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 COMMONWEALTH OF MASSACHUSETTS AND THE STATES OF MARYLAND, NEW JERSEY, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AND THE STATES OF MARYLAND, NEW JERSEY, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The Commonwealth of Massachusetts and the States of Maryland, New Jersey, and Vermont respectfully submit this brief as *amici curiae* in support of respondents.[1]

INTEREST OF *AMICI CURIAE*

This case implicates a State's authority to refuse to subsidize conduct that is contrary to its public policy. *Amici* have a unique perspective on that issue. Many States, including *Amici*, have state laws that condition public funding—including public funding of education—on nondiscrimination. *Amici* submit this brief to emphasize the importance of these laws and to urge this Court to affirm that States are not constitutionally obligated to subsidize conduct that is contrary to their nondiscrimination policies.

SUMMARY OF ARGUMENT

A majority of States has enacted laws that prohibit the disbursement of state funds to organizations that discriminate on the basis of grounds that

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

are contrary to state policy. These laws further the States' vital interest in ensuring that funds collected from all taxpayers do not support discrimination against some. That interest is particularly strong in the area of education. Allocating funding to organizations that do not discriminate on prohibited grounds furthers a State's overriding interest in affording equal educational opportunity to all of its students.

Petitioner suggests that States may pursue this interest only when an organization engages in racial or perhaps gender discrimination. That conception of the State's interest, however, is far too narrow. Some States have chosen not to subsidize discrimination based on religion; others have chosen not to subsidize discrimination based on sexual orientation; and still others have chosen not to subsidize discrimination on political, economic, and other grounds. Although *Amici* have different views on the forms of discrimination that should not be subsidized as a matter of public policy, *Amici* are in agreement that States should have leeway to determine what conduct should and should not be subsidized by state funds.

The Court's cases support that conclusion. They establish that States have broad discretion to reserve scarce funds for activities that promote the State's policies. That funding authority may not be challenged under the Constitution simply because an organization that practices discrimination wishes to do so in order to further its own First Amendment interests. The First Amendment gives an organization a right to choose its own ideology. But it does

not entitle an organization that discriminates to demand that the State subsidize the discrimination.

Finally, while petitioner's state *amici* claim that a ruling in petitioner's favor would encourage more speech, precisely the opposite could well occur. Given the State's strong interest in not subsidizing discrimination, a State forced to choose between subsidizing discriminatory private activity, and not subsidizing a particular activity at all, might choose the latter. The Court's precedents caution against such an "all-or-nothing regime under which 'nothing' could be a State's easiest response." *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 44 (1999) (Ginsburg, J., concurring). Instead, the Court's cases give States flexibility to fund activities that further state policies, without forcing them to fund activities that are contrary to state policy as well.

ARGUMENT

STATES HAVE BROAD DISCRETION UNDER THE CONSTITUTION TO REFUSE TO SUBSIDIZE ORGANIZATIONS THAT DISCRIMINATE ON GROUNDS THAT ARE CONTRARY TO STATE POLICY

Most States have laws that deny funding to organizations that discriminate on grounds that are contrary to state policy. Those laws reflect the States' overriding interest in ensuring that funds collected from all taxpayers are not used to support discrimination that is contrary to state policy. The Court should affirm the constitutionality of those laws.

A. Most States Condition Public Funding on Nondiscrimination

1. Most States have laws that prohibit the disbursement of state funds to organizations that engage in discrimination that is contrary to state policy. Indeed, more than 30 States have enacted such statutes.[2]

These laws are especially common in the context of public education.[3] The California Education Code,

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[2] *E.g.*, Alaska Stat. § 47.80.010; Ariz. Rev. Stat. Ann. § 15-1184(G); Ark. Code Ann. § 26-73-108(a)(1); Cal. Educ. Code §§ 220, 66270; Colo. Rev. Stat. § 27-10.5-112(1); Conn. Gen. Stat. § 10-16p(f); Del. Code Ann. tit. 29, § 6962(d)(7); Fla. Stat. Ann. § 287.134(2); Haw. Rev. Stat. § 368-1.5(a); 20 Ill. Comp. Stat. § 301/30-5(c); Iowa Code § 16.9(1); Ky. Rev. Stat. Ann. § 45.570(1)-(2)(a); La. Rev. Stat. Ann. § 46:2254(A); Me. Rev. Stat. Ann. tit. 5, § 784(2)(A); Md. Code Ann., State Fin. & Proc. §§ 19-104, 19-115; Mass. Gen. Laws ch. 151B § 4(6); Miss. Code Ann. § 93-21-107(3); Mo. Ann. Stat. § 455.220(3); Mont. Code Ann. § 49-3-206; Neb. Rev. Stat. § 43-2624; N.J. Stat. Ann. § 10:5-9.1; N.Y. Civ. Rights Law § 18-a; N.D. Cent. Code § 50-24.4-19(5); Ohio Rev. Code Ann. § 3113.36(B); Or. Rev. Stat. § 458.505(4)(h); 32 Pa. Cons. Stat. § 5408; R.I. Gen. Laws § 42-87-2; S.C. Code Ann. § 44-7-345; Tenn. Code Ann. § 49-11-105; Tex. Gov't Code Ann. § 2306.065; Va. Code Ann. § 51.5-42; Wash. Rev. Code § 28B.04.120; W. Va. Code § 10-5-2a; Wis. Stat. § 106.56(1); Wyo. Stat. Ann. § 14-4-201(f).

[3] *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 15-1184(G); Md. Code Ann. Educ. § 9-102; Mass. Gen. Laws ch. 71, § 89(f); N.H. Rev. Stat. Ann. § 194-B:8; N.J. Stat. Ann. § 18A:36A-7; Tenn. Code Ann. § 49-13-111; *see also Ellis v. Oregon Dep't of Educ.*, 967 P.2d 912, 916 (Or. Ct. App. 1998) (finding sufficient evidence that a private alternative education program understood "that compliance with the nondiscrimination rule is required and that continued funding depends on continued compliance with the rule"); *cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 645, 653-54 (2002) (noting the nondiscrimination conditions of the

for example, establishes that "[n]o person shall be subjected to discrimination on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any characteristic listed [in other specified statutes] . . . in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid." Cal. Educ. Code § 66270.

State laws prohibiting the use of public funds to discriminate are by no means limited to the context of education. Arizona, for example, prohibits the disbursement of public funds to "shelter[s] for victims of domestic violence" that engage in discrimination contrary to public policy.[4] Hawaii requires applicants to whom a "Foundation for Culture and the Arts" grant has been awarded to agree to comply with "state laws prohibiting discrimination."[5] Iowa requires that any "[h]ousing financed or otherwise assisted by the [Iowa Finance] [A]uthority . . . be open to all persons," without discrimination contrary to state policy.[6] And Mississippi will not provide assistance to an otherwise qualified health center unless the center certifies "that it will not discriminate" on specified grounds.[7]

Cleveland voucher program at issue in affirming its constitutionality).

[4] Ariz. Rev. Stat. § 36-3005(B).

[5] Haw. Rev. Stat. § 9-12.

[6] Iowa Code Ann. § 16.9(1).

[7] Miss. Code Ann. § 41-99-5(9).

Many States have also established agencies that are charged with enforcing their laws that condition funding on nondiscrimination. *See*, *e.g.*, Colo. Rev. Stat. Ann. § 24-34-301 *et seq*. (establishing the Colorado Civil Rights Commission); *see also* Richard A. Leiter, *Civil Laws Rights and Privileges*, 50 State Statutory Surveys (2007). As a consequence, State executive branch officials, like state courts, are charged with enforcing funding conditions that prohibit discrimination.

These state laws are matters of great importance to *Amici*. They are based on the fundamental notion, which also underlies Title VI of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000d, "that 'taxpayers' money, which is collected without discrimination, shall be spent without discrimination.'" *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 599 (1983) (opinion of White, J.) (quoting 110 Cong. Rec. 7064 (statement of Sen. Ribicoff)); *accord* President John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities (June 19, 1963). And they reflect the judgment that state funding of organizations that engage in discrimination that is contrary to state policy can "aid and abet [the] discrimination." 110 Cong. Rec. 1519, 2467 (1964) (statement of Rep. Celler) (discussing Title VI). By forbidding States to subsidize discrimination that is contrary to state policy, these state laws serve the vital state interest of breaking the link between the State and the discrimination.

B. A State's Decision Not To Subsidize a Particular Form of Discrimination Is Entitled to Deference

Petitioner does not challenge a State's authority to prohibit the disbursement of state funds to organizations that discriminate on the basis of race or possibly gender. *See* Pet'r Br. at 43. State laws conditioning funding on nondiscrimination, however, extend far beyond the categories of race and gender. More than 20 States have enacted laws that condition the receipt of public funds on an agreement not to discriminate on the basis of religion.[8] At least 11 States have enacted statutes prohibiting organizations that receive government funds from discriminating on the basis of sexual orientation.[9] Other

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[8] *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 15-1184(G), 36-3005(B); Ark. Code Ann. § 26-73-108(a)(1); Cal. Educ. Code §§ 220, 66270; Conn. Gen. Stat. Ann. §§ 8-294(c), 46a-81n(b); Fla. Stat. Ann. § 287.134(2); Haw. Rev. Stat. §§ 6E-35, 9-12, 42F-103, 346-102(b)(3); Iowa Code Ann. § 16.9(1); Ky. Rev. Stat. Ann. § 45.570(2)(a); La. Rev. Stat. § 39:1411; Me. Rev. Stat. Ann. tit. 5, § 784(2)(A); Md. Code Ann., State Fin. & Proc. §§ 19-104, 19-115; Miss. Code Ann. §§ 41-99-5(9), 93-21-107(3); Mo. Stat. Ann. §§ 161.223(3), 215.110; 455.220; Mont. Code Ann. §§ 49-3-206, 53-21-1012; N.J. Stat. Ann. § 10:5-9.1; N.Y. Labor Law § 831; Ohio Rev. Code Ann. § 3113.36(B); 32 Pa. Cons. Stat. § 5408; 73 Pa. Cons. Stat. § 390.8; S.C. Code Ann. § 11-9-15; Tenn. Code Ann. § 49-13-111; Va. Code Ann. § 2.2-4343.1(E); Wash. Rev. Code § 28B.04.120; Wyo. Stat. Ann. § 14-4-201(f).

[9] *See, e.g.*, Cal. Educ. Code § 220; Conn. Gen. Stat. § 46a-81n; 29 Del. Code Ann. § 6962(d)(7); Haw. Rev. Stat. §§ 6E-35, 42F-103, 368-1; Mass. Gen. Laws ch. 151B § 4(6); Me. Rev. Stat. Ann. tit. 5, § 4602(4)(A); Md. Code Ann., State Fin. & Proc., §§ 19-104, 19-114, 19-115; Neb. Rev. Stat. § 71-7611; Nev. Rev. Stat. Ann. § 338.125(1); N.J. Stat. Ann. § 10:5-9.1; Or. Rev. Stat. § 458.505(4)(h).

States have prohibited recipients of public funds from discriminating on the basis of characteristics as varied as disability,[10] economic status,[11] HIV-positive status,[12] pregnancy,[13] politics,[14] "familial status,"[15] and "gender identity or expression."[16]

Amici have differing views on the forms of discrimination that are contrary to public policy and therefore should not be supported by State funds. *Amici* are in agreement, however, that States should have latitude to decide what conduct should and should not be subsidized by state funds. The determination is properly left to the political process, and courts should defer to those funding decisions and policy choices.

This Court's cases firmly support that conclusion. The Court has explained that "[g]overnmental decisions to spend money to improve the general public welfare in one way and not another are not confided to the courts." *Bowen v. Owens*, 476 U.S. 340, 345 (1986) (citations and internal quotation marks omitted). Instead, that "discretion belongs to [the legislature], unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.* A State's decision to fund only organizations that do

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[10] Ariz. Rev. Stat. Ann. § 15-1184(G).

[11] Conn. Gen. Stat. § 28-15.

[12] Fla. Stat. § 760.50(4)(b).

[13] Me. Rev. Stat. Ann. tit. 5, § 4602(1)(C).

[14] Mont. Code Ann. § 49-3-206.

[15] N.J. Stat. Ann. § 10:5-9.1.

[16] *Id.*

not discriminate on grounds that are inconsistent with state policy falls squarely within the scope of that funding authority.

The exercise of that discretion is not subject to challenge simply because the group practicing discrimination in violation of state policy claims to be exercising its First Amendment rights. In several different contexts, the Court has held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983).

For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Court upheld a statute that provides federal funds to candidates who enter primary campaigns, but not to candidates who do not run in party primaries. Relying on the principle that a legislature has broad discretion to determine what activities it will fund, the Court rejected a First Amendment challenge to the statute. *Id.* at 92-108. Similarly, in *Regan*, the Court upheld a tax exemption for the lobbying activities of veterans' organizations, but not for charitable organizations. The Court explained that "[c]ongressional selection of particular entities or persons for entitlement to this sort of largesse is obviously a matter of policy and discretion" that generally is "not open to judicial review." *Regan*, 461 U.S. at 549 (citations and internal quotation marks omitted).

Those principles apply no less to the funding decisions made by State legislatures. This Court has held that a state "'legislature's decision not to subsidize the exercise of a fundamental right . . . is not

subject to strict scrutiny.'" *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009) (quoting *Regan*, 461 U.S. at 549). Moreover, as Justice Kennedy has observed, "[n]o State has unlimited resources, and each must make hard decisions on how much to allocate" to different programs. *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 611 (1999) (Kennedy, J., concurring in judgment). And there are real "federalism costs inherent in referring state decisions regarding . . . the allocation of resources to the reviewing authority of the federal courts." *Id.* at 610.

That is certainly the case in the context of public education, where resources are increasingly limited. By channeling public educational funds to organizations that do not exclude particular groups of students, States further their overriding interest in ensuring equal educational opportunity for all students. *See*, *e.g.*, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 149 (2d Cir. 2007) (a State has "a substantial interest in making sure that its resources are available to all its students"); *see also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1926 (2005) (A State "may legitimately want to make sure that when its subsidies help enhance students' influence or credentials, this help is distributed without regard to the students' race, religion, and the like."); Br. of *Amici* State Universities and State University Systems (discussing public universities' interest in ensuring that educational and leadership opportunities are available to all students on equal terms and in avoiding perception that state schools support discriminatory groups in institutions of higher learning).

Courts have no warrant to interfere with that vital interest.

Petitioner's state *amici* do not as a general matter deny the state interest in limiting the disbursement of public funds so as not to subsidize discrimination. *See* Br. of *Amici Curiae* States of Michigan, *et al.*, ("Michigan Br.") at 17-18 (arguing that the "policy . . . to prohibit discrimination" on public campus "is laudable" and suggesting that universities have an "interest in prohibiting discrimination when the discrimination is unrelated to . . . expressive activity"). Those States argue, however, that application of such funding conditions to groups like petitioner violate the First Amendment because they are viewpoint discriminatory and aimed at "modifying the expressive activity" of the group. *Id.* at 18.

To be sure, this Court has made clear that a State may not "discriminate invidiously in its subsidies in such a way as to aim[] at the suppression of dangerous ideas." *Regan*, 461 U.S. at 548 (citation and internal quotation marks omitted; alteration in original). But laws that condition funding on nondiscrimination do not run afoul of that principle. State statutes limiting public disbursements to those organizations that do not engage in discriminatory conduct are not aimed at suppressing any ideas. Instead, as discussed above, they seek to ensure that the taxes that are collected from all taxpayers are not channeled to organizations that exclude individuals from the benefits of those funds on grounds that are inconsistent with state policy. And they seek to ensure that the States themselves do not become instruments of such discrimination.

Thus, contrary to petitioner's argument, a State is not required to subsidize organizations that violate its nondiscrimination policies. Organizations have a right to speak in accordance with their own values. But they have no constitutional right to demand that a State subsidize discriminatory conduct that is contrary to state policy.

C. A Decision in Petitioner's Favor Could Well Result in Less State Funding of Speech

Petitioner's state *amici* contend that nondiscrimination funding conditions limit "diversity of thought and robust debate" and thereby decrease the level of private speech as a general matter. *See* Michigan Br. at 12-13; *see also* Pet'r Br. at 50 (asserting that "[f]ree association, including the right to exclude, better facilitates the goal of promoting an exchange of ideas"). That assertion ignores the States' strong interest in refusing to subsidize discrimination and the practical reality of a rule that would force States to do so.

If forced to choose between subsidizing discriminatory private activity, and not subsidizing a particular activity at all, States might well choose the latter course. Thus, far from promoting vigorous and robust exchange, a ruling in petitioner's favor could easily "dampen[] the vigor and limit[] the variety of public debate." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 681 (1998) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 656 (1994)) (internal quotation marks omitted). Indeed, States might even be required to eliminate subsidy programs pursuant to laws that prohibit them from engaging in

discrimination against specified classes of individuals. *See*, *e.g.*, *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 97 (2d Cir. 2003) ("[T]he [Connecticut Commission on Human Rights and Opportunities] concluded that the state was sufficiently involved in the [state employees' charitable] Campaign to trigger the provisions of Connecticut law that prohibit state agencies from supporting organizations that discriminate on the basis of sexual orientation," if Boy Scouts were permitted to participate in the campaign.) (citing Conn. Gen. Stat. §§ 46a-81i, 46a-81*l*, 46a-81n), *cert. denied*, 541 U.S. 903 (2004).

This Court's precedents caution against rules that would subject States to such "all-or-nothing regime[s] under which 'nothing' could be a state's easiest response." *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 44 (1999) (Ginsburg, J., concurring); *see*, *e.g.*, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009) (observing that, "if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations"). They instead favor rules that allow the States sufficient flexibility to fund "expressive activity" without having to confront such an "all-or-nothing choice." *Forbes*, 523 U.S. at 680.

Petitioner has provided no justification for adopting an all-or-nothing rule here. The Court should therefore reaffirm that States are not required to expend scarce public resources on discriminatory activities when that may make States unwilling to subsidize private activities at all.

CONCLUSION

For the reasons discussed, States have broad discretion under the Constitution to refuse to subsidize organizations that discriminate on grounds that are contrary to state policy.

Respectfully submitted,

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