No. 08-1371

IN THE

Supreme Court of the United States

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

Petitioner,

v.

LEO P. MARTINEZ, ET AL.,

Respondents.

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

BRIEF OF THE CENTER FOR INQUIRY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of Church and State is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy. The *amicus* submits this brief because the boundaries between government and religion are an essential part of our free society, and because ensuring that viewpoint-neutral laws and policies apply equally to the religious and non-religious alike is critical to maintaining those boundaries.

SUMMARY OF ARGUMENT

James Madison, drafter of the First Amendment, stated in his oft-cited *Remonstrance* that a people asserting freedom of religious belief "cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced [them]."

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

James Madison, *Memorial and Remonstrance Against Religious Assessments* (reprinted in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 app. at 66 (1947)). Contrary to this admonition, Petitioner, the Christian Legal Society Chapter of University of California, Hastings College of the Law, seeks for religious student organizations the right to deny equal access to classmates who do not accept Petitioner's principles. In the name of religious equality, Petitioner seeks for religious groups a right they would deny secular groups—to receive state funds while discriminating on the basis of religious beliefs and status. Nothing in the Constitution compels this result.

At the outset, it is important to understand the facts involved in this case. For more than fifteen years prior to this litigation, Respondent Hastings College of the Law required that all student organizations seeking official recognition pledge to abide by a non-discrimination policy that prohibits, *inter alia*, exclusion of students from holding voting positions on the basis of a student's religion or sexual orientation. *See* J.A. 220-21.[2] For ten

[2] As Respondent Hastings shows, the policy at issue in this litigation—the "All-Comers Policy"—requires that "a student organization's bylaws . . . provide that its membership is open to all students." Br. of Hastings College of the Law Resp'ts ("Resp. Br.") at 19-23. Here, *amicus* focuses on the constitutionality of a subset of this policy, namely a rule prohibiting discrimination solely on the basis of an enumerated list of characteristics such as race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation (a "Non-Discrimination Policy" or "Policy"). *Amicus*

years, Petitioner's predecessor complied and was recognized as an official group. J.A. 223-25. In the 2004-2005 school year, however, Petitioner reorganized itself and for the first time sought an exemption—never before requested by or granted to any other student organization—from its obligation to refrain from discrimination on the basis of religion or sexual orientation. J.A. 227-28. Fundamentally, then, this case involves a student group seeking—based solely on the strength of its religious beliefs—an exemption from the well-established boundaries that govern participation in a limited public forum.

Cognizant that this Court has been reluctant to excuse compliance with generally applicable laws on the basis of individual religious beliefs, *see generally Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 876-88 (1990), Petitioner attempts to obtain its exemption through *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). But *Rosenberger* and other limited public forum cases offer little, if any, support to Petitioner. In seeking an exemption, Petitioner ignores that the government is not required to open a limited public forum for all purposes or to any and all comers. To the contrary, this Court has always required that a challenging

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argues that a Non-Discrimination Policy is constitutional, contrary to Petitioner's arguments throughout most of its brief. *See* Br. for Pet'r ("Pet. Br.") at 1-46, 54-58. It is *amicus*' position that arguments sustaining the constitutionality of a Non-Discrimination Policy apply to Hastings' All-Comers Policy.

group meet the threshold recognition requirements applicable to all would-be forum participants before that group can demand viewpoint neutrality.

To be sure, *Rosenberger* requires that a school opening a limited public forum to a particular group manage that forum in a way that is content- and viewpoint-neutral. But the Policy does not discriminate against speech of any kind, religious or non-religious; it applies only to the *conduct* of discriminating. Moreover, even if viewed as targeting speech, the Policy is viewpoint-neutral because it is not justified based upon the viewpoint of the alleged speaker (in this case the group refusing a student); rather, it is justified upon the status of the refused student. Nor does the Policy impose any appreciable burden on Petitioner's ability to convey its message—Petitioner remains free to say what it wants, but is simply barred from discriminating. Finally, should Petitioner feel that either a Non-Discrimination Policy or the All-Comers Policy threatens its existence, it may avail itself of a host of measures to ensure that student applicants do not overtake its message without discriminating on the basis of status or beliefs.

Once the pretense that *Rosenberger* controls this case is eliminated, Petitioner's request for a blanket exemption on the basis of its religious status becomes even more far-fetched. Under Free Exercise jurisprudence, the Policy is plainly neutral towards religion on its face, and is not motivated by bias against, or animus towards, religion. Thus, Petitioner's challenge *a fortiori* fails

the tests articulated in *Smith* and *Locke v. Davey*, 540 U.S. 712 (2004). And, as in *Davey*, the Policy does not impermissibly burden religious beliefs because it does not require Petitioner's members to choose between an act compelled by their beliefs and a government benefit. Finally, Petitioner's invitation to ignore an unbroken line of precedent denying groups exemptions from generally applicable laws based solely on religious beliefs should be rejected because, as this Court has recognized, such exemptions would make every man "a law unto himself," *Smith*, 494 U.S. at 879 (citation omitted), and render our legal system unworkable. Worse, Petitioner's proposed approach—that the exemption benefit only "well-established" religions—would have the unwelcome and untoward consequence of making the federal courts arbiters of which beliefs are bona fide and which are not.

The Constitution neither requires granting Petitioner an exemption from a generally applicable regulation nor confers upon it the right—not enjoyed by any secular group in a limited public forum—to receive state funding while discriminating against students with certain beliefs or of a certain status. The Court should decline Petitioner's invitation both to extend public forum precedent and to misapply Free Exercise principles in order to obtain such an exemption.

ARGUMENT

I. THE POLICY DOES NOT VIOLATE THE FREE SPEECH CLAUSE

Respondents' Policy prohibits all student groups from denying voting membership to a student on the basis of, *inter alia*, that student's religious beliefs or sexual orientation. Because it regulates conduct, not the dissemination of ideas, and imposes a functionally non-existent burden on the exercise of speech, the Policy is consistent with the Free Speech Clause of the First Amendment. Petitioner nevertheless argues that the Policy violates the principles of *Rosenberger*. Petitioner's attempt to extend that case to the easily distinguishable facts here is, in essence, an unabashed effort to obtain—solely on the basis of religious beliefs—a constitutionally mandated exemption from these generally applicable regulations, an exemption not available to secular groups. Cognizant that, as shown in Part II, no such exemption is available under the Free Exercise Clause, Petitioner turns to *Rosenberger* to obtain its exemption. Neither that case nor the Constitution requires one.

A. PETITIONER'S *ROSENBERGER* ARGUMENT IGNORES THE 'OTHERWISE ELIGIBLE' THRESHOLD REQUIREMENT OF THIS COURT'S LIMITED PUBLIC FORUM CASE LAW

In an unbroken line of cases dealing with student group access to limited public fora, the Court has consistently reaffirmed an educational institution's ability to enforce reasonable and generally applicable restrictions.[3] In all of these cases, only if the group was, as an initial matter, "in conformity with the [forum's] requirements," *Healy v. James*, 408 U.S. 169, 184 (1972), did the Court apply constitutional scrutiny to the school's decision to restrict access. Thus, in *Rosenberger* the Court held it an "important consideration" that the group requesting equal access had qualified as a student organization in the first place by complying with "certain procedural requirements." 515 U.S. at 823, 826 (internal citation omitted). Notably, the forum in *Rosenberger* required—as did the forum in *Healy*—that a group, among other things, "pledge not to discriminate in its membership" as a prerequisite to recognition as an official student organization. *See id.* at 823 (internal citation omitted); *see also*

[3] Petitioner glosses over the type of forum at issue in this case, *see* Pet. Br. at 22-23, but it is apparent that Hastings has created a "limited public forum" for use by student organizations, on which reasonable restrictions on access are necessary and permitted, because the forum is not open to any or all potential participants, *see* J.A. 219-20, Cert. Pet. App. 8a, 83a.

Healy, 408 U.S. at 184 n.11.[4] The Court thus explicitly limited its holding in *Rosenberger* to regulations "directed against speech *otherwise within* the forum's limitations." 515 U.S. at 830 (emphasis added).

Petitioner pays lip service to the "otherwise eligible" requirement, *see* Pet. Br. at 18, 25-26, but otherwise avoids any discussion of this threshold inquiry. Tellingly, Petitioner altogether ignores analysis of whether *Rosenberger* is applicable and fast-forwards to the nature of the burden it claims to have suffered. *See id.* at 23-26. This cart-before-the-horse approach betrays Petitioner's understanding that it fails to meet *Rosenberger*'s basic requirements.

Under the facts stipulated before the district court, J.A. 213-306, the Policy applies to all student organizations, and no group has ever sought an exemption, *see* J.A. 220-21. Hastings Christian Legal Society ("HCLS"), Petitioner's predecessor,[5] abided by the Policy from its inception at Hastings in 1994 through the end of the 2003-2004 school year; HCLS was thus granted access on equal footing with all other groups.

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[4] *Cf. Widmar v. Vincent*, 454 U.S. 263, 274 n.5 (1981) (noting that a school may "impose reasonable regulations compatible with [its] mission upon the use of its campus and facilities" and that, for example, a university is not required to "make all of its facilities equally available to students and nonstudents alike").

[5] HCLS was also known as the Hastings Christian Fellowship. *See* J.A. 222-23.

J.A. 223-24. Then, during the 2004-2005 school year, Petitioner amended its bylaws and decided that it would no longer abide by the Policy. J.A. 226-28. Petitioner's failure to respect that generally applicable boundary unsurprisingly resulted in its exclusion, and Petitioner cannot be heard to complain about the natural consequences of its own conduct. As the Ninth Circuit succinctly observed, Petitioner knew that participation in the forum was conditioned on "accept[ing] all comers as voting members even if those individuals disagree with the mission of the group." *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, 319 Fed. App'x 645, 645-46 (9th Cir. 2009). No more need be said; the salient point is that Petitioner's reliance on *Healy, Rosenberger*, and *Widmar*, *see* Pet. Br. at 21-22, 24-25, is at the outset misplaced because none of those cases involved an organization seeking an exemption from generally applicable threshold procedural requirements, *see, e.g.*, *Rosenberger*, 515 U.S. at 823-26. Hastings has simply "reserv[ed] [its forum] for certain groups," *id.* at 829, namely, groups that abide by its Policy.[6] In light of this,

[6] This reading is consistent with the Court's own analysis of limited public forum cases, such as *Rosenberger* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). In *Good News Club v. Milford Central School*, the Court characterized those cases as involving prohibitions against "otherwise permissible" activities conducted from a religious viewpoint. 533 U.S. 98, 111-12 (2001). In this case, by contrast, excluding a student on the basis of his or her religious beliefs or sexual orientation is not "otherwise permissible" to student groups—even if they do it for non-religious reasons. *See* J.A. 220-21.

Petitioner's attempt to characterize this case as involving simply the exclusion of a group of religious students is disingenuous. *See* Pet. Br. at 2.

B. The Policy Is Constitutional Even Under *Rosenberger* Because It Is Content- And Viewpoint-Neutral

Despite this initial shortcoming, Petitioner seeks to extend *Rosenberger* beyond its stated boundaries and use it to analyze generally applicable threshold requirements, such as the Policy, that a school sets for its limited public forum. This analysis also fails.

Under *Rosenberger*, in a limited public forum, a regulation that constitutes content discrimination "may be permissible if it preserves the purposes of that limited forum"; viewpoint discrimination, by contrast, "is presumed impermissible when directed against speech otherwise within the forum's limitations." 515 U.S. at 830. Petitioner's unwavering return to *Rosenberger* is an unavailing effort to fit a square peg into a round hole. The principles of that case are not implicated here because the Policy, unlike those in *Rosenberger* and its companions, is neither content- nor viewpoint-discriminatory.

1. The Policy is Content-Neutral Because It Targets Conduct, Not Speech

First, the Policy is not content-discriminatory because it is "justified without reference to the content of the regulated speech." *Ward v. Rock*

Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). In fact, the Policy is justified without reference to speech. Although Petitioner attempts to characterize its exclusion of certain students as speech, the Court has consistently held that antidiscrimination provisions are content-neutral regulations of conduct. In *Roberts v. United States Jaycees*, the Court noted that a statute prohibiting places of public accommodation from denying equal access to voting positions "because of race, color, creed, religion, disability, national origin or sex" was not "aim[ed] at the suppression of speech" or at "distinguish[ing] between prohibited and permitted activity on the basis of viewpoint." 468 U.S. 609, 615, 623 (1984) (citation omitted). In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Court noted that a similar antidiscrimination law "[did] not, on its face, target speech or discriminate on the basis of its content." 515 U.S. 557, 572 (1995). And this was the unanimous holding of the Court in *Wisconsin v. Mitchell*, which challenged a law providing enhanced penalties for acts committed "because of [a person's] race, religion, color, disability, [or] sexual orientation" as an impermissible regulation of speech. 508 U.S. 476, 480, 481 n.1 (1993) (citation omitted). The Court rejected that characterization, holding instead that such laws constitute "permissible content-neutral regulation of conduct." *Id.* at 487; *see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (noting that law banning discrimination on the

basis of race regulates conduct, not speech). The Policy is indistinguishable from the anti-discrimination policies of the above-mentioned cases in that it targets only *acts* motivated by bias against people on account of their status. Accordingly, the Policy cannot be said to impermissibly target speech.[7] The Policy is therefore content-neutral and *a fortiori* constitutional under *Rosenberger*.[8]

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[7] Because the Policy plainly targets conduct it must be analyzed under the test established in *United States v. O'Brien*, 391 U.S. 367 (1968), as Respondent Hastings has argued before this Court. *See* Resp. Br. at 28 n.5. In particular, the Policy is unarguably in furtherance of an important governmental interest, is unrelated to the suppression of speech, and imposes only an incidental restriction on alleged First Amendment freedoms. *See O'Brien*, 391 U.S. at 377. The remainder of Part I analyzes why the Policy is consistent with limited public forum cases even if the Court determines that *O'Brien* is inapplicable.

[8] To avoid this straightforward result, Petitioner makes the convoluted argument that its membership rule is speech rather than conduct because it targets the beliefs of a potential applicant. *See* Pet. Br. at 34-36. This argument is easily disposed of in light of *Roberts* and *Mitchell*, which Petitioner tellingly ignores. In *Roberts*, the determination that an antidiscrimination law did not "aim at the suppression of speech" did not turn on whether the group acted on the basis of a targeted person's speech, conduct, or beliefs. *See Roberts*, 468 U.S. at 623. In other words, the anti-gender discrimination provision would not suddenly target speech if the Jaycees attempted to exclude only women with certain viewpoints about their status as women. Similarly, the Court's holding in *Mitchell* that a hate-crime enhancement was content-neutral did not turn on whether Mitchell targeted only people of particular beliefs about their race. Simply put,

2. The Policy is Viewpoint-Neutral Because It Requires Religious and Non-Religious Groups Alike to Refrain from the Same Conduct

Because the Policy is content-neutral it is presumptively viewpoint-neutral: viewpoint discrimination is "a subset or particular instance of the more general phenomenon of content discrimination." *Rosenberger*, 515 U.S. at 830-31 (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992)).

In any event, even if the Policy does not meet the content-neutrality test—which it does—it plainly meets the viewpoint-neutrality principle reaffirmed in *Lamb's Chapel*, 508 U.S. at 392-93, and in *Rosenberger*. Under this test, a policy is viewpoint-discriminatory "when the specific motivating ideology or the opinion or perspective *of the speaker* is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829 (citation omitted) (emphasis added). Petitioner cannot seriously argue that only a particular kind of student group is, under the Policy, prohibited from excluding students on the basis of religion or sexual orientation. To the contrary, both religious and

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the content-neutrality of an antidiscrimination standard cannot turn on an issue as cosmetic as whether a discriminatory individual targets status, beliefs, or both. In this sense, Petitioner's feeble attempt to recast their exclusionary rule as targeting only homosexual conduct is irrelevant. The conduct is a direct proxy for the *status* the Policy seeks to protect.

secular groups alike are prohibited from denying membership to students based on "whatever views the individuals hold about God, the afterlife, and the like." Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1933 (2006). Likewise, no group may exclude gay members, and no group may exclude straight members—the Policy makes no reference to or distinction based upon a group's motivations for doing so. *See* J.A. 220.

For these reasons, Petitioner's and its *amici's* heavy reliance on *Lamb's Chapel*, *Rosenberger*, and *Good News Club* is beside the point. *See, e.g.*, Pet. Br. at 22-25, 37-38; Br. of *Amici Curiae* States of Michigan in Supp. of Pet'r at 19-24. In *Lamb's Chapel*, for example, the Court dealt with a regulation that prohibited screening a film on school property "*solely because* the [film] dealt with [a] subject from a religious standpoint." 508 U.S. at 394 (emphasis added). In *Rosenberger*, the University of Virginia reimbursed costs of publications discussing issues from a secular viewpoint, but not those covering the same issue from a religious perspective. 515 U.S. at 829, 832. Finally, in *Good News Club* the Court held that a school's policy of prohibiting storytelling from a religious perspective but not a secular standpoint was also impermissible viewpoint discrimination. *See* 533 U.S. at 112.

None of these cases is remotely similar to this case—the Policy does not permit secular groups to discriminate on the basis of religion or sexual orientation any more than it allows religious

groups to do so. Instead, the Policy simply establishes categories upon which a group may not base its decision—in other words the Policy is concerned only with the status of the *applicant*—regardless of an organization's motivations. *See* Volokh, *supra* at 1932-33. That an environmental group is allowed to impede "climate change skeptics [from] conduct[ing] its discussion groups," Pet. Br. at 37, is a *non sequitur*. Petitioner would be allowed to do so under a Non-Discrimination Policy on a religion-neutral basis; conversely, the environmental group would also be prohibited from denying membership to climate change skeptics on the basis of an applicant's religious beliefs.[9] In marked contrast to the petitioner in *Good News Club*, who sought "to address a subject otherwise permitted under the rule . . . from a religious standpoint," 533 U.S. at 109, Petitioner here seeks to engage in *conduct not otherwise permitted* to any group.

To avoid this straightforward result, Petitioner again attempts to warp the meaning of *Rosenberger*, arguing that it is disadvantaged, *vis-à-vis* other student groups, in its ability to control its message by controlling the makeup of its voting membership. *See, e.g.*, Pet. Br. at 38. This argument fails in several key respects. First, it ignores that *Rosenberger* was about a student organization's

[9] Tellingly, Petitioner abandons any serious argument that the All-Comers Policy is not viewpoint-neutral, *see* Pet. Br. at 51-52, because it is apparent that the environmental group could not impede climate change skeptics at all under the All-Comers Policy.

right of equal access to the benefits of a limited public forum, such as funding, not its ability to control its membership. Nothing in *Rosenberger* or its companion cases, for example, prevents Hastings from requiring that organizations exclude non-students as voting members.[10]

Second, this argument, if accepted, would allow Petitioner to obtain for itself a constitutional right not afforded to any group—namely the right to discriminate on the basis of religious beliefs or sexual orientation and receive state funding to do so. Petitioner admits as much in its brief, overtly stating that non-religious groups should not be exempted from the Policy while requesting such an exemption for itself. *See id.* at 36-37. Neither *Rosenberger* nor the Free Speech Clause should be

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[10] One of Petitioner's *amici*, relying on *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), suggests that WAP would have been within its rights to limit the publication's editors and writers to professed Christians. *See* Br. of *Amicus Curiae* Boy Scouts of America in Supp. of Pet'r at 21-22. But *Amos* held only that the Establishment Clause was not offended by providing a religious exemption to Title VII's prohibition against religious discrimination in employment, not that the exemption was constitutionally required. *See* 483 U.S. at 327-28. Similarly, Petitioner and its *amici* argue that the prohibition against discrimination based on sexual orientation must be evaluated in light of statutes exempting religious organizations from complying with such prohibitions. *See* Pet. Br. at 46. Again, however, this argument erroneously implies that because legislatures may be "solicitous" of "the negative protection accorded [by the Constitution] to religious belief," those statutory exemptions are "constitutionally required." *Smith*, 494 U.S. at 890.

construed to command such an absurd result. To the contrary, *Rosenberger* involved a group seeking a right enjoyed by all other groups: to discuss a subject from their own particular viewpoint. Here, by contrast, Petitioner seeks a right not enjoyed by any group: the right to discriminate on the basis of certain criteria.

Finally, Petitioner's argument erroneously implies that a law is viewpoint-discriminatory simply because it affects one group more than others. This argument has been rejected by the Court. *See, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) (noting that simply because injunction affected a particular viewpoint did not mean it was "content- or viewpoint-based"); Volokh, *supra* at 1931-33. Were it not so, the Court would have invalidated the statutes at issue in *Roberts* and *Mitchell*, as they unarguably burdened sexist and racist viewpoints more than others.[11]

Petitioner's viewpoint argument boils down to this: the Non-Discrimination Policy is viewpoint-

[11] Nor is Petitioner's argument that it is disproportionately burdened *vis-à-vis* secular groups correct. The Non-Discrimination Policy specifically prohibits a feminist group from rejecting, as an example, 'unrepentant fornicating males' on the basis that such acts oppress women and are thus contrary to the group's views, just as much as it prohibits Petitioner from excluding such males on the basis that it is compelled to do so by its religious beliefs. Simply put, one can think of many secular groups that may wish to reject students with viewpoints tied to their race, gender, or national origin, for example, and those groups are as barred from discriminating on those grounds as religious groups are.

discriminatory because it affects religious organizations more than secular ones, and thus religious groups are constitutionally exempted from complying. Petitioner asks the Court to require neither equal access to the forum regardless of viewpoint, which is protected by *Lamb's Chapel* and *Widmar*, nor equal access to the benefits of the forum regardless of viewpoint, which is protected by *Rosenberger*, but favored treatment in the form of an exemption from the boundaries of the forum. This Court should decline Petitioner's request to extend *Rosenberger* to place a constitutional imprimatur on the discriminatory conduct in which Petitioner seeks to engage.

C. The Policy Is Reasonable And Imposes No Significant Burden On Petitioner's Ability To Express Its Message

Neither a Non-Discrimination Policy nor the All-Comers Policy burdens Petitioner's ability to convey its message. Thus, they are plainly "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804-06 (1985)).

1. The Policy is a Reasonable Boundary of the Limited Public Forum Created by Hastings

Even assuming the Policy regulates speech—which it does not, *see supra* Part I.B—it is plainly reasonable. *See Rosenberger*, 515 U.S. at 829.

Hastings has opened a limited public forum to promote "tolerance, cooperation, and learning among students of different backgrounds and viewpoints." J.A. 349. In addition, an important purpose of the student-group forum is to help a student build interpersonal and professional relationships to advance his or her standing in the law school community and thus benefit his or her career after law school. In light of these goals, it is plainly reasonable to desire that all students be granted access to membership and leadership positions—which are particularly important on a student's résumé—regardless of such student's religion, sexual orientation, or beliefs related thereto. *See* Volokh, *supra* at 1926.

2. The Policy Has No Discernible Impact on Petitioner's Ability to Express Its Message

More importantly, even with the Policy in place, Petitioner remains free to say whatever it wants about non-Christian religions and homosexuality. This was not the case in *Rosenberger*, where the student organization, Wide Awake Productions ("WAP")—itself subject to a nondiscrimination policy—was denied funding to publish its newspaper because of the publication's religious viewpoint. *See Rosenberger*, 515 U.S. at 822-23, 827. In *Rosenberger*, "[t]he prohibited perspective . . . resulted in the refusal to make third-party payments." *Id.* at 831. Even more to the point, in *Roberts* the Court recognized the ability of a group

to continue to express its message despite the inclusion into its voting ranks of members it viewed as contrary to that message. *See* 468 U.S. at 627; *see also* Volokh, *supra* at 1930 n.40. There is no reason why petitioner should receive an exemption from that general rule.

Unlike the plaintiffs in *Good News*, *Rosenberger*, *Lamb's Chapel*, and *Widmar*, Petitioner remains free to express its religious message and has not been denied funding for doing so. Petitioner is free to advance its view that homosexuality is morally wrong or, as Petitioner now frames it, that "all acts of sexual conduct outside of God's design for marriage between one man and one woman" are inconsistent with its statement of faith, *see* Pet. Br. at 7 (citation omitted), or to advance its view that non-Christian religions are wayward. Petitioner makes much of the fact that the mission statements of other student groups allegedly allow them to exclude members who, for example, refuse to abide by "the goals set out by the leadership [of the organization]," *id.* at 12-13, 28 (internal citations omitted). This argument is plainly incorrect under the All-Comers Policy, and unavailing to attack a Non-Discrimination Policy, because such a rule does not forbid Petitioner from requiring, for example, that its members attend a weekly prayer service, or that they conduct the Bible classes in a certain way. *Cf. Roberts*, 468 U.S. at 627. Importantly, as Petitioner repeatedly points out, although most other student groups have mission statements requiring members to participate in the

activities of the group, no other student group has run afoul of either rule while enforcing those requirements. *See* J.A. 221-22.

Moreover, as in *Roberts*, it is debatable whether the burden on Petitioner's speech from admitting students that are "unrepentant homosexuals" or that hold certain religious views is great in light of Petitioner's conceded admission of such students into the majority of its activities. *See Roberts*, 468 U.S. at 627; *see also* Pet. Br. at 5, 7-8; J.A. 224, 227, 231, 280; Cert. Pet. App. 88a (Petitioner admits all Hastings students, regardless of religion or sexual orientation, to participate in its meetings and most other activities, including leading prayer groups through at least the 2004-2005 school year). In fact, Petitioner's position unfairly stereotypes all students of a particular sexual orientation or religion as thinking uniformly about their own status or beliefs. *Cf. Roberts*, 468 U.S. at 627-28 (rejecting decisionmaking based on "unsupported generalizations about the relative interests and perspectives of men and women" and "declin[ing] to indulge in the sexual stereotyping that underlies [the argument that] by allowing women to vote, [the law at issue] will change the content or impact of the organization's speech"); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (noting that the Constitution does not condone decisions "based on the assumption that race or ethnicity determines how [people] act or think"). Worse, Petitioner's undue assumption ignores the existence of individuals belonging to

groups such as Jews for Jesus or Exodus International, organizations comprised of individuals of a particular religion or sexual orientation that wish to eschew or change their status for one presumably more aligned with Petitioner's beliefs.[12]

Perhaps recognizing that the Policy does not prevent Petitioner from disseminating whatever viewpoint it likes, Petitioner and its *amici* argue that enforcement of the Policy will expose it to hostile takeover or, stated otherwise, a "heckler's veto" permitting students who disagree with Petitioner to silence its viewpoint. *See, e.g.*, Pet. Br.

[12] Cognizant that its blanket rejection of students of a particular sexual orientation can be decried as impermissible stereotyping about a person's beliefs, Petitioner recasts its rule as excluding only students that engage in certain acts. *See* Pet. Br. at 6-7. This begs the question of why, if this is the case, Petitioner refused to abide by a Non-Discrimination Policy—which would forbid it from discriminating blindly on the basis of sexual orientation but allow it to do so on the basis of conduct. Petitioner responds that the Non-Discrimination Policy was interpreted to prohibit discrimination based on sexual conduct as well—but offers no support in the record for this assertion. *See id.* at 10-11. More importantly, Petitioner's attempt to recast its admission criteria as not discriminating on the basis of sexual orientation is remarkably audacious given that, as Petitioner acknowledges, CLS's admission criteria bars those engaged in "acts of sexual conduct outside of God's design for marriage between one man and one woman." *Id.* at 7 (internal citation omitted). The fact that Petitioner may discriminate against only *some* gays and lesbians—"unrepentant" ones—does not diminish the fact that Petitioner discriminates against them *because of* their sexual orientation.

at 30-34, 51-53; Br. of *Amici Curiae* Foundation for Individual Rights in Education & Students for Liberty in Supp. of Pet'r at 8-27. They offer a parade of horribles in which students hostile to various organizations' viewpoints have threatened to seize or otherwise interfere with those organizations. *See id.* at 21-23. This alarmist, speculative argument should not provide the basis for constitutionally sanctioned discriminatory conduct.

Despite these scattershot examples, Petitioner offers no concrete reason to believe that it has been or would be subject to such a takeover at Hastings. Additionally, there is no reason to believe that individual preference will fail to attract like-minded members or fail to deter non-concurring ones. As previously noted, Petitioner remains free to use speech to dissuade any type of student from joining and participating in the club.

In addition, there exist many ways in which Petitioner's fear of being overrun can be assuaged. For example, Hastings could put in place policies to ensure that registered student organizations are not subjected to hostile takeovers. It is plainly within Hastings' power to prohibit attempts by hostile students to destroy or substantially interfere with educational opportunities. *See, e.g., Healy*, 408 U.S. at 188-89 (stating that universities are permitted to exclude First Amendment activities that "substantially interfere with the opportunity of other students to obtain an education").

Alternatively, if Petitioner legitimately fears itself exposed to hostile takeover, it could place conditions on voting or holding office in a manner consistent with both a Non-Discrimination and the All-Comers Policy. Petitioner could require its members to regularly attend a certain number of meetings before allowing them to vote, or limit officerships to students in their second year of law school that regularly attended its meetings and participated in Petitioner's activities during their first year. Countless conditions of this nature are possible, with the general effect of ensuring that voting members and officers of Petitioner vote and seek office because they are committed to Petitioner's cause, and not because they desire to overthrow the organization.

In addition to ignoring the endless possibilities that exist to control for hostile takeovers, Petitioner also ignores the fact that there could be a number of reasons why students who do not agree completely with Petitioner's viewpoints might nevertheless wish to fully participate. Students could wish to participate to gain knowledge about religious association from an academic perspective, or because they are intellectually and spiritually curious about the values embodied by Petitioner. In these circumstances, allowing Petitioner the exemption it seeks would thwart one of the purposes of the forum—to provide students with opportunities to pursue diverse academic and social interests outside the classroom. There is no reason to believe that the students described above

would attempt to silence Petitioner's viewpoints or otherwise censor the content of its speech, and there is no reason why these students should not be allowed to participate fully. Indeed, allowing full participation may well result in a student embracing Petitioner's views of Christianity, which result Petitioner would undoubtedly find satisfactory. *See, e.g., Matthew* 28:16-20.

Bearing these considerations in mind, the impact, if any, the Policy has on Petitioner's ability to disseminate its viewpoint and participate in the forum is minimal. Requiring Petitioner to comply with the Policy does not pose the threat, or the burden, that Petitioner claims. Petitioner's speculative hijacking scenarios notwithstanding, the policy is reasonable in light of the purposes of the forum.

In sum, it is apparent that Petitioner's attempt to pigeonhole this case into Free Speech precedent should be rejected. Simply put, none of the considerations present in those cases is at issue here—the Policy regulates conduct, not speech, and is plainly content- and viewpoint-neutral in any event. Petitioner seeks an exemption from the equal treatment principles exemplified in *Rosenberger* and related cases on the basis of its status as a religious organization. Petitioner's complaint is essentially that the Policy hampers its ability to disseminate its viewpoint, which in turn hampers its ability to practice its religion. *See* Pet. Br. at 5-7. This, however, is the classic framework that

precipitates lawsuits challenging state action under the Free Exercise Clause, *see, e.g., Locke v. Davey*, 540 U.S. 712, 720-21 (2004) (collecting cases), and it is that framework, and not *Rosenberger*, that the Court should apply.

II. THE POLICY IS CONSISTENT WITH THIS COURT'S FREE EXERCISE JURISPRUDENCE—WHICH DOES NOT REQUIRE EXEMPTIONS FROM GENERALLY APPLICABLE LAWS ON THE BASIS OF RELIGIOUS BELIEFS

Hastings' Policy does not unconstitutionally infringe on Petitioner's right to the free exercise of religion because it is neutral and generally applicable, even if it incidentally burdens particular exercises of religion, and because it does not violate the principles set forth in *Locke*. The Court has time and again rejected Petitioner's underlying position—that it is entitled to an exemption from a natural regulation on the basis of its religious beliefs—and should do so again here.

A. THE POLICY MEETS THE *SMITH* AND *LOCKE* TESTS

1. The Policy is Neutral and Generally Applicable

Under the straightforward constitutional rule announced in *Smith*, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu*

Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872). This is so because, as a practical matter, the diversity of religious beliefs in a country as large and as free as the United States requires that religious exercise sometimes face limitations imposed by the requirements of civil society. *See Smith*, 494 U.S. at 888. Thus, it is constitutional for the government to require compliance with a neutral law even when it interferes with an individual's religious beliefs. *See id.* at 880.

The initial question under *Smith* is whether the Policy is facially neutral: "the minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. The Policy does not, on its face, reference, endorse, require, or prohibit any religious practice or group and, in fact, prohibits others from discriminating on the basis of religious practice or belief.

This Court has also recognized that the neutrality principle "protects against governmental hostility which is masked, as well as overt." *Id.* at 534. In *Lukumi*, for example, the legislative and public record and the aggregate effect of regulations prohibiting cruelty to animals revealed that the government had targeted religious animal sacrifices in the practice of Santeria. *Id.* at 533-38, 540-42.[13]

[13] Similarly, the Court has upheld the exclusion of college students undertaking theological or religious studies from state-funded scholarship programs after reviewing the text and history of the laws and the operations of the program and discovering nothing "that suggests animus toward religion." *Locke*, 540 U.S. at 725.

By contrast, Petitioner here presents no evidence—either through the procedural history or the effects or implementation of the Policy—that supports the assertion that the Policy was motivated by masked hostility towards religious groups, or that it was selectively applied only to Petitioner or religious student groups. Nor could it: Hastings has never received any complaints that any other student group has violated the Policy, and no other student group has ever sought an exemption. *See* J.A. 221-22.

Although Petitioner claims that "the Policy disfavors religious groups, as such, by denying them the right that other opinion-based groups enjoy—the right to confine their leadership to students who share their viewpoint," and that this "violates the principle of *Lukumi*," Pet. Br. at 40, the Policy prohibits all recognized groups from discriminating against students on the basis of certain, clearly delineated characteristics. The focus, again, is on the prospective member's religion, not on the religious views of the student group. It is "hard to see [the Policy], then, as 'an attempt to disfavor [a] religion'—or religion generally—'because of the religious ceremonies it commands.'" Volokh, *supra* at 1937 (citing *Lukumi*, 508 U.S. at 532).[14] The law is both facially and substantively neutral.[15]

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[14] Moreover, even if the no-religious discrimination provision of the Policy is held as non-neutral towards religion, the no-sexual orientation discrimination provision would survive, because it burdens religious and non-religious groups

Much like they do in their discussion of Free Speech principles, Petitioner's *amici* attempt to argue that the Policy "singles out" religion merely because it uses that word. *See, e.g.*, Br. *Amici Curiae* of Christian Med. & Dental Ass'ns in Supp. of Pet'r at 38-39. This argument is nonsense; it is tantamount to saying that the government discriminates on the basis of race when it enumerates that trait as a basis upon which an organization may not discriminate. *See also* Volokh, *supra* at 1936-37.

2. The Policy Meets the Principles Outlined in *Locke*

In *Locke*, this Court upheld against a Free Exercise challenge a scholarship program that conditioned eligibility, *inter alia*, upon a student's

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alike. Many religious groups do not view homosexuality as sinful. Moreover, secular groups interested in issues relating to sexual orientation, like Respondent Outlaws, would have to admit students of all sexual orientations into its ranks.

[15] *Smith* also requires a determination of whether the Policy is generally applicable. *See Smith*, 494 U.S. at 879-81. Although the Court has yet to enunciate the exact standard by which general applicability is measured, it at least mandates "that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. As stated in the text, Petitioner has presented no evidence that the Policy is not generally applicable—both because it applies to all campus organizations, regardless of their religious content, and because Petitioner is the only student group to have ever sought exemption under the Policy.

certification that he or she would not pursue a degree in theology. The Court noted that because the program "impose[d] neither criminal nor civil sanctions on any type of religious service or rite," and neither "den[ied] to ministers the right to participate in the political affairs of the community" nor "require[d] students to choose between their religious beliefs and receiving a government benefit," it did not violate the Free Exercise Clause. *Locke*, 540 U.S. at 720-21 (citation omitted). Petitioners do not dispute that the Policy neither imposes sanctions nor denies them participation in the political affairs of the community.

Petitioner cannot seriously contend that the Policy requires students to choose between their religious beliefs and receiving a government benefit any more than the policy in *Locke* did. To be sure, Davey could not have benefited from the scholarship and simultaneously studied theology—but he remained free to believe whatever he wished free from government interference. Here, Petitioner may not benefit from the limited public forum and simultaneously, for example, conduct Bible classes separate from an unrepentant gay or lesbian or unmarried but sexually active student. That said, Petitioner remains free to hold any religious belief it wants. This distinction is critical as it embodies the Court's recognition that the Free Exercise Clause is about what the government may not do, not what a person can extract from the government. *Cf. Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("[n]ever . . . has the Court interpreted the First Amendment

to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development" (emphasis in original)).

Nor is this case like the unemployment benefit denial cases the Court distinguished in *Locke*. *See Locke*, 540 U.S. at 721; *see, e.g.*, *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). In those cases, the unemployed person was, generally speaking, unwillingly forced to renounce his or her religious beliefs or risk denial of unemployment benefits. Here Petitioner is not faced with this dichotomy because, as it has sought entry to a government facility (or scholarship, as in *Locke*), Petitioner has imposed this choice upon itself. *See, e.g., Bowen*, 476 U.S. at 703 (requiring that welfare applicants provide a social security number does not "compel" applicants "to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons" because "it is [the applicant] who seek[s] benefits from the Government"). Another distinction is germane here: in the unemployment cases the individual's clash with the government was compelled by his or her religious beliefs, for example the individual was compelled to not work on a Sabbath, *see Sherbert*, 374 U.S. at 400-01, which resulted in direct conflict with the government. In *Locke*, by contrast, Davey was not compelled to pursue a degree in theology; rather,

he was inspired to do so by his beliefs. *See* Jesse R. Merriam, *Finding a Ceiling in a Circular Room:* Locke v. Davey, *Federalism, and Religious Neutrality*, 16 TEMP. POL. & CIV. RTS. L. REV. 103, 121 (2006). In the same way, Petitioner's members are not *compelled* by their religion to form *student* groups *in law schools* in order to exclude other religions and persons who engage in certain acts. They have simply been inspired to do so and remain free to form, and indeed have successfully formed and maintained, a group without government assistance, just as Davey remained free to pursue a religious degree.

Finally, as this Court has noted, the unemployment-benefit cases can be easily distinguished because they involved the government's case-by-case determination that a particular religious belief was not a worthy reason to become unemployed. In other words, the programs' "eligibility criteria invite[d] consideration of the particular circumstances behind an applicant's unemployment." *Smith*, 494 U.S. at 884; *see also* Merriam, *supra* at 122. In *Locke* this was not so: the government did not judge an application based on the merits of a candidate's religion—it simply refused to fund a "distinct category of instruction." 540 U.S. at 721. This case is even easier than *Locke*, as the Policy does not single out religion at all; it simply refuses to fund a distinct category of conduct—conduct that the Policy deems impermissible—without reference to any potential religious motivation.

B. Petitioner Has No Constitutional Right To An Exemption From The Policy On The Basis Of The Religious Beliefs Of Its Members

Because the Policy easily meets the neutrality principles of *Smith* and *Locke*, Petitioner's Free Exercise argument is, in essence, that it is constitutionally entitled to exemptions from neutral laws on the basis of its religious status alone. However, a religious believer has no absolute right to an exemption from "an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-79. In other words, "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id.* at 879 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594-95 (1940)). The Court repeated this admonition a third time in *Smith*, explicitly refusing to hold "that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself . . . be free from governmental regulation." *Id.* at 882.

This Court has consistently declined invitations to grant religious groups exemptions from generally applicable laws even when the burden the law imposed on that group's ability to exercise their religion was much more substantial than the burden here. In *Bowen*, a couple believed that the use of their daughter's social security number in certain governmental administrative procedures

would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." 476 U.S. at 696 (internal citation omitted). In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), a Native American tribe claimed that the construction of a road on their land would prevent them from effectively engaging in spiritual ceremonies necessary for their religion. *Id.* at 442. In both *Lyng* and *Bowen*, the Court denied the requests for religious-based exemptions even though it found that "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." *Id.* at 449. Here, as noted, the burden on Petitioner's ability to hold and exercise its religious beliefs is non-existent. *See supra* Part II.A.2.

The *Smith* respondents unsuccessfully argued that their use of peyote—necessary to their basic religious ceremonies—should not violate criminal statutes prohibiting peyote use. 494 U.S. at 878. As the tribe did in *Smith*, Petitioner here:

> contend[s] that [its] religious motivation . . . places [it] beyond the reach of a . . . law that is not specifically directed at [its] religious practice, and that is concededly constitutional as applied to those who [undertake such actions] for other reasons. [It] assert[s], in other words, that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance

> of an act that his religious belief forbids (or requires).

Id. (alteration to Constitutional text in original). The Court rejected this argument in *Smith* and should do so here.

For similar reasons, *Watson v. Jones*, 80 U.S. 679 (1871) and *Serbian Eastern Orthodox Diocese for United States of America & Canada v. Milivojevich*, 426 U.S. 696 (1976) do not support an argument that Petitioner has an absolute right of religious association free from any government regulation. *See* Pet. Br. at 40-41. These cases stand for the unremarkable proposition that when "hierarchical religious organizations . . . establish their own rules and regulations for internal discipline and government, and . . . create tribunals for adjudicating disputes over these matters . . . the Constitution requires that civil courts accept their decisions as binding upon them." *Milivojevich*, 426 U.S. at 724-25. Thus, these cases are wholly inapplicable: Petitioner is neither a hierarchical religious organization nor a Church or organized religious sect that sought no benefit or funding from the government. Petitioner is a student group seeking access to a limited public forum. That Petitioner makes this argument demonstrates that its ultimate goal is to obtain an exemption from civil law nondiscrimination provisions—exemptions not available to any other group—based solely on its religious nature. *See also Locke*, 540 U.S. at 727 (Scalia, J., dissenting) (citing *Lyng* as an example of a religious group impermissibly

seeking an exemption solely on the basis of its religious beliefs).

To hold that Petitioner is entitled to the exemption it seeks would invite courts to create a presumption in favor of unconstitutionality every time a law incidentally burdened the free exercise of a religion. This would grind enforcement of our civil system of laws to a halt, transforming an individual, "by virtue of his beliefs, '[into] a law unto himself.'" *Smith*, 494 U.S. at 885 (citation omitted). Specifically, it would exempt religious organizations from:

> almost every conceivable kind [of civic duty]—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

Id. at 888-89 (citations omitted). As the Court succinctly wrote in *Smith*, "[t]he First Amendment's protection of religious liberty does not require this." *Id.* at 889.

Cognizant that the Court has proven unwaveringly reluctant to allow such a chaotic result, Petitioner attempts to subtly limit the reach of its request for an exemption to "well-established" religions. Pet.

Br. at 45. Under Petitioner's view of the law, "a religious group with a *well-established* set of convictions," *id.* (emphasis added), has the *constitutional* right to discriminate and receive state funding to do so. Petitioner's proposed rule, however, invites more problems than it avoids, as it puts the courts in the business of determining which beliefs are well-established and which are merely added to a creed to gain exemption from a particular law. This approach runs contrary to decades of precedent noting that it is not "appropriate for judges to determine the 'centrality' of religious beliefs before applying a . . . test in the free exercise field" because this is "akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Smith*, 494 U.S. at 886-87 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982)).[16] *See also Lyng*, 485 U.S. at 449 (the Court will not "determine the truth of the underlying beliefs" that prompted the religious objections at issue in the case). *Cf. Widmar v. Vincent*, 454 U.S. 263, 270 n.6 (1981) (noting that

[16] One of Petitioner's *amici* overtly requests a broad exemption from nondiscrimination provisions for religious groups, without any apparent limit to the type of nondiscrimination provision from which it would be exempted. *See* Br. of *Amici Curiae* Ass'n of Christian Sch. Int'l in Supp. of Pet'r at 27-41. The proposed exemption is limited only by the amorphous question of whether an organization is "operated primarily for bona fide religious purposes." *Id.* at 39. For the reasons stated in the text, this approach is impermissible as it would put the courts in the business of determining which religious purposes are bona fide or "plausibl[y] connect[ed]" to an organization's mission. *Id.* at 40.

attempts by federal courts to draw distinctions between what religious speech acts constitute worship "would tend inevitably to entangle the State with religion in a manner forbidden by [the Court's] cases").

Of course, it is no answer that many states, sensible to the array of varied religious convictions in this country, have granted such exemptions. As the Court wrote in *Smith*, "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." *Smith*, 490 U.S. at 890; *see also supra* note 11. Petitioner's request that its newly-found exemption be limited to a certain as-of-yet unknown type of religious group provides a further reason to deny the exemption.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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