JA 230 (JSF ¶ 48).

Although Hastings had informed CLS that it was free to use Hastings facilities for meetings, CLS never requested use of Hastings facilities during the 2004-05 school year. *See* JA 232 (JSF ¶ 58). Hastings again informed CLS that it was able to use Hastings facilities for meetings in the 2005-06 school

year. *See* JA 233 (JSF ¶ 61). In general, nonregistered student organizations may apply to use Hastings facilities, and notwithstanding CLS's contrary suggestion, Hastings has never indicated that it would charge CLS a fee for meeting on campus. Pet. Br. 11-12; *see* JA 294, 300. Further, CLS was able to use chalkboards and generally available bulletin boards to make announcements, just like any other non-RSO, in addition to using online communications such as Yahoo! chat groups. JA 233 (JSF ¶ 62), 300; Pet. App. 48a.

C. Procedural History

CLS commenced this action in 2004, shortly after Hastings informed CLS that it could not become a registered student organization because it refused to comply with Hastings' Nondiscrimination Policy. CLS's First Amended Complaint asserted that "[b]y enacting and enforcing the Policy on Nondiscrimination forbidding [CLS] to discriminate on the basis of religion or sexual orientation [and] refusing to recognize [CLS's] constitutional right to an exemption from said policy," Hastings had violated CLS's right to freedom of association and free speech under the First Amendment. JA 75-76. CLS also claimed a violation of its rights to free exercise of religion and to equal protection. *See* JA 78-79.

After CLS filed its First Amended Complaint, Hastings Outlaw filed a motion to intervene, on the basis that it "seeks to protect the interests of its members and of other gay, lesbian and bisexual students who wish to attend law school in an

environment free from discrimination and who wish to have an equal opportunity to become members of any registered student organization without regard to sexual orientation." Hastings Outlaw's Mot. to Intervene as Party Def. 1-2. The district court granted the motion. JA 98.

On cross-motions for summary judgment, the district court denied CLS's motion and granted the motions filed by Hastings and Hastings Outlaw. The court began by noting that the Policy, like other regulations prohibiting discrimination, "regulates conduct, not speech." Pet. App. 24a. The court went on to conclude that Hastings had created a limited public forum and that, even if Hastings' Nondiscrimination Policy regulated speech directly, the Policy was valid under forum analysis because restrictions on access to a limited public forum are permissible so long as they are viewpoint neutral and reasonable. Pet. App. 30a.

Citing to the parties' Joint Stipulation of Facts, the district court acknowledged that Hastings "requires student organizations to comply with the Nondiscrimination Policy and to *open their membership to all students*." Pet. App. 30a (emphasis added). The court concluded that the Policy was viewpoint neutral, specifically rejecting CLS's argument that Hastings' enforcement of its Policy discriminated against a Christian viewpoint: "there is no evidence in the record to [indicate] that Hastings will not allow CLS to become a recognized student organization because of CLS's religious perspective. In fact, the evidence in the record

demonstrates otherwise." Pet. App. 35a-56a. The court also concluded that Hastings' Policy is a reasonable regulation in light of the forum's purpose of "further[ing] students' education and participation in the law school environment and . . . foster[ing] students' interests and connections with their fellow students." Pet. App. 37a.

The court next rejected CLS's claim that the Nondiscrimination Policy violated its freedom of expressive association.

> 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. If CLS wishes to participate in the forum and be eligible to receive funds, it must comply with Hastings' Nondiscrimination Policy. . . . CLS 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 2004-05 academic year.

Pet. App. 42a. The district court also rejected CLS's claims that the Policy violated its rights to free exercise of religion or to equal protection. *See* Pet. App. 63a-69a.

In a two-sentence unpublished memorandum, the Ninth Circuit affirmed, observing that "[t]he parties stipulate that Hastings imposes an open membership rule on all student groups." Pet. App. 2a. Citing to its decision in *Truth v. Kent School District*, 542 F.3d

634 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2866 (2009), the Ninth Circuit concluded that Hastings' requirement of open membership is "viewpoint neutral and reasonable."

SUMMARY OF ARGUMENT

CLS's effort to escape application of this Court's well-established limited public forum analysis is based in large part on attempting to evade its express admission in the district court and on appeal that Hastings applies the Policy to forbid discrimination on the basis of *any* status or belief. CLS had an opportunity in the district court to create a factual dispute as to how Hastings interprets or enforces its own Policy – but instead CLS stipulated to the open access interpretation of the Policy. That is the agreed-upon record before the Court, and that record plainly establishes that Hastings' open access rule is both viewpoint neutral and reasonable.

This Court has always recognized a university's right to craft reasonable, viewpoint-neutral rules regarding the benefits it provides to students and their groups in a university-created and university-funded student activities program. In this case, Hastings has articulated a strong interest in using its resources to support only those groups that enhance the educational and social opportunities available to students through allowing all students to join, regardless of their status or beliefs. Under long-established doctrine, such a restriction on funding and recognition does not abridge the First

Amendment rights of those groups that choose not to comply with the rules of the program.

By subsidizing student group activities, Hastings has created a forum for speech. But it is not an open forum where all members of the general public, or even all campus groups, are invited to participate and speak. To be eligible for a limited set of benefits provided by the law school, groups must be non-commercial, must be limited to students, and must permit any Hastings student to become a member.

Such rules are permissible as long as they are viewpoint neutral and reasonable. *See Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995). In its brief, CLS misreads *Healy v. James*, 408 U.S. 169 (1972), and *Widmar v. Vincent*, 454 U.S. 263 (1981), as suggesting that any restriction on access to a university's forum for recognized student groups is somehow subject to strict scrutiny as a "prior restraint" on speech. Pet. Br. 21. But applying that standard would undermine the University's ability to place the kind of viewpoint-neutral conditions on university-supported campus groups that this Court has always upheld. *Rosenberger*, 515 U.S. at 834-35; *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233-34 (2000).

Here, Hastings' open access Nondiscrimination Policy is clearly reasonable and viewpoint neutral. The Policy requires all registered student groups to accept all students regardless of status or belief, and the Policy is supported by Hastings' interest in promoting open participation within groups by all

students. While Hastings' Policy is not the only conceivable or permissible means of providing support to student groups, it is a reasonable way of doing so. Indeed, notwithstanding CLS's speculation about "hostile takeover" scenarios at other schools, at Hastings, dozens of groups continue to meet and operate around common interests without the need to exclude some students from membership.

The Court's compelled speech and association cases are completely inapposite in this context. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). By providing support for some groups as part of a limited public forum, Hastings is not attempting to force CLS to admit students who do not share its beliefs. Hastings is simply applying reasonable, viewpoint-neutral restrictions on access to monetary subsidies and other benefits provided by the school. CLS remains free, as a nonregistered organization, to meet on campus, to exercise its right to expressive association, and to exclude students on the basis of belief or conduct.

For this reason as well, CLS fails to show that Hastings' Policy of denying it a subsidy effectively deprives it of its right to expressive association under the Court's conditional funding cases. Hastings is not coercing CLS into abandoning its speech or expression rights by setting conditions on the limited set of benefits that CLS may choose to receive. Indeed, the record shows that despite CLS's non-RSO status, attendance at its events grew, and CLS

continued to speak and hold activities in the year after it refused to comply with the Nondiscrimination Policy. On this record, Hastings denial of a subsidy cannot remotely be seen as a coercive suppression of speech or associational rights.

At bottom, in seeking a "constitutional right to an exemption" from Hastings' Policy, JA 75-76, CLS seeks a rule that would grant special privileges for student groups, or some subset of groups, that wish to exclude members on the basis of belief, to take advantage of university facilities, means of communication, and funding despite a contrary university policy. Doing so would run contrary to the Court's settled forum jurisprudence and would limit the university's ability to allocate its resources in a manner that the university determines would maximize educational opportunities for all of its students. Moreover, a right to such an exemption, if recognized, would have no apparent limits. Any group could claim a right to discriminate on any basis while retaining its status as an RSO, and would thus have a constitutional entitlement to university-provided and university-funded benefits despite its discriminatory membership policy.

ARGUMENT

I. The Court Should Not Reach Issues Not Properly Presented in This Case.

As explained further in Parts II and III, Hastings' Nondiscrimination Policy, as applied pursuant to the parties' joint stipulation, passes First Amendment muster. CLS's contrary argument is premised on its contention that Hastings enforced its Policy in a

different way – that only religious groups were unable to restrict membership based on belief. Pet. Br. 36-37. But this assertion is flatly contradicted by CLS's admission in the Joint Stipulation, in the district court and in the Court of Appeals that Hastings enforced its Policy by forbidding any exclusion based on status or beliefs. CLS's attempt to create an issue of fact with its own previous admission is procedurally improper. And it is all the more dangerous here, where CLS invites the Court to wade into issues of religious and sexual orientation discrimination that have never been, and emphatically are not, raised by the record in this case.

In the district court, as noted *supra*, CLS filed a stipulation of undisputed facts, in which it agreed that "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 (JSF ¶ 18). By filing that stipulation, CLS conceded under the district court's Local Rules that it was an "undisputed fact[]." N.D. Cal. R. 56-2. In its district court briefing, CLS similarly conceded that Hastings "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" before registering the student organization. Pl.'s Reply Mem. in Supp. of Mot. for Summ. J. & in Opp'n to Def.'s Cross-Motions for Summ. J. at 3 (internal quotations and ellipses omitted). In fact, during the district court's hearing on the parties' motions for

summary judgment, CLS – quoting from the Joint Stipulation of Facts – stated that "[i]t's important to understand what Hastings' policy is": that registered student organizations are required to "allow any student to participate, become a member or seek leadership positions in the organization regardless of their status or beliefs." Excerpts of Record Filed Before the Ninth Circuit 628 (internal quotations omitted).

In the Ninth Circuit, CLS similarly acknowledged that Hastings has interpreted the Policy "such that student organizations must allow *any* student, regardless of their status, beliefs, or conduct to become voting members and leaders of their group." Br. of Appellant 10. Significantly, even in its petition for writ of certiorari, CLS conceded that "*[t]he material facts of this case are undisputed*" and acknowledged that "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.'" Pet. at 2, 4 (quoting JSF) (emphasis added).

CLS now argues, for the first time in its merits brief, that Hastings' "justification for denying recognition to CLS has vacillated between two dramatically different accounts of its Nondiscrimination Policy" – the stipulated open access policy and application of the "Policy's written terms" in which groups are only precluded from discriminating "on the basis of a finite list of forbidden categories" including religion and sexual orientation. Pet. Br. 19-20. It is undisputed that

CLS's constitution does not comport with either interpretation of the Nondiscrimination Policy, *see* JA 277, 294, 295, so the question CLS raises here is *what the Policy means*. While CLS now claims that it understood the Policy as preventing exclusion based only on "forbidden categories," its admission in the trial court – after it had the opportunity to litigate the issue fully – was that the Policy meant no discrimination on the basis of status or belief.[9]

It is this failure to identify a factual dispute on the meaning of the Policy in the courts below that undermines CLS's attempts to do so now, as the courts widely recognize that "a stipulation of fact that is fairly entered into is [generally] controlling on the parties and the court is bound to enforce it." *Fisher v. First Stamford Bank & Trust Co.*, 751 F.2d 519, 523 (2d Cir. 1984).[10] This is because "formal

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[9] For example, CLS points to one ambiguous statement in Hastings' Answer filed early in the case that, it believes, suggests that groups could exclude members based on belief. *See* JA 93. But that statement says nothing about permitting groups to exclude members, and in fact states that CLS was subject to the same rules as any other type of student organization. If CLS thought it truly inconsistent with later testimony, it should not have stipulated to facts based on the later testimony.

[10] *See also Block v. City of Los Angeles*, 253 F.3d 410, 419 n.2 (9th Cir. 2001) ("A party cannot create a genuine issue of material fact to survive summary judgment by contradicting his earlier version of [stipulated] facts."); *Keller v. United States,* 58 F.3d 1194, 1198 n.8 (7th Cir. 1995) (stipulations made by a party "may not be controverted at trial or on appeal"); *Brown v. Tennessee Gas Pipeline Co.*, 623 F.2d 450, 454 (6th Cir. 1980) ("Under federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court.");

concessions in the pleadings in the case or stipulations by a party or counsel . . . have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." 2 Kenneth S. Brown, *McCormick on Evidence* § 254, at 181 (6th ed. 2006) (footnote omitted). *Cf. Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.").

In light of the general rule that parties are bound by their factual admissions, this Court has declined to address challenges to factual issues to which the parties have stipulated in the lower court. In *Southworth*, the parties stipulated that university funding for registered student organizations is "administered in a viewpoint-neutral fashion." 529 U.S. at 224 (quotation marks omitted). When respondents in the action attempted to challenge this factual issue, pointing to university policy statements stating that such funding could not be used for political or lobbying purposes, this Court declined to address the challenge, noting that "both parties entered a stipulation to the contrary at the outset of this litigation." *Id.* at 226.

Even more fundamentally, the Court has properly been reluctant to address factual disputes resolved by factual stipulations below based on the general

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Fenix v. Finch, 436 F.2d 831, 837 (8th Cir. 1971) ("It is well settled that stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them.").

principle that, absent unusual circumstances, the Court will not address an argument raised for the first time in this Court. *See Kennedy v. Plan Adm'r for Dupont Sav. & Inv. Plan*, 129 S. Ct. 865, 869 n.2 (2009) (declining to address argument challenging a factual issue stipulated in district court and stating that the challenging party "did not raise this argument in the Court of Appeals, and we will not address it in the first instance"); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]."). As the Court has also made clear, arguments raised for the first time in an opening brief on the merits should not be addressed absent "unusual circumstances." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (quotation marks omitted).

CLS challenges, for the very first time in its merits brief here, the very fact to which it had stipulated: namely, that Hastings requires RSOs to accept any Hastings student regardless of status or beliefs. By stipulating to Hastings' interpretation and enforcement of its Policy, CLS essentially withdrew that fact from issue before the lower courts, precluding further evidentiary development of that factual issue. More broadly, the fact that CLS stipulated to this point shows that it was unable to create an issue of fact about the meaning and application of the Policy.

Thus, the Court has no basis to decide CLS's hypothetical religious discrimination claim here, as Hastings' representatives stated unequivocally that

religion was not singled out over any other belief as an impermissible ground for exclusion. To the extent that CLS now suggests that Hastings acted with some impermissible motive, that is a factual assertion at best that is long abandoned and would require further factual development below.

CLS also seeks to evade the stipulated record as to the Policy's meaning in order to create an asserted conflict between the Policy's prohibition on sexual orientation discrimination and the First Amendment that does not exist on the facts of this case. CLS asserts that it would not have sought to exclude gay or lesbian students based on their status but rather on "a conjunction of conduct and the belief that the conduct is not wrong," Pet. Br. 36, in an attempt to argue that conditioning university funding and other support on a group's agreement not to discriminate based on sexual orientation violates CLS's expressive association rights. *Id.* 39-40. But again, the parties stipulated in the district court that the exclusion of students on the basis of *any* status or belief is forbidden. The Policy at issue in this case does not distinguish between exclusion based on sexual orientation and exclusion based on one's beliefs about the morality of certain sexual conduct. Neither kind of exclusion is permitted.

Moreover, CLS was not denied recognition because it expressed disapproval of certain beliefs about moral conduct, but because it expressly reserved its right to discriminate on the basis of religion and sexual orientation. CLS chose to omit from its constitution any promise not to discriminate

on the basis of sexual orientation or religion, knowing that it would fail to comply with the Policy. *See* Pet. App. 101a (proposed constitution pledged not to discriminate on the basis of "age, disability, color, national origin, race, sex, or veteran status" only). Because CLS specifically and pointedly reserved the right to discriminate based on sexual orientation, the issue of *why* it choose to do so – and whether any actual exclusion of gay or lesbian students would have been based on conduct or belief rather than status – is not presented here.[11]

Any concern about the constitutional validity of laws barring discrimination on the basis of religion or sexual orientation should be raised and decided in other contexts if and when the issue is actually presented. CLS's efforts to interject those issues into this case are baseless. To the extent that the Court granted certiorari to address these questions based on an interpretation of the Policy entirely different from that stipulated to and addressed below, the writ should be dismissed as improvidently granted.

[11] These issues are discussed at greater length in the Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., et al.

II. Hastings' Imposition of Reasonable, Viewpoint-Neutral Restrictions When Subsidizing Expressive Activities Does Not Infringe CLS's First Amendment Rights.

A. Hastings Has Created a Limited Public Forum.

It is undisputed that in providing certain student organizations particular communication channels, funding options, and priority to use school facilities, Hastings has subsidized a "forum" for those groups' speech activities. But CLS's argument starts from a flawed premise about that forum: that Hastings' provision of facilities and benefits to RSOs is designed to create an "open speech forum," Pet. Br. 2. CLS assumes that when a university provides some benefits to student groups, it creates an unrestricted forum for speech by any and all groups, with no room for the university to impose limitations on the use of university resources based on its own legitimate interests. *See, e.g.*, *id.* 57 (arguing that the "entire purpose" of Hastings' RSO benefits is to "facilitate and encourage 'a diversity of views from private speakers'") (citation omitted). Thus, CLS suggests that the exclusion of any particular group, for any reason, from the limited support that Hastings provides for registered student organizations is automatically subject to strict scrutiny. *Id.* 21-22.[12]

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[12] This mischaracterization also drives the arguments of a number of *amici*. *See*, *e.g.* Br. of Michigan, et al. at 17 (describing support for RSOs as a "designated public forum" that must be open to all "public discourse"); Brief of Am. Islamic

That legal analysis is fundamentally flawed. By restricting eligibility to groups comprised only of students, that are non-commercial, and that allow any Hastings student to participate, Hastings has indisputably created a "limited" forum under the Court's governing precedents. That is, Hastings has designated otherwise nonpublic resources (for example, classroom space and law school funds) for limited expressive use by private parties for a particular purpose. *See Rosenberger,* 515 U.S. at 829; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 818-19 (1985). The First Amendment provides the government ample discretion not only to determine the purpose of the forum, but also to impose restrictions on speech in the forum, as long as they are "reasonable in light of the purpose served by the forum," *Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (quoting *Cornelius*, 473 U.S. at 806), and do not discriminate on the basis of the viewpoint of the speech. *Rosenberger*, 515 U.S. at 829.[13]

Conf., et al. at 3 (arguing that any exclusion from forum must be narrowly tailored to a compelling interest). Of course, if the State of Michigan or other states wish to create open forums for all groups, it is within their discretion to do so, but that does not mean that Hastings has in fact done so.

[13] While the terminology has varied over the years, "limited public forum" is used here as in *Good News Club.*, 533 U.S. at 106, and *Rosenberger*. The key point is that when the government opens public property to a limited range of expressive activity to serve other legitimate governmental

In fact, Hastings' program is similar in type to the limited forum that the Court recognized as established by the University of Virginia in *Rosenberger* – though in this case, as explained below, there is no impermissible viewpoint discrimination. Like the University of Virginia, Hastings provides limited additional benefits to RSOs whose activities "are related to the educational purpose of the University" in order "to enhance the University environment." 515 U.S. at 824 (quotation marks omitted). Also like the University of Virginia, Hastings requires groups that wish to take advantage of this subsidy to obey its procedural rules and "pledge not to discriminate" in their membership. *Id.* The Court in *Rosenberger* analyzed the university's support of such organizations as a limited public forum and made clear that "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for *certain groups* or for the discussion of certain topics." *Id.* at 829 (emphasis added).

In short, there is no basis for CLS to assert that Hastings has created an "open forum" to indiscriminately fund speech by any campus group. That assertion ignores Hastings' legitimate interest in regulating access to law school funds, classroom space, and other resources for educational purposes. *See Lamb's Chapel*, 508 U.S. at 390 (school district, "like the private owner of property, may legally

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purposes, it is constrained only by the requirements of viewpoint neutrality and reasonableness.

preserve the property under its control for the use to which it is dedicated"). Hastings' limited support of RSOs is far afield from government maintenance of a truly open forum such as a park or fair ground, where the government has indiscriminately opened up its property to any speaker, *e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), or of a public street open to a parade. *E.g., Hurley,* 515 U.S. at 568-69. Indeed, as the Court recognized in *Widmar*:

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.

454 U.S. at 268 n.5.

B. Hastings' Policy is Viewpoint Neutral.

Consistent with the principles governing a limited public forum, the Court has always held that a public university may impose viewpoint-neutral limitations on access by student groups that relate to its legitimate educational goals. *See Healy*, 408 U.S. at 188. For example, the university may unquestionably limit access to a forum it creates to students. *Widmar*, 454 U.S. at 267-68 n.5.[14] The

[14] Similarly, Hastings separately restricts the ability of RSOs to admit non-student members, *see* Pet. App. 83a, but CLS does

university may also limit the topics discussed in such a forum to those germane to the academic or educational purposes of the university, if done in a viewpoint-neutral manner. *Id.* at 276; *Rosenberger*, 515 U.S. at 829. And a university is entitled not to subsidize student associations that manifest an intent to engage in *conduct* that "violate[s] reasonable campus rules or substantially interfere[s] with the opportunity of other students to obtain an education." *Widmar*, 454 U.S. at 277; *see Healy*, 408 U.S. at 193-94 ("[T]he benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any campus rules with which it disagrees").

Likewise, time and again this Court has held that anti-discrimination requirements that prohibit discrimination on the basis of status and belief categories constitute "permissible content-neutral regulation of conduct." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (ban on discrimination in public accommodations "does not aim at the suppression of speech" nor does it "distinguish between prohibited and permitted

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not suggest that this rule somehow unconstitutionally restricts its right to associate with non-student members. If CLS's argument that Hastings has created an open forum that triggers strict scrutiny were correct, *any* membership regulation of registered student groups would be subject to scrutiny as an associational speech restriction, but the Court has never questioned such reasonable regulations. *See* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1940 (2006).

activity on the basis of viewpoint."); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (discrimination ban "makes no distinction[ ] on the basis of the organization's viewpoint"); *see also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006) (noting that open membership policies are viewpoint neutral). Such conduct-regulating requirements apply equally to everyone and thus do not disfavor any particular group or viewpoint.

CLS relies on cases like *Healy*, *Widmar* and *Rosenberger* in an effort to support treating Hastings' neutral Policy as an invasion of its First Amendment rights. *See* Pet. Br. 21. But in none of these cases did the Court suggest that a university that facilitates some expressive activity by student groups automatically creates a virtual "speakers' corner" where any restrictions on access are akin to a form of prior restraint. Rather, in *Healy* and *Widmar*, the university affirmatively sought to exclude the disfavored groups from campus entirely. *See Healy*, 408 U.S. at 176, 181; *Widmar*, 454 U.S. at 265 n.3. And each of those cases involved express viewpoint discrimination. In *Healy*, the university attempted to exclude the local chapter of Students for a Democratic Society because the university's president objected to the national organization's "philosophy" which he believed to be "abhorrent" and shared by the local chapter. 408 U.S. at 187. In *Rosenberger* and *Widmar*, the universities adopted policies expressly excluding religious speech from the limited forums they created. *Rosenberger*, 515 U.S.

at 837-38; *Widmar,* 454 U.S. at 273. This type of exclusion constitutes impermissible discrimination against religious viewpoints because it denies support only to religious viewpoints while permitting funding for viewpoints with non-religious perspectives. *Rosenberger*, 515 U.S. at 832.

Likewise, all of the gay student organization cases that CLS cites involved attempts to exclude such organizations from campus because officials objected to their specific viewpoint – promotion of tolerance and acceptance of homosexuality (as opposed to moral condemnation).[15] The lesson of all of these cases is that courts must be on guard against university discrimination based on *any* disfavored viewpoint, whether of religious student groups or other student groups.

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[15] *See Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 367 (8th Cir. 1988) (organization "met all objective criteria for funding" but was denied funds due to its viewpoint); *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 856-57 (8th Cir. 1977) (denial of funding due to objections to organization "pro homosexual" viewpoint); *Gay Student Servs. v. Tex. A&M Univ.*, 737 F.2d 1317, 1327 (5th Cir. 1984) (denial of funding because of objection to organization's "philosophy and goals"); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 165 (4th Cir. 1976) (denial of funding due to fear that organization's viewpoint would spread); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974) (restriction imposed due "in large measure . . . [to] the content of the GSO's expression"); *Gay Activists Alliance v. Bd. of Regents of the Univ. of Okla.*, 638 P.2d 1116, 1122 (Okla. 1981) (same); *accord Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 526-27 (3d Cir. 2004) (impermissible to exclude group simply because particular viewpoint is "divisive or controversial").

But all those cases are a far cry from the neutral rule applied by the Policy here, which forbids any discrimination on the basis of status or belief, and thereby does not discriminate based on the specific perspective of any particular speaker. CLS does not seriously contest this point, arguing only that it is "not . . . clear that the all-comers policy is viewpoint neutral," Pet. Br. 51, and that it "infringes the rights of all student groups," *id.* 49. Moreover, the fact that CLS wishes to exclude some students from membership, while other groups do not, does not make the Policy any less viewpoint neutral. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *United States v. O'Brien*, 391 U.S. 367, 381-82 (1968) (upholding a law prohibiting the willful destruction of draft cards even though most people violating the statute opposed the Vietnam War).

CLS also argues that because Hastings' Policy will allegedly disadvantage small and unpopular groups – a proposition for which there is no record evidence, *see infra* at 40 – campus debate will be systematically skewed in a way that raises First Amendment concerns. *See* Pet. Br. 51 (citing *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001)). But *Velazquez,* like the other cases on which

CLS relies, was a case of viewpoint discrimination: the challenged restriction was held unconstitutional because it "permit[ted] Congress to define the scope of the litigation it funds to exclude certain vital theories and ideas," 531 U.S. at 548, and was "aimed at the suppression of ideas thought [to be] inimical to the Government's own interest." *Id.* at 549. Here the Policy is not aimed at ideas to be suppressed; it is a rule that simply requires all subsidized groups to be open to all students without reference to content or subject matter, and the effect on the range of ideas expressed, if any, is incidental.

As CLS admits, the remarkable principle for which it advocates here is not limited to religious groups' sincerely held beliefs, and not limited to exclusion on the basis of religion or sexual orientation. If CLS prevails in its argument for heightened scrutiny here, all sorts of groups could claim a constitutional right to make all sorts of exclusions, for any reason or no reason at all, while receiving university support. *See*, *e.g., Dale*, 530 U.S. at 653-54 (associations other than religious associations entitled to deference regarding whether acceptance of openly gay and lesbian members would interfere with expression); Pet. Br. 34 (arguing that Hastings must defer to a group's own view of whether admitting a particular member would effect the group's expression). Nothing in *Healy*, *Widmar*, or any other case suggests that the First Amendment, while permitting a public university the ability to regulate the *content* of speech in a limited public forum in a viewpoint-neutral manner, somehow restricts its ability to enforce reasonable,

viewpoint-neutral conditions on the membership policies of student organizations that wish to receive the benefits of the forum.[16]

C. Hastings' Viewpoint-Neutral Conditions On Registered Student Organizations Are Reasonable.

In addition to being plainly viewpoint neutral, Hastings' Policy is also reasonable "in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius,* 473 U.S. at 809. In this case, as the District Court found, "Hastings' purpose in recognizing and funding student organizations is to further students' education and participation in the law school environment and to foster students' interests and connections with their fellow students." Pet. App. 37a; *see also* JA 349. Hastings' open access Policy reasonably advances Hastings' legitimate objectives.

First, the Policy advances the goal of providing every student the benefit of an equal chance to

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[16] Similarly, CLS's argument that Hastings has somehow violated CLS's Free Exercise rights by targeting its religion also fails. It is well settled that Hastings need not provide CLS with all the benefits of official recognition, while at same time exempting it from the neutral requirements of the Nondiscrimination Policy simply because CLS is a religious group. *See Employment Division v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)[.]") (internal quotation marks omitted).

participate in all officially supported extracurricular activities, as Hastings seeks to promote "opportunities to pursue academic and social interests outside of the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience." JA 349 ¶ 4. Hastings has reasonably concluded that neither a student's status nor beliefs should limit the range of school-supported, extracurricular options available to any particular student, and has decided to implement this policy decision through a clear, easily administered open access rule. Hastings' Policy thus ensures that all students have an equal opportunity to participate and take advantage of participation in the student groups it subsidizes. The Policy is a reasonable means of compliance with the State of California's antidiscrimination laws, which forbid certain kinds of discrimination in state funding decisions. *See* CAL. GOV'T CODE § 11135; CAL. EDUC. CODE § 66270. Hastings' interest also extends beyond merely protecting students from discrimination against particular groups of persons, to a strong interest in providing students with equal access to extracurricular educational and social activities that Hastings supports.[17]

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[17] Hastings does not bar exclusion on the basis of neutral conditions unrelated to status or belief, such as the requirement to pay dues or attend a meetings, or (in the case of journals) evaluation of grades or a writing competition. All students still have the opportunity to participate, even if there are some restrictions on entry.

Separately, Hastings has also determined that its open access Policy allows students to experience and engage in dialogue with a wide variety of ideas and points of view advanced by individuals with diverse perspectives. JA 349. That reflects a reasonable judgment that the educational benefits of viewpoint diversity are best obtained by permitting students holding a wide range of beliefs to meaningfully participate in any student group, rather than encouraging individual student groups to wall themselves off from discussion and debate. The Policy thus serves the university's interest in promoting exposure to different viewpoints as part of its educational mission. *See Southworth,* 529 U.S. at 233 ("The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.").

Third, in addition to the above goals, Hastings' Policy avoids entangling Hastings with the internal operations of the student organizations it supports. JA 349. By requiring uniform compliance with the Policy by all RSOs, rather than allowing the sort of case-by-case exception that CLS seeks here, Hastings ensures that its administrators are not called on to make a subjective judgment about whether a challenged exclusion was based on sincerely held beliefs. While CLS here is principally concerned with its members' religious beliefs, other groups may profess racially discriminatory beliefs, *e.g.*, *Bob Jones University v. United States*, 461 U.S. 574, 580

(1983), or wish to prohibit women from holding leadership roles. By adopting a blanket open membership requirement, Hastings subsidizes only those groups that are open to all its students without the need for entangling itself in evaluating the legitimacy and sincerity of such claims for an exemption on an organization-by-organization basis.

As should be apparent from the above, Hastings' purpose in adopting the Policy is not to "eliminat[e] the desire or ability of co-religionists to flock together," Pet. Br. 43, nor is it "forcing" CLS or any other group to change its religious beliefs or "renounce [its] views that homosexual or other disputed sexual conduct is wrong." *Id.* 44. Persons sharing common beliefs remain fully entitled to associate together under Hastings' Policy. To the extent that they wish to exclude other students, they remain entitled to do so, and to meet, worship and speak on or off campus, but without the benefit of Hastings' subsidy.

To be sure, other law schools and universities may have different goals in supporting and registering certain student organizations and different views on how best to meet them, and may choose to adopt a different policy that permits exclusion by some or all groups. But a university has ample discretion in making such policy decisions about how to deploy its resources, as long as the chosen policy is viewpoint neutral in substance and application. Hastings' open membership Policy "need not be the most reasonable or the only reasonable" way of furthering the educational

objectives that Hastings seeks to promote. *Cornelius*, 473 U.S. at 808. Whether a policy requiring openness or one permitting exclusion better promotes Hastings' educational goals is a question of policy, not a matter of constitutional requirement.

CLS responds that Hastings' decision to recognize only those student organizations with non-exclusionary membership policies is irrational because it "defeats the very purpose of recognizing any group as a group in the first place." Pet. Br. 53. But the record here makes clear that is nonsense. A wide variety of groups – including those taking positions likely in the minority on the Hastings campus – can and have been built "around common interests and beliefs" while permitting any interested student to become a member or leader. *Id.* 50.

There is also no evidence that Hastings' Policy has led to or even encouraged the sort of "hostile takeovers" that CLS and its *amici* discuss. *See* Pet. Br. 28-29; Br. of Foundation for Individual Rights in Education 15-20. It is telling that CLS and *amici* must scour for unrelated anecdotes at other universities when Hastings itself has dozens of groups with explicit open membership requirements – including the Hastings Republicans for example – with no evidence of any "hostile takeover." For the ten years that CLS's predecessor organizations operated with an open membership policy, they were not taken over by non-Christians and anti-religionists, although they may have had some

members who held different views on some issues than the leadership of the group in 2004-05. *Supra* at 9. Moreover, CLS remains free to maintain its exclusionary membership policy and to meet and communicate on campus as a non-RSO.

Likewise, there is no evidence that small and unpopular groups are disadvantaged by the increased participation that Hastings' Policy seeks to encourage in groups that it subsidizes. Hastings Outlaw has historically been such a small and unpopular group, but it has found that the benefits of open participation far outweigh its interest in excluding potential members it disfavors. Moreover, the membership, leadership, and mission of a student group may continually change even if a group can exclude members based on a status or belief. What is orthodox for a student group in one academic year may be heretical for the same group in a later year as the membership changes. And if there was actual evidence of small and unpopular groups being "overtaken" or otherwise disadvantaged, Hastings could reasonably decide to change its policies to provide greater encouragement of exclusive groups rather than open participation by students. The First Amendment certainly does not require Hastings to tailor its open access Policy in light of hypothetical and largely imaginary dangers. *Cf. NEA v. Finley*, 524 U.S. 569, 584 (1998) (refusing to hold statute unconstitutional based on "hypothetical application to situations not before the Court") (quotation marks omitted).

D. *Dale* and *Hurley* Are Inapposite.

In arguing that Hastings has infringed its speech and associational rights, CLS relies significantly on the Court's decisions in *Dale* and *Hurley*. But these cases are inapposite, as Hastings is not attempting to force CLS to admit students who do not share its beliefs or to express a certain message. It is merely regulating access to law school funding and other benefits in a limited forum, based on generally applicable, viewpoint-neutral rules.

Dale, and the line of expressive association cases on which it draws, are inapposite because they concern direct regulatory burdens on associational rights. *Dale* involved an effort to compel the Boy Scouts, through application of a New Jersey anti-discrimination law, to admit an openly gay scout leader. 530 U.S. at 654. The Court held that such an application of the law would violate the Boy Scouts' First Amendment rights, reasoning that "[t]he *forced* inclusion of an unwanted person in a group" can infringe the group's expressive association rights if the presence of the person "affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648 (quotations omitted) (emphasis added). The Court concluded that compelling the Boy Scouts to admit a gay scoutmaster would impact the group's message regarding homosexuality and therefore sustained the Boy Scouts' as-applied challenge to the New Jersey law. *Id.* at 654.

CLS faces no such regulatory compulsion here. CLS remains free to exclude members with

dissenting views while continuing to meet and hold events, both on and off campus, as a nonregistered student organization. By contrast, the problem addressed in *Dale* was a true case of compelled association: for the Boy Scouts to operate as a group in New Jersey, the group would have had no alternative but to accept leaders with views with which it disagreed. *See Dale*, 530 U.S. at 659 (state law "directly and immediately affect[ed]" the Boy Scouts' associational right to exclude an unwanted member). That struck at the heart of the First Amendment interest that underlies expressive association claims: that "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others," but "[i]f the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) ("*FAIR*").

CLS argues that, if anything, the rule in *Dale* is even more applicable here because in *Dale* "it was disputable whether the principles of the Boy Scouts were genuinely opposed to homosexual conduct," and CLS is much more of an expressive association than the Boy Scouts. Pet. Br. 45. This argument misses the point entirely. Hastings' Policy does not distinguish between organizations based on how "purely" expressive their activities are, and CLS's ability to meet and speak is not uniquely disadvantaged because it is more or less expressive. CLS also remains free to express itself as a religious organization, while excluding any members it wishes

on the basis of religion, without interference from Hastings.

Similarly, CLS's reliance on *Hurley* to suggest that Hastings is somehow forcing CLS to convey a message with which it disagrees, Pet. Br. 34, 45, is particularly misplaced. In *Hurley*, parade organizers participating in an open forum were forced to convey a specific message through the inclusion of a pro-gay and lesbian group's display in a St. Patrick's Day parade. 515 U.S. at 562-63. The Court ruled this to be impermissible compelled speech. *Id.* at 581. Here, however, Hastings is enforcing a neutral membership rule as a condition of obtaining access to the benefits of a limited forum. That does not compel CLS to speak, much less to convey any particular message.

As the District Court aptly observed: "Hastings is not ordering CLS to admit certain members . . . . Rather, Hastings is merely imposing a condition of participation in certain aspects of the forum on campus." Pet. App. 54a. Absent evidence of a coercive effect on a group's ability to associate, there is no First Amendment violation.

III. Hastings' Decision Not to Subsidize CLS's Expressive Activities Does Not Amount to Coercive Suppression of Those Activities and Does Not Compel Association.

A. Hastings' Policy Must Be Analyzed as a Refusal to Subsidize, Not as a Direct Restriction on Expressive Activity.

As explained above, CLS's argument that it is constitutionally entitled to receive benefits from Hastings, while receiving a special exemption from the reasonable, viewpoint-neutral conditions that Hastings imposes on those benefits, finds no basis in the Court's forum jurisprudence governing the subsidy of expressive activity. CLS's argument that Hastings' viewpoint-neutral Policy of denying it a subsidy effectively deprives it of expressive association rights similarly fails under the Court's line of decisions involving conditional public funding of speech activities. Pet. Br. 54-55. The Court's previous decisions make clear that when the government spends money, it is free to impose reasonable viewpoint-neutral conditions on those expenditures, as long as the conditions do not coercively suppress expressive activity. *See FAIR*, 547 U.S. at 68; *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996) (analysis applies to conditions on "users of public facilities").

Thus, the Court has upheld Congress's decision to condition certain federal subsidies on the recipient libraries' implementation of filtering software limiting the availability of adult content via internet

terminals. *United States v. Am. Library Ass'n,* 539 U.S. 194, 211-12 (2003) ("*ALA*") (plurality). Likewise, the Court has approved a scheme that conditioned certain nonprofit tax exemptions on the recipient refraining from lobbying activities. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 550 (1983). And the Court has upheld a statute excluding students pursuing degrees in theology from a state-funded scholarship program. *Locke v. Davey*, 540 U.S. 712, 720-21 (2004). In each of these cases the government refused to fund expressive activities that it plainly could not have directly suppressed. As the Court noted in *Regan*, such a decision might create an incidental burden on expressive activities by denying a speaker the resources to engage in his or her desired level of expression, 461 U.S. at 549-50, but the decision not to subsidize the exercise of First Amendment rights does not violate the First Amendment. *Id.* at 546.

B. Hastings' Withholding of Benefits Does Not Prevent CLS From Exercising Its Speech or Associational Rights.

In this case, CLS cannot reasonably contend that denial of the limited benefits of RSO status prevents it from engaging in expressive activities or associating only with members of its choice. True coercion in this context would be akin to a university effectively forbidding a student group to meet or speak on campus by denial of a benefit. But the record here shows that CLS, far from being effectively kicked off campus once it was denied RSO status, succeeded and flourished.

Hastings has carved out certain benefits that it provides RSOs beyond those accorded to any other student or group of students. RSOs have the ability to apply for office space, a voice mailbox, and a fiscal services account, and to apply limited student activity and travel funding, though such benefits are not guaranteed. *Supra* at 4-5. RSOs also receive Hastings email addresses as well as the privilege of using the Hastings name and appearing on the school's website. *Id.* Thus, while Hastings does not endorse any RSO's message, RSOs in this way are permitted to affiliate themselves with Hastings. *Id.*

CLS here focuses not on those benefits, but on others that it broadly characterizes as "the customary means by which student organizations communicate with the student body," Pet. Br. 12, and its "legal right to meet on the premises of the law school." *Id.* 11. But these characterizations go too far. In terms of communications, Hastings provides RSOs access to certain bulletin boards, a weekly Hastings newsletter, and Student Information Center space, eligibility to send out certain mass emails using a Hastings email address, and participation in the student organization fair. Aside from the bulletin boards, all of these are properly reserved for organizations in some way affiliated with Hastings; it would hardly be unusual for Hastings to restrict access to those forms of communication by commercial or non-student organizations, for example. Nonetheless, even assuming these could be considered "customary" means of communication, it is undisputed that CLS may use chalkboards and certain *other* bulletin

boards to make announcements. JA 233 (JSF ¶¶ 61-62), 300. And this does not even account for CLS's ability to meet in common areas or off campus or to communicate by any non-"customary" means that exist in the world of online discussion groups and electronic communications. *See* JA 114 (group communicated using Yahoo! groups).

CLS's ability to meet on campus is also not jeopardized. Both registered and non-registered student organizations may request use of campus facilities. Although RSOs have greater priority in available facilities, non-RSOs may obtain space on a first-come, first-served basis; and both groups' use of facilities is subordinated to academic functions and Hastings-sponsored events. Pet. App. 78a-79a. To the extent that Hastings maintained any discretion to deny use of campus facilities to non-RSOs, it made clear on this record that it would not do so in the case of CLS, and in fact CLS was never denied access to campus meeting space. *See* JA 232, 233 (JSF ¶¶ 58, 61-62); *cf. ALA*, 539 U.S. at 215 (Kennedy, J., concurring) (burden on speech minimized on facts of case). CLS's suggestion that Hastings could have revoked its permission to use facilities is needlessly speculative; the access of even RSOs may be limited on a number of grounds. CLS's claim that its members have "no right" to meet on campus finds no support in the record.[18]

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[18] CLS argues that the ability of a group excluded from a forum to still meet on campus is irrelevant. *See* Pet. Br. 24-25 (citing *Widmar* and *Board of Education v. Mergens*, 496 U.S. 226 (1990)). However, those cases both involved viewpoint

Indeed, there is no record evidence in this case that CLS's expressive activities were actually hindered by the inability to use the benefits that registration provided. After CLS changed course and opted not to comply with the Policy and thereby stop receiving the benefits of registration, CLS continued to express itself in the community life of Hastings without interference from the University. *Supra* at 11. In fact, attendance at CLS events *grew* in the 2004-05 school year. *See* JA 230 (JSF ¶ 48). The only evidence in this case shows that the CLS members were able to meet, pray, and put on a number of activities, while retaining their right to exclude members based on their core religious beliefs.

In short, Hastings has not sought to suppress particular speech or strong-arm any views from the marketplace, and its denial of a subsidy here does not violate the First Amendment.

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discrimination which is by its nature impermissible regardless of whether the groups could still meet. *See R.A.V.,* 505 U.S. at 391. In this case, where Hastings is applying a viewpoint-neutral rule, a group's ability to express itself on campus is directly relevant to whether CLS's expressive activities are actually burdened by denial of the benefit of RSO status.

CONCLUSION

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

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