No. 08-1371

# In The
# Supreme Court of the United States

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

*Petitioner,*

v.

LEO P. MARTINEZ, ET AL.,

*Respondents.*

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**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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**BRIEF OF *AMICI CURIAE* BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY AND THE INTERFAITH ALLIANCE FOUNDATION IN SUPPORT OF NEITHER PARTY**

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## QUESTION PRESENTED

Whether the Constitution permits a public university law school to exclude a religious student organization from a forum for speech solely because the group requires its officers and voting members to share its core religious commitments.

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## STATEMENT OF INTEREST

The Baptist Joint Committee for Religious Liberty (BJC) serves fifteen Baptist entities, including national and regional conferences and conventions, working together to promote religious liberty for all through strong support of principles of no establishment and free exercise.[1] Grounded in the historical experience of Baptists, whose religious freedom struggles figured prominently in the fight for disestablishment in the American colonies, the BJC recognizes that religion and religious liberty are best served when government neither seeks to promote nor inhibit religion, but leaves it to its own merits and the voluntary efforts of adherents.

The BJC believes that religious freedom requires noninterference by the state in matters of faith and doctrine, and that the government has an affirmative duty to avoid any sponsorship of religion. For more than seven decades, the BJC has defended the constitutional boundaries between the institutions of religion and government in Congress and the courts. The BJC supported the U.S. Supreme Court's "school prayer" decisions that prohibited government-led prayer and Bible reading in the public schools, and

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[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

worked for passage of the Equal Access Act of 1984, defended its constitutionality, and led efforts to produce guidelines for its proper implementation. While the BJC has supported application of equal access principles for religion in contexts that do not threaten governmental sponsorship or promotion of religion, it has also vigorously opposed governmental actions that would create an official or financial connection to religion in violation of no establishment principles. The BJC has filed *Amici Curiae* briefs in more than one hundred cases in the courts, including most of the U.S. Supreme Court's cases dealing with religious freedom.

The Interfaith Alliance Foundation celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country made up of 75 different faith traditions as well as from no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy.

## SUMMARY OF ARGUMENT

This case presents a conflict between the rights of a religious student organization and the non-discrimination policies of a public educational

institution. The dispute, like similar ones across the country, raises concerns under a number of constitutional theories. Of special concern, however, is the way this case implicates the fundamental distinction between governmental entities and private religious entities that is essential to understanding and protecting religious liberty.

This case should be resolved in a way that best reflects and preserves religious liberty protections in its specific context – a public educational institution's limited public forum for the participation of student clubs to meet on campus and exercise First Amendment rights. A specific line of Supreme Court cases protects the First Amendment rights of speech, association, and religion for students on public school and university campuses through recognized student organizations participating in a limited public forum. The cases make clear that religious student groups, no less than groups organized around other common interests, should have equal access to the forum and the incidental means of communication provided by the forum.

The constitutional principle of equal access for a speech forum, however, is constitutionally and logically tied to principles of no establishment that protect against government sponsorship of religion. While cases protecting the equal access of religious groups to participate in a limited public forum, such as on public school and university campuses, are decided under free speech principles, they do so with an implicit (if not explicit) understanding that the

government may promote many messages, but may not promote religion. The Establishment Clause prohibits government, including public universities, from promoting religion, but other First Amendment provisions protect religious expression by individuals and the student associations they form on public school and university campuses. As this Court stated clearly in upholding the Equal Access Act of 1984, there is a "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000), *citing Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring).

Indeed, the development of equal access case law (which draws on and parallels Equal Access Act cases) reflects and is instructive for understanding the broader relationship between private religious organizations that seek to promote their religion and governmental entities that are constitutionally prohibited from promoting religion. Participation in the forum should not threaten a group's right to self-definition and expressive association. The operation of a typical limited public forum for student clubs provides no justification for interference with a religious organization's mission and leadership through the application of the school's nondiscrimination policy.

Recognition of a private religious group (including one that insists on strict conformity to particular religious beliefs) in a limited public forum does not

diminish the important rights and responsibilities of a public educational institution to avoid sponsorship or endorsement of religion. Nor does it deny a state's interest in promoting its own message of non-discrimination, which may conflict with the message of some religious student groups.

While the Constitution requires equal access to a forum for religious student clubs, it also forbids the government from funding religion. Equal access does not extend to general grants to religious student groups engaged in religious activity. Nor does it allow sponsorship or control of religious student groups by the public school or university, which would raise Establishment Clause concerns. When a university links access to a limited public forum for student organizations with financial benefits (beyond what is merely incidental to the forum and its purpose), it subverts the positive nature of equal access principles for a religious group in a limited public forum, creating confusion and constitutional risk.

Public institutions are constitutionally required to avoid sponsorship of religion. The operation of a forum for student clubs to meet on campus should not create a false connection or confusion between the identity, speech, or expressive association of the public school or university on the one hand, and the identity, speech, or expressive association of student groups on the other. The religious liberty rights of all students, as well as the integrity of public institutions, demands that public schools and universities take measures to provide a clear separation between

the schools' own speech and sponsored activities, and those of their students. That separation is also vital for maintaining a university's own nondiscrimination message that should not get clouded by the multitude of speech by private, student organizations promoting various messages through participation in a broad, diverse speech forum on campus.

*Amici* file this brief on behalf of neither party, urging the Court to render a decision that protects the significant religious freedom interests inherent in this dispute.

## ARGUMENT

### I. Public School and University Forums for Student Speech Serve Important First Amendment Interests, Including Religious Liberty for Students

Strong religious freedom interests support participation of religious student groups on public school and university campuses. Beginning with *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court has recognized the First Amendment rights of religious student organizations to meet on public school campuses and participate in forums designed to engage students in non-curricular activities. Such forums serve important purposes for student development and leadership and offer the opportunity to enjoy First Amendment rights of speech and association from a

wide variety of viewpoints.[2] Religious student organizations, like their secular counterparts, have the right to form associations based upon shared interests, views and practices, and to advance their views on campus without the suggestion of governmental endorsement. While the Establishment Clause precludes a state university from creating a special religious forum or otherwise promoting religion, an "equal access" policy that allows religious and other student groups to use state school facilities for meetings demonstrates neutrality toward religion. *Widmar*, 454 U.S. at 274 n.14.

The *Widmar* Court recognized that while the state's obligation to comply with the Establishment Clause may be "characterized as compelling," an "equal access" policy governing a forum of students for the voluntary association of a wide variety of

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[2] As this Court observed in *Widmar*,

> [t]he college classroom with its surrounding environs is peculiarly "the marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

454 U.S. at 268 n.5.

interests was not "incompatible" with that obligation. 454 U.S. at 271. The forum "does not confer any imprimatur of state approval on religious sects or practices" and any benefit to religion is only incidental. *Id*. at 274. *Widmar* demonstrates the constructive way that equal access policies facilitate religious expression and association without government promotion of religion.

### A. The Federal Equal Access Act and *Widmar* Line of Equal Access Cases Rely on Separation Between Private Religious Groups and the Government

Congress acknowledged the important way equal access principles facilitate religious speech by students, without violating the Establishment Clause, when it enacted the Equal Access Act.[3] Its legislative history and statutory framework, as well as the cases applying it, are instructive. Congress made it unlawful to deny religious student clubs "equal access" to meet in public secondary schools if other non-curriculum related clubs were allowed to meet during non-instructional time on school property. The Act was a legislative response to a pattern of discrimination against religious speech by students in public schools based upon widespread misunderstanding

[3] 20 U.S.C. §§ 4071 *et seq.*

of this Court's decisions forbidding government-sponsored prayer in public school.[4] Following the rule in *Widmar*, the statutory right to equal access is triggered by the opening of a forum for voluntary, student-initiated non-curricular student groups. Once the forum has been opened, the Act requires equal access for religious groups, but specifically limits expenditure of public funds for the forum.[5]

Whether each element of the Act is constitutionally required or statutorily mandated to provide the proper balance of student rights and government responsibilities, the Act illustrates the constitutionally significant distinction between public educational institutions and their students. In upholding the Equal Access Act in *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990), the Court made plain a fundamental principle of religious liberty when it said that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause

[4] The United States Senate Committee on the Judiciary, in favorably reporting the Act out of committee, noted that "those administrators act not from malevolence toward religion but from ignorance of the law and erroneous legal advice. A primary source of their confusion has been the lower Federal courts." Equal Access Act, Report of the Senate Comm. on the Judiciary on S. 1059, Senate Report No. 98-357 at 6 (reprinted in U.S. Code Cong. & Ad. News, 98th Cong., 2d Sess. at 2348 (1984)).

[5] Indeed, the express terms of the Act provide that the covered schools may not sponsor religious meetings and expressly disclaims any license to influence religious activities or expend public funds beyond what is necessary for maintenance of the forum. 20 U.S.C. § 4071(c)(d).

forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id*. at 250 (O'Connor, J., concurring); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842-43 (1995).

### B. The Limited Public Forum Created by Hastings for Private Student Groups Does Not Empower It to Mandate Membership Requirements for CLS

The University of California-Hastings College of the Law ("Hastings") established a limited public forum for recognized student organizations ("RSOs") designed to facilitate "a broad range of student groups reflecting many different interests and viewpoints" and "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." Rdt. Br. in Opp. to Cert. 1-2.

When this dispute arose in 2004, Hastings had approximately 60 recognized student organizations on campus, reflecting a diverse array of student interests, each with access to certain RSO privileges. Hastings emphasized that it did not sponsor or endorse the views of any RSO and requires RSOs to inform all members and third party contractors that the groups were not school sponsored. As enumerated by the parties, most of the privileges offered to RSOs

reflect access to university facilities, including its communication channels. These incidents of the forum are typical, and except for the eligibility for financial grants discussed below, are generally consistent with providing access for the student groups to meet and to communicate among themselves and to others in the campus community.

The Christian Legal Society ("CLS") was denied RSO status because it would not agree to Hastings' nondiscrimination policy, which requires student organizations to have completely open membership. CLS requires all members "to sign, affirm, and endeavor to live their lives in a manner consistent with the Statement of Faith," as interpreted by CLS and subject to disqualification for conduct that is inconsistent with the Statement of Faith. Ptr. Br. 5-7. For CLS, allowing those who would not affirm their Statement of Faith to become voting members would alter who they are. *Amici* agree with Petitioner that Hastings' policy violates its right of expressive association. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Freedom of association plainly presupposes a freedom not to associate. *Id.* at 623. Whether viewed as a matter of free speech, free exercise or expressive association, the Constitution protects the rights of individuals to organize around

common religious principles and practices. The Court below failed to recognize that right, treating Hastings' nondiscrimination policy as a neutral rule of conduct. CLS's application of its faith statement to its members, however, is protected activity[6] that is essential to the expressive content of its meetings and preservation of the group's purpose and identity.

While the validity of Hastings' interest in nondiscrimination in education is not in dispute, application of its nondiscrimination policy to private student groups and at the expense of a religious student group's expressive association is not justified.[7] What Hastings has given with one hand – a forum for student clubs to meet around common interests in the *Widmar* equal access tradition – it has taken away with the other. By conditioning RSO status on acceptance of its nondiscrimination policy, Hastings undercuts the purpose of its forum (facilitating a broad range of student interests and viewpoints), and deprives religious organizations of its constitutional right of equal access to the forum.

As the parties stipulated, and the district court found, Hastings interprets its nondiscrimination policy

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[6] Unlike, for example, the perceived propensity of a student group to engage in violent or disruptive behavior on campus. *See Healy,* 408 U.S. at 191-94.

[7] JOAN W. HOWARTH, *Teaching Freedom: Exclusionary Rights to Student Groups*, 42 U.C. DAVIS L. REV. 889, 926-36 (2009) (detailing ways a university can protect its nondiscrimination interests without violating expressive association rights of religious student groups).

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. J.A. 161-63; Rdt. Br. in Opp. to Cert. 3. Hastings has concluded that this policy helps ensure that those groups to which it provides funding and other benefits are furthering the general purposes of Hastings' registration system and that the educational and social opportunities these groups offer are available to all students. It claims its policy "encourages tolerance, cooperation, and learning among students of different backgrounds and viewpoints." Rdt. Br. in Opp. to Cert. 4.

It is unremarkable that a club that is organized for legitimate religious purposes has exclusionary criteria for membership to control its message. Application of the nondiscrimination policy interferes with rights of expressive association and destroys its intended purpose of allowing student groups to meet around common interests and to encourage the exchange of ideas on campus.[8] When a public university has created a forum generally open for use by student groups, it has "assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms [ . . . ] [t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Widmar*, 454 U.S. at 267-268.

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[8] *See generally Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006).

## II. Direct Grants of Government Funding to Student Organizations Threaten Establishment Clause Violations and Undercut Applicability of Equal Access

A baseline assumption for the application of equal access for religious student groups on public school and university campuses is that the forum facilitates student speech and association but is conducted in a way that does not risk university sponsorship. The Establishment Clause, which has been held to not bar access to a limited public forum in *Widmar* and *Rosenberger*, prohibits direct financial aid to a religious organization engaged in religious activity. Protection of religious liberty, including the operation of a free speech forum provided by a public university, requires a clear separation between the identity and messages of the university itself and the private religious clubs it recognizes on campus. That separation is called into question by the availability of direct grants to an indisputably religious organization engaged in religious activities.

### A. The Establishment Clause Prohibits Direct Funding of Religion

Although the Constitution allows the government, as a general matter, to directly subsidize private speech, religion is different. It is a fundamental principle of the Constitution that government shall not use "public funds to finance religious activities." *Rosenberger*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). The First Amendment, made applicable to the states by the Fourteenth Amendment, prohibits

government from making laws "respecting an establishment of religion," whether by "'sponsorship, financial support [or] active involvement in religious activity.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (*quoting Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970)).

Religion is different because of the Establishment Clause's prohibition against the use of public funds to advance religion, a prohibition designed to protect religious liberty.[9] This restriction on government sponsorship of religion is grounded in the historical experience of colonial disestablishment well-known to the Founders of our nation,[10] as

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[9] *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) (emphasizing constitutional distinction between a state-funded scholarship program and a forum of speech designed to encourage a diversity of views from private speakers).

[10] The principle of government neutrality in matters of faith originated not with James Madison and Thomas Jefferson, or even with John Locke, but with a seventeenth-century fundamentalist Baptist preacher, Roger Williams. Williams, who founded Rhode Island as a haven for religious freedom, spoke of the need for a "hedge or wall of separation between the garden of the church and the wilderness of the world." EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA 207 (1991). Colonial Baptists and other then-minority (and oft-persecuted) faiths joined Williams in his belief that government neutrality toward religion is good for both, and their like-minded descendants provided much of the grassroots support for colonial disestablishment and for the religion clauses' inclusion in the First Amendment.

evinced by the writings and public actions of Thomas Jefferson, John Madison and others.[11]

The Establishment Clause's ban on sponsoring religion is essential to accomplish the Founders' aims, insulating citizens against compulsory support of religion, and inoculating religion from the inevitable government regulation and control that appropriately follows direct government funding. It follows that this

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[11] As Justice Souter has observed:

> Madison wrote against a background in which nearly every Colony had exacted a tax for church support, the practice having become "so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence," Madison's [Memorial and Remonstrance Against Religious Assessments] captured the colonists' "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." Their sentiment, as expressed by Madison in Virginia, led not only to the defeat of Virginia's tax assessment bill, but also directly to passage of the Virginia Bill for Establishing Religious Freedom, written by Thomas Jefferson. That bill's preamble declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical" [ . . . ] We have "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."

*Rosenberger*, 515 U.S. at 869-71 (Souter, J., dissenting) (internal citations omitted).

Court must scrutinize carefully any attempt by government to disburse public funds to religious entities.

First, "no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones." *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973). *See also Mitchell v. Helms*, 530 U.S. 793, 818 (2000) (leaving extant the pervasively sectarian doctrine and acknowledging the "special Establishment Clause dangers when money is given to religious schools or entities directly rather than . . . indirectly"); and *Rosenberger*, 515 U.S. at 842 ("The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions").

Second, "if secular activities can be separated out, they alone may be funded." *Roemer*, 426 U.S. at 755; *Hunt*, 413 U.S. at 743. In short, only religious institutions that are not pervasively religious may receive direct federal financial assistance[12] and, then,

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[12] *Amici* acknowledge that certain types of indirect financial assistance to pervasively sectarian institutions may be constitutionally permissible. For example, this Court has upheld government-funded services to assist persons with disabilities in furthering their education at religious institutions on grounds that this is neutral assistance for individuals who may choose to study where they wish, rendering the religious institutions "only incidental beneficiaries." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993). *Accord Witters v. Washington Dep't*

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only for activities that are wholly secular and segregated from an organization's religious activities. This Court upheld the funding at issue in *Hunt* because the funded institution was non-sectarian and the funds were not to be used for a religious purpose. *Accord Bowen v. Kendrick*, 487 U.S. 589 (1988); *Roemer*, 426 U.S. 736 (funding in the form of non-categorical grants upheld because the institution was not pervasively sectarian and there were strictures against religious use of the money); *Tilton v. Richardson*, 403 U.S. 672 (1971) (federal funding for construction of academic facilities at a university approved, but only to the extent that the funds could not be used for sectarian facilities or the advancement of religion).

Taken together, *Rosenberger* and the *Hunt* line confirm that, outside of benefits incidental to a limited public forum, the Establishment Clause precludes a public university from making direct grants to a pervasively religious entity or to otherwise fund religious activities. Instead, public university programs must avoid financial entanglement with religious organizations such as CLS.

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*of Servs. for the Blind*, 474 U.S. 481 (1986) (state financial vocational assistance to a blind ministerial student at a Christian college upheld).

### B. *Rosenberger* Does Not Require and the Establishment Clause Prohibits Direct Funding of Religious Organizations Engaged in Religious Activities

While the Court in *Rosenberger* treated student activity fees for student clubs as a limited public forum from which a religious club could not be excluded, it did not usher in a sea change in the Court's jurisprudence on public funding for religious entities. *Rosenberger* was a nuanced application of this Court's line of student organization cases, ultimately holding that third-party reimbursements of a non-religious organization – paid out only upon satisfaction of carefully crafted criteria – do not constitute the sort of unfettered, direct funding of a pervasively religious entity that the Establishment Clause prohibits. The *Rosenberger* Court found such indirect, third-party disbursements to be practically the same as the in-kind benefits that the gamut of organizations, religious and secular alike, are afforded pursuant to equal access to the limited public forum of a registered student organization construct. The Court found, "[t]here is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf." 515 U.S. at 843.

The funding offered by the Hastings RSO forum invites Establishment Clause concerns not raised by *Rosenberger*. Distinct characteristics present in

*Rosenberger* are absent from the instant case. For example, it was undisputed – and the *Rosenberger* Court found significant[13] – that the student organization at issue there was not a religious organization,[14] while no party has made such a claim about CLS. Indeed, CLS is thoroughly, unabashedly religious and devoted to a very specific set of religious beliefs and practices. Although the student organization funding structure for both Hastings and the *Rosenberger*-era University of Virginia were based on compulsory student activity fee payments, there is a key difference in the nature of the disbursements. In *Rosenberger* no money was ever directly disbursed to the student publication at issue; instead, receipts were submitted, and the Student Council paid the vendors directly for the printing costs – a fact on which the *Rosenberger* Court placed considerable emphasis.[15]

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[13] "It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's own regulations." *Rosenberger*, 515 U.S. at 844.

[14] The University of Virginia's guidelines for student organizations defined a "religious organization" as one "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." 515 U.S. at 826.

[15] "We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that

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Of special concern in this case is the fact that registered student organizations may apply for travel and other funding that is remitted directly to the organizations' coffers in an official Hastings student organization account. As in *Rosenberger*, the emphasis is most properly placed not on the fact that some level of funding would flow to CLS through Hastings' forum, but on the "nature of the benefit [that would be] received" by CLS. 515 U.S. at 843-44. While the constitutionality of the direct grant program in Hastings' RSO policy is not directly before this Court, this funding does not appear to be "incidental to the government's provision of secular services for secular purposes on a religion-neutral basis," under *Rosenberger*. The nature of the funding appears to be decidedly different;[16] it is not indirect, and would be disbursed to an organization that is undisputedly religious and dedicated to inherently religious activities. Such funding certainly goes beyond the bounds of this Court's decision in *Rosenberger* – a decision that was properly limited to its context and tailored to a discrete set of facts. While equal access to the forum facilitates religious expression without creating the risk of government endorsement of religion, a public university's funding of religious student groups

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is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to [the student publication's] coffers." *Rosenberger*, 515 U.S. at 842.

[16] *See* Ptr. Br. 4 ("RSOs are entitled . . . to apply for funding to support *various group activities*") (emphasis added).

beyond the incidental kind in *Rosenberger* threatens an Establishment Clause violation and confuses the application of equal access to the forum.

The eligibility of access to direct grants of student fees alters a basic assumption of this equal access case, causing confusion between the messages promoted by Hastings and those promoted by student clubs under the RSO policy. Equal access assumes facilitation of speech and association under conditions that do not give rise to sponsorship. As discussed, the funding of a religious club engaged in religious activities raises specific constitutional concerns. CLS has no right to a public university's support of its religious principles and activities. Indeed, Hastings is constitutionally forbidden from providing such support. At the same time, Hastings cannot manufacture an interest in altering CLS's message by bundling rights of access with fees that are unrelated to the purpose of the forum, resulting in an indicia of sponsorship that threatens an Establishment Clause violation. Hastings cannot justify one constitutional incursion by creating another. While the additional factor of government funding complicates the relationship with student groups, it does not warrant interference with a religious organization's membership requirements as a condition of participation in a limited public forum designed to promote free speech of student groups.

## CONCLUSION

*Amici* respectfully submit that this Court's ruling must sanction neither direct funding of a private religious organization for religious purposes nor authorize a state entity, under the artifice of protecting the rights for all, to curtail the expressive association rights of that same, private religious organization.

Respectfully submitted,

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